BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON,	)	
	)	
Petitioner,	)	PCB 03-134
	)	
v.	)	(Third-Party Pollution Control Facility Siting Appeal)
	)	
COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC.,	)	Consolidated with PCB 03-125, 03-133, 03-135
	)	
Respondents.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on September 24, 2003, we filed with the Illinois Pollution Control Board, the attached **WASTE MANAGEMENT OF ILLINOIS, INC.'S RESPONSE TO PETITIONER WATSON'S MOTION TO RECONSIDER** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON,	)	
	)	
Petitioner,	)	PCB 03-134
	)	
v.	)	(Third-Party Pollution Control
	)	Facility Siting Appeal)
COUNTY OF KANKAKEE, COUNTY	)	
BOARD OF KANKAKEE, and WASTE	)	Consolidated with PCB 03-125,
MANAGEMENT OF ILLINOIS, INC.,	)	03-133, 03-135
	)	
Respondents.	)	

WASTE MANAGEMENT OF ILLINOIS, INC.'S
RESPONSE TO PETITIONER WATSON'S MOTION TO RECONSIDER

Respondent WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by its attorneys Pedersen & Houpt and pursuant to Section 101.500(d) of the Illinois Pollution Control Board ("Board") Procedural Rules ("Rules"), submits this response to Petitioner Michael Watson's Motion to Reconsider Portions of the Illinois Pollution Control Board's Ruling of August 7, 2003 ("Opinion")[1] ("Motion to Reconsider")[2]. In support thereof, WMII states as follows:

1. This submission is in response to the second argument raised in Petitioner Watson's Motion to Reconsider, namely, that the Board erred in ruling that WMII properly notified Robert Keller under Section 39.2(b) of the Illinois Environmental Protection Act ("Act"). (Wat. Mot. at pp. 6-10).

2. In his Motion to Reconsider, Petitioner Watson argues that the Board misconstrued Section 39.2(b) to permit an applicant to effect service of notice on property owners via certified mail with return receipt requested, and that service is proper upon mailing.

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[1] References to the Opinion will be cited as "(Slip op. at __)."

[2] References to Petitioner Watson's Motion to Reconsider will be cited as "(Wat. Mot. at p. __)."

(Wat. Mot. at p. 6). Specifically, Petitioner Watson argues that the Board erred in relying on *People ex rel. Devine v. $30,700 U.S. Currency*, 199 Ill. 2d 142, 766 N.E.2d 1084 (2002) in construing Section 39.2(b) because *$30,700 U.S. Currency* involves a statute that specifically provides that notice via certified mail returned receipt requested is effective upon mailing, whereas Section 39.2(b) does not contain any such provision. (Wat. Mot. at p. 7-9). Petitioner Watson posits that the issue of whether WMII properly served Mr. Keller via certified mail is governed by *Ogle County Board v. Pollution Control Board*, 272 Ill. App. 3d 184, 649 N.E.2d 545 (2d Dist. 1995), which held that notice via certified mail was not effective without proof of actual receipt. (Wat. Mot. at p. 6).

3. While WMII does not agree with Petitioner Watson that the Board erred in ruling that Mr. Keller was properly served or in ruling that Section 39.2(b) does not require actual notice, WMII agrees that the Board ought to reconsider its construction of Section 39.2(b) in light of the *$30,700 U.S. Currency* case, which provides the appropriate analytical framework for construing Section 39.2(b). In *$30,700 U.S. Currency*, the Illinois Supreme Court liberally construed the notice provisions of the statute at issue in order to achieve the statute's overall purpose, and concluded that the statutory purpose did not require actual receipt of notice.

I. THE BOARD CORRECTLY RULED THAT *$30,700 U.S. CURRENCY* OVERRULED *OGLE COUNTY* TO THE EXTENT *OGLE COUNTY* INCORRECTLY HELD THAT THE "RETURN RECEIPT REQUESTED" LANGUAGE IN SECTION 39.2(b) OF THE ACT REQUIRED ACTUAL NOTICE

4. Petitioner Watson contends that the Board erred in ruling that *$30,700 U.S. Currency* overruled *Ogle County* because *$30,700 U.S. Currency* involves the Drug Asset Forfeiture Procedure Act ("Forfeiture Act"), which contains a specific provision that notice "is effective upon personal service, the last date of publication, or the mailing of written notice,

whichever is earlier." 725 ILCS 150/4(B). Petitioner Watson argues that because Section 39.2(b) of the Act does not contain a similar section addressing when notice is effective, the *$30,700 U.S. Currency* case is inapposite and cannot be relied upon by the Board to reach the conclusion that Section 39.2(b) does not require actual notice.

5. By making this argument, Petitioner Watson attempts to direct the Board's attention away from the relevant portion of the analysis in the *$30,700 U.S. Currency* case. While true that the *$30,700 U.S. Currency* case discussed Section 4(B) of the Forfeiture Act, which provides when notice was effective, the Illinois Supreme Court also gave a *separate* analysis of the "return receipt requested" language contained in Section 4(A) of that statute, which describes how notice is to be given. Section 4(A) of the Forfeiture Act provides, in pertinent part:

> (A) Whenever notice of pending forfeiture or service of an *in rem* complaint is required under the provisions of this Act, such notice or service shall be given as follows: (1) If the owner's or interest holder's name and current address are known, then by either personal service or mailing a copy of the notice by certified mail, return receipt requested, to that address.

