65448-POH

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON, Petitioner, v. COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondent.	No. PCB 03-134 (Pollution Control Facility Siting Appeal) Consolidated With PCB 03-125, 03-133, 03-135)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on September 26, 2003, we filed with the Illinois Pollution Control Board, the attached **Petitioner Michael Watson's Response in Opposition to Waste Management of Illinois, Inc.'s Motion to Reconsider**, a copy of which is attached hereto and served upon you.

Dated: September 26, 2003

Respectfully Submitted,

PETITIONER MICHAEL WATSON

By: _____
One of his Attorneys

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PROOF OF SERVICE

I, Ronnie Faith, a non-attorney, on oath state that I served the foregoing **Notice of Filing, along with copies of document(s) set forth in this Notice,** on the following parties and persons at their respective addresses and/or fax numbers, as stated below, this 26th day of September 2003, by or before the hour of 4:30 p.m. in the manners stated below:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON, **Petitioner,** **v.** **COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC.,** **Respondent.**	**No. PCB 03-134** **(Pollution Control Facility Siting Appeal)** **Consolidated With PCB 03-125, 03-133, 03-135)**

PETITIONER MICHAEL WATSON'S RESPONSE IN OPPOSITION TO WASTE MANAGEMENT OF ILLINOIS, INC'S MOTION TO RECONSIDER

This Response in Opposition to Waste Management of Illinois, Inc.'s (WMII) Motion to Reconsider, is submitted by Petitioner Michael Watson (Watson) by and through his attorneys at Querrey & Harrow, Ltd. WMII argues that the Illinois Pollution Control Board's (IPCB) Opinion and Order of August 7, 2003, is erroneous, to the extent it found that Brenda Keller was not served with prefiling notice pursuant to Section 39.2(b) of the Illinois Environmental Protection Act (Act), as the IPCB allegedly erroneously construed that Section of the Act by: **(1)** interpreting Section 39.2(b) in a manner which WMII alleges is "contrary to legislative intent"; **(2)** finding that constructive notice is not applicable to the facts presented concerning Mrs. Brenda Keller; and, **(3)** applying *de novo* rather than manifest-weight standard of review. The IPCB's decision concerning notice not having been served pursuant to Section 39.2(b) of the Act on Mrs. Brenda Keller should stand and WMII's Motion be denied, as the IPCB's decision in this regard was correct and WMII's claims of error are simply not supported by the facts or law in this case. Specifically, as set forth below, WMII's Motion fails to meet the elements required to maintain a motion for reconsideration as: **(1)** the IPCB

correctly held that "posting" and "U.S. Mail" do ont satisfy the plain language of Section 39.2(b) of the Act; **(2)** the IPCB correctly held that the facts of this case do not fit within the constructive receipt notice doctrine enunciated in *dicta* in ESG Watts; and, **(3)**, the IPCB correctly applied the *de novo* standard of review in deciding the jurisdictional issue of whether prefiling notice was proper under Section 39.2(b) of the Act.

Legal Standard

One of the three following elements are necessary in to maintain a motion to reconsider: (1) newly discovered evidence; (2) changes in the law; and (3) errors in the Court's prior application of existing law. Universal Scrap Metals, Inc. v. J. Sandman and Sons, Inc., 786 N.E.2d 574 (1st Dist. 2003). Like this standard, the IPCB Rule 101.902 provides that the IPCB will "consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." Although the aforementioned rule does not set forth the third element considered by Illinois Courts, namely, errors in the Court's prior application of existing law, by its plain language and use of the term "including," this Rule does not exclusively limit consideration to exclude review of errors in the Court's prior application of existing law. Thus, although WMII's arguments present no new evidence and no new law, if the IPCB finds that Rule 101.902 is not an exclusive limit to those two elements, then WMII's Motion should be considered. However, even if considered, WMII does nothing more than restate legal arguments it previously raised and asserts misstatements of fact, which is clearly insufficient to show any error on the part of the IPCB with respect to its August 7, 2003, finding that Mrs. Brenda Keller was not served with notice pursuant to Section 39.2(b) of the Act.

Argument

(1) The IPCB correctly held that "posting" and "U.S. Mail" do not satisfy the plain language of Section 39.2(b) of the Act

Although it argues failure to consider legislative intent is the source of the IPCB's error, WMII's restatement of previously made legal argument and misstatement of facts in this case are not sufficient to show such error. WMII argues that the IPCB erred in finding that Mrs. Keller was not served with prefiling notice pursuant to Section 39.2(b) of the Act, asserting that the plain language of that Section of the Act allows for "posting" and U.S. Mail notice. In making its legislative intent argument, WMII does nothing more than recite cases and misstate facts considered by the IPCB in making its August 7th decision concerning Brenda Keller. WMII's legal argument that "posting" and "U.S. Mail" were intended by the legislature to be allowed by Section 39.2(b) of the Act, is unsupported by the plain language of the statute, as well as the case law. In addition to the legal inadequacy of any "posting" or U.S. Mail attempts at service, WMII's assertion that Ms. Keller received "posting" and "U.S. Mail" notice is not accurate, as the only evidence concerning Brenda Keller was that she did not receive any notice of the filing of the application prior to the 14-day prefiling deadline provided in Section 39.2(b) of the Act. (Slip Op. at 5-6).

The IPCB correctly held that "posting" and "U.S. Mail" do not satisfy the plain language of Section 39.2(b) of the Act. WMII's contention that the IPCB's ruling in this regard is too strict and contravenes the intent of the statute is not supported by any case law cited by WMII and is inopposite to the IPCB's previous holdings concerning Section 39.2(b)

notice and its interpretation of the Legislature's intent. The "'true intention' of the Legislature in enacting the notice provision of Section 39.2(b) was to implement a system whereby there would be some record of the notice to owners and legislators having been both sent and received." Ash v. Iroquois County Board, PCB 97-29 at 12 (July 16, 1987)(IPCB holding that that this is the "most logical analysis of the legislative intent behind this notice requirement", in finding that certified mail is equally as sufficient as registered mail)(emphasis added). Regardless of whether the IPCB continues to find the "received" portion of its former interpretation to have been overruled by People ex rel. Devine v. $30,700 U.S. Currency, 199 Ill.2d 142, 776 N.E.2d 1084 (2002), neither the case law cited by WMII or the logic proposed by WMII supports an interpretation of Section 39.2(b) that opens the door to essentially any type of attempt at notification as being sufficient.

The following cases, cited by WMII, fail to support WMII's contention that the IPCB and Illinois Courts have liberally construed Section 39.2(b) to allow for forms of notice outside those prescribed by the plain language of the Act. City of Columbia, et al. v. County of St. Clair, *et al.*, PCB 85-177, 85-220, 85-223 (consolidated)(April 3, 1986), is distinguishable, because IPCB found no jurisdiction, as the applicant was unreasonable in its attempt at service by sending out notice the fifteenth day prior to filing the application. Similarly, DiMaggio, PCB 89-138 (Jan. 11, 1990), is distinguishable, as neither of the Keller's moved from their address, and thus, the holding of this case, is also inapplicable to the instant facts.

Likewise, Waste Management of Illinois v. Bensenville, PCB 89-28 (Aug. 10, 1989), is not applicable to the precedent for which WMII suggests, even if the IPCB's finding that Ogle County Board v. Pollution Control Board, 272 Ill.App.3d 184, 649 N.E.2d 545 (2nd Dist.

1995) has been overruled is upheld, as the notice recipient at issue in that case was sent and received notice by certified mail (although, it received notice eleven, rather than fourteen days, prior to the filing of the application), whereas WMII admits it made no attempt to serve Mrs. Keller by certified mail in this case. Further, in Bensenville, the IPCB took special note of the unique facts of the case in making its holding, which facts are not analogous to the circumstances in this case, specifically, the anomaly of having the local government raise the jurisdictional issue, after having denied the siting application on dispositive grounds, and the fact that there were no "third party" opposition in that particular case. Finally, since there is no evidence of recalcitrance in this case, and the IPCB's holding with respect to Mrs. Keller is not based on whether or not recalcitrance existed, the concept of constructive receipt of notice discussed in ESG Watts, Inc. v. Sangamon County Board, PCB 98-2 (June 17, 1999), is not applicable here, even though although the IPCB did not find constructive receipt in the ESG Watts case.[1]

Further, even if the IPCB were to consider forms of service outside those provided for by Section 39.2(b), there is no evidence in the record supporting the conclusion asserted by WMII that WMII "actually" served Brenda Keller through the U.S. Mail and "posting." The testimony of Mrs. Keller that she did not receive notice of the siting hearings is uncontradicted in the record. (*See*, summary of evidence on Slip Op. at 5-6; Watson Opening and Reply Briefs). Further, WMII's assertion that Mrs. Keller had "actual notice" is nothing more than a

[1] Additionally, although WMII argues that ESG Watts, Inc. v. Sangamon County Board, PCB 98-2 (June 17, 1999), stands for Section 39.2(b) allowing constructive "notice," in fact, the language of ESG Watts discusses "constructive receipt" of notice, and the precedential value of that holding is arguably at issue given the IPCB's

conclusory statement, unsupported by the evidence in the record. Moreover, WMII's accusation that the denial of Mrs. Keller of "actual notice" is insufficient based on Montalbano Builders, Inc. v. Rauschenberger, *et al.*, 794 N.E. 2d 401 (3rd Dist. 2003), is wrong.