725 ILCS 150/4(A)(1).

6. In rejecting the argument that the inclusion of the "return receipt requested" language in Section 4(A) implies that the legislature intended that notice was not proper unless and until the State received the return receipt, the Illinois Supreme Court stated:

> Clearly, our legislature is able to expressly condition service upon receipt of the signed return receipt. Other enactments expressly demand a return receipt to complete service. *See e.g.*, [citation omitted] (Veterinary Medicine and Surgery Practice Act of 1994) (notice is given to the owner "by certified mail, return receipt requested, and shall allow a period of 7 days to elapse after the receipt is returned before disposing of such animal"); [citation omitted] (Juvenile Court Act of 1987) ("the return receipt, when

> returned to the clerk, shall be attached to the original notice, and shall constitute proof of service"); [citation omitted] (Expedited Child Support Act of 1990) ("if service is made by certified mail, the return receipt shall constitute proof of service"); [citation omitted] (Museum Disposition of Property Act) ("notice is deemed given if the museum receives, within 60 days of mailing the notice, a return receipt").

$30,700 U.S. Currency, at 152, 766 N.E.2d at 1090. The Court held that the plain language of the notice provision clearly shows that the legislature meant only to require a returned receipt *requested*, not a *returned* receipt. *Id.*, at 153, 766 N.E.2d at 1091.

7. Therefore, the Board did not err in ruling that Section 39.2(b) does not require proof of actual notice. The Board's ruling was correct, not only because the *$30,700 U.S. Currency* case clarified that the "return receipt requested" language does not demand the return of a receipt to prove notice (thereby overruling *Ogle County*), but also because such a ruling is consistent with the long line of Board decisions that has held that Section 39.2(b) does not require actual notice, but can also be satisfied by evidence of constructive notice. *See ESG Watts, Inc. v. Sangamon County Board*, PCB 98-2 (June 17, 1999); *DiMaggio v. Solid Waste Agency of Northern Cook County*, PCB 89-138 (January 11, 1990); *Waste Management of Illinois, Inc. v. Village of Bensenville*, PCB 89-28 (August 10, 1989); *City of Columbia v. County of St. Clair*, PCB 85-177, 85-220, 85-223 (April 3, 1986).

II. EVEN THOUGH THE BOARD CORRECTLY HELD THAT SECTION 39.2(b) OF THE ACT DOES NOT REQUIRE PROOF OF ACTUAL NOTICE, THE BOARD NONETHELESS MISCONSTRUED THE ACT

8. Although the Board properly ruled that Section 39.2(b) does not require proof of actual notice, the Board still erred by strictly construing the Act's notice requirements. According to *$30,700 U.S. Currency*, the Board was required to analyze the issue of whether the "return receipt requested" language in Section 39.2(b) requires actual service by first considering

the Act's purpose and then liberally construing it to achieve that purpose. *$30,700 U.S. Currency*, at 154, 766 N.E.2d at 1091.

9. In *$30,700 U.S. Currency*, the Court looked at the purpose of the Forfeiture Act and found that forfeiture served as a remedial civil sanction designed to deter drug abuse and trafficking. *Id.*, at 149, 766 N.E.2d at 1088-89. In analyzing the "return receipt requested" language, the Court recognized that in forfeiture proceedings, individuals often provide false address information when property is being seized. *Id.*, at 154, 766 N.E.2d at 1091-92. Given this reality, the Court reasoned that strictly construing the Forfeiture Act to condition notice on the State's receipt of a "return receipt" would actually be an obstacle to the enforcement of the Forfeiture Act. *Id.* Therefore, the Court held that the notice requirements of the Forfeiture Act warranted a liberal construction so as not to contravene its overall purpose. *Id.*

10. The Court in *$30,700 U.S. Currency* determined that the Forfeiture Act's notice requirements do not require actual notice, even though notice was necessary to apprise the defendants of the *in rem* forfeiture proceeding that threatened the seizure of their property. Unquestionably, the issue of whether the Kellers were properly notified of WMII's intent to file a request for site location approval does not rise to the level of property rights that were at stake in the *$30,700 U.S. Currency* case. *See Village of Lake in the Hills v. Laidlaw Waste,* 143 Ill. App. 3d 291, 492 N.E.2d 969 (2d Dist. 1986) (local siting decisions are essentially matters of public policy, and the notice and hearing provisions of Section 39.2 do not confer specific benefits on individuals). Therefore, it is illogical for the Board to adopt a stricter construction of Section 39.2(b) than the Illinois Supreme Court's construction of the Forfeiture Act's notice requirements in *$30,700 U.S. Currency*.

11. The Board's overly-restrictive construction also overlooks the practical difficulties

that applicants face in attempting to serve notice in local siting proceedings, which the Board has recognized in past decisions. *See e.g., City of Columbia*, slip op. at 13 (the Board liberally construed Section 39.2(b) as not requiring actual notice in recognition of the fact that property owners often engage in tactics to frustrate attempts to serve notice). The Court in *$30,700 U.S. Currency* specifically considered the problems that the State faced in serving individuals entitled to notice under the Forfeiture Act, and found that the realities in forfeiture proceedings required a liberal interpretation of the notice requirements in order to achieve the overall statutory purpose. *$30,700 U.S. Currency*, at 154, 766 N.E.2d at 1091-92.

12. The purpose behind the Act is: "to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b). The Act explicitly provides that its terms and provisions shall be liberally construed so as to effectuate its purposes. 415 ILCS 5/2(c). Section 39.2 was intended to further the overall purpose of the Act by establishing uniform local siting procedures for determining whether siting approval is warranted after thoroughly considering the effects upon the environment. The notice provisions in Section 39.2(b) provide adjoining property owners the opportunity to participate in the public hearing or to comment on the siting request. The purpose behind the provision in Section 39.2(b) that applicants "cause written notice of such request to be served either in person or by registered mail, return receipt requested" is to ensure that applicants undertake appropriately reliable and diligent efforts to cause notice to be served. The legislature could not have reasonably intended that the language in Section 39.2(b) specifying methods of causing service would be strictly construed to require only personal service and service via registered mail.