Montalbano Builders, Inc. is inapplicable due to the fact it involves a dispute over mailed service of requests to admit (a discovery issue in a pending lawsuit), rather than statutory and jurisdictionally required as is at issue in this case, and it, likewise, involves a different standard of review. Additionally, Montalbano Builders, Inc. is distinguishable, because the Court did not hold, as WMII infers, that U.S. Mail service was sufficiently reliable to overturn the denial of the attorney who stated he did not receive the requests to admit. In fact, the Court stated:

> It is conceivable that the plaintiff did not receive the request to admit. Rauschenberger may have accidentally neglected to include the request itself in the envelope. The document may have inadvertently been lost among other papers at Mr. McGrun's office. Attorneys are human, and can make mistakes, and the court should be mindful of this when granting or denying relief. Montalbano Builders, Inc., 794 N.E. 2d at 407-8.

The Court's holding in Montalbano Builders, Inc. is, instead, based on the fact that it was undisputed that after the attorney for the plaintiff *admittedly* found out about the requests to admit having been prepared and, at least, attempted to be served, the attorney did nothing to rectify the problem of having not received those requests for a period of four months, without providing any reason for that four month delay: "In light of the length of the delay and the

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holding in the August 7th decision that Ogle County Board v. Pollution Control Board, 272 Ill.App.3d 184, 649 N.E.2d 545 (2nd Dist. 1995) has been overruled.

failure to give an adequate explanation, we find no abuse of discretion in the trial court's denial of the motion." Montalbano Builders, Inc., 794 N.E. 2d at 409.

Finally, WMII's policy argument for a broad interpretation of "notice" to avoid "tactics" by property owners to "frustrate" the local siting process, is equally applicable to an applicant and the rational for construing the statute for what it states and requiring notice by registered (or certified) mail or personal service. If the Legislature had intended that any sort of notice would do, why not just leave the notice requirement at publication and why pay special attention to property owners within very close proximity to the site, the applicable General Assembly persons, and the Illinois Environmental Protection Agency? Thus, WMII's arguments are not sufficient to maintain a motion for reconsideration, and its Motion should be denied.

(2) The IPCB correctly held that the facts of this case do not fit within the constructive notice doctrine enunciated in dicta in *ESG Watts*

In arguing that he IPCB erred, WMII contends that the IPCB failed to analyze the attempts WMII made to serve Mrs. Keller personally. As an initial matter, WMII's argument does not fit within one of the three elements for a motion for reconsideration, as WMII is not arguing new facts, a change in law, or an error in the application of the existing law. WMII's allegation is that the IPCB did not sufficiently consider the issue of constructive notice. On the contrary, the IPCB's August 7th opinion considered WMII's arguments that constructive notice was applicable to Mrs. Keller through WMII's personal service, the decision specifically summarized facts related to attempts at personal service (Slip Op. at 5-6), and the IPCB's finding on this issue, distinguishing the facts of this case from the dicta of ESG Watts, was not exclusive to some of the facts related in the IPCB opinion in disregard to other facts in that

opinion and record, as WMII contends. Specifically, the IPCB found that "[t]here is no evidence in the record that Mrs. Keller had constructive notice of the pending application." WMII fails to raise any applicable element for maintaining a motion for reconsideration with respect to this issue.

Further, as discussed in the first section of this brief, above, ESG Watts is not applicable to the facts of this case, as there is no evidence of recalcitrance. Further, the ESG Watts *dicta* concerning constructive "receipt" of notice, is arguably no longer valid, if the IPCB's finding in this case that the Ogle County requirement for receipt of notice is upheld, as the entire discussion in ESG Watts concerning constructive receipt of notice focused on the timeliness of receipt, as opposed to the initiation of the notice, except to the extent reasonableness of initiation was considered *in conjunction* with timeliness of receipt. Specifically, the IPCB stated:

> The Board finds that the Ogle County Board court left open the question of whether a property owner can be found in constructive receipt of a notice. The Board believes that the requirements of Section 39.2(b) can be met through constructive receipt. If a property owner does not receive the notice on time, he or she nonetheless may be deemed to be in constructive receipt of a notice if the property owner refuses service before the deadline. Otherwise, a recalcitrant property owner could forever frustrate attempts to obtain a hearing on a request for siting approval. . . .
>
> In this case, however, the Board cannot find these property owners in constructive receipt of the notice before the deadline. ESG Watts sent the notice by registered mail, return receipt requested, to Oldani, Weigland, Paoni, and the Shures four days before the deadline. ESG Watts then sought to personally serve these property owners, but these attempts took place after the deadline, with the exception of ESG Watts' attempt to serve

> Oldani. ESG Watts first attempted to personally serve Oldani on the deadline day--November 18, 1996. The Board finds that there is no evidence that these property owners refused service. Therefore, these property owners were not in constructive receipt of the siting request notice before the deadline. ESG Watts, at 20-21.

Thus, the only factor of any constructive notice argument left to be reviewed, if the IPCB is to adopt the concept of constructive notice, is whether there is recalcitrance, and the facts of this case do not support that finding. Therefore, the IPCB correctly held that the facts of this case do not fit within the constructive notice or constructive receipt of notice doctrine, and WMII's Motion should be denied.

(3) The IPCB correctly applied the *de novo* standard of review in deciding the jurisdictional issue of whether prefiling notice was proper under Section 39.2(b) of the Act

WMII argues that the IPCB applied the wrong legal standard when it utilized the *de novo* standard of review and, instead, should have utilized the manifest weight of the evidence standard of review in determining whether WMII was timely and diligent in its attempts to serve Mrs. Keller. As with WMII's argument concerning constructive notice, WMII does not argue any of the elements necessary to maintain a motion for reconsideration and, thus, its motion should be denied.

In addition, the case law WMII cites as the basis for its argument, Laidlaw Waste Systems, Inc. v. Pollution Control Board, 230 Ill.Ap.3d 132, 595 N.E.2d 600 (6th Dist. 1992) is distinguishable from this case, as the key finding in the Laidlaw case was the finding that the IPCB "concluded, as a matter of law, that two applications which seek expansion of the same

regional pollution control facility are substantially the same within the meaning of section 39.2(m) regardless of any other differences between them." Thus, the basis of the Laidlaw holding was not even within the scope of the manifest weight standard discussed in that opinion, rather that the IPCB incorrectly interpreted Section 39.2(m). The findings in Laidlaw that the IPCB incorrectly interpreted Section 39.2(m) and did not review the applications to determine whether any differences existed, are simply not applicable to this case.[2]

Additionally, the proper standard of review is de novo when the consideration before the administrative body is a determination as to the scope of its jurisdiction. Geneva Cmty. Unit Sch. Dist. No. 304 v. Prop. Tax Appeal Bd., 695 N.E.2d 561, 564 (2nd Dist. 1998). Jurisdictional considerations are distinguishable from other questions of law, fact or mixed law and fact, as the administrative entity making the decision on jurisdiction (whether explicitly or implicitly) is, at the first level of consideration, the actual entity making the decision. Thus, "where the authority of an administrative body is in question the determination of the scope of its power and authority is a judicial function, not a question to be finally determined by the administrative agency itself. However, it does not follow that an administrative body can never determine the scope of its jurisdiction in a situation. By acting or refusing to act, it necessarily determines that the subject matter and its activity are or are not within the purview of the statute creating the agency. The correctness of that determination is a question of law." Id., *citing,* People ex rel. Thompson v. Property Tax Appeal Board, 22 Ill. App. 3d 316, 321, 317 N.E.2d 121 (1974).

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[2] Richard's Tire Co. v. Zehnder, 295 Ill. App. 3d 48, 56, 692 N.E.2d 360, 366, 229 Ill. Dec. 587 (1998)

Finally, the facts that WMII failed to send certified mail to Brenda Keller and failed to complete service on Brenda Keller are not disputed. WMII clutters these facts with arguments about its diligence and timeliness and alleged credibility of its process server, which are not factors considered in the straight forward analysis of whether or not Section 39.2(b) service was met, and only, arguably, considered if the IPCB were to engage in a constructive receipt of notice argument, which would require evidence of recalcitrance which is not presented in this case and with respect to which Kankakee County made no finding.[3] Thus, the IPCB finding applying the *de novo* standard of review was correct, even if it finds that there are circumstances in which it would apply a manifest weight of the evidence argument in determining jurisdiction, as the facts forming the basis for its decision were not disputed.

WHEREFORE, Michael Watson, by and through its attorneys, respectfully requests that the Illinois Pollution Control Board enter an order denying WMII's Motion for Reconsideration and for any additional relief that the Board deems appropriate.

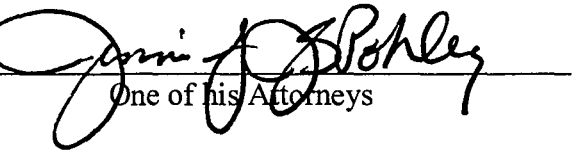
(interpretation of a statute is a question of law).

[3] The credibility arguments of the witnesses are addressed in Watson's opening and reply briefs, and if those arguments are being reconsidered by the IPCB, although outside the elements of a motion for reconsideration, Watson, without waiving its objection to reconsideration of those facts in response to WMII's motion, incorporates those portions of its briefs related to the evidence of WMII's attempts at service and credibility of the witnesses regarding same as and for its response to that portion of WMII's motion addressing those arguments.

Dated: September 26, 2003

Respectfully Submitted,

PETITIONER MICHAEL WATSON

By: 
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