

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE, )  
)  
Petitioner, )  
)  
v. )  
)  
COUNTY OF KANKAKEE, COUNTY )  
BOARD OF KANKAKEE, and WASTE )  
MANAGEMENT OF ILLINOIS, INC., )  
)  
Respondents. )

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PCB 03-03-125 )  
SEP 15 2003 )  
(Third-Party Pollution Control )  
Facility Siting Appeal) )  
STATE OF ILLINOIS )  
Pollution Control Board )

MERLIN KARLOCK, )  
)  
Petitioner, )  
)  
v. )  
)  
COUNTY OF KANKAKEE, COUNTY )  
BOARD OF KANKAKEE, and WASTE )  
MANAGEMENT OF ILLINOIS, INC., )  
)  
Respondents. )

PCB 03-133 )  
(Third-Party Pollution Control )  
Facility Siting Appeal) )

MICHAEL WATSON, )  
)  
Petitioner, )  
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v. )  
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COUNTY OF KANKAKEE, COUNTY )  
BOARD OF KANKAKEE, and WASTE )  
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PCB 03-134 )  
(Third-Party Pollution Control )  
Facility Siting Appeal) )

KEITH RUNYON, )  
)  
Petitioner, )  
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v. )  
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**NOTICE OF FILING**

TO: See Attached Service List

PLEASE TAKE NOTICE that on September 15, 2003, we filed with the Illinois Pollution Control Board, the attached **WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION TO SUBMIT CORRECTED PAGES *INSTANTER*** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By  \_\_\_\_\_

One of Its Attorneys

Donald J. Moran  
Lauren Blair  
PEDERSEN & HOUP  
Attorneys for Petitioner  
161 N. Clark Street  
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Telephone: (312) 641-6888

**PROOF OF SERVICE**

Victoria L. Kennedy, a non-attorney, on oath states that she served the foregoing **WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION TO SUBMIT CORRECTED PAGES INSTANTER** on the following parties via hand delivery on September 15, 2003:

Ms. Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

Bradley Halloran, Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11th Floor  
Chicago, Illinois 60601

and on the following parties via first class mail, postage prepaid in an envelope correctly addressed and placed in the mail depository at 161 North Clark Street, Chicago, Illinois on or before 5:00 p.m. on September 15, 2003

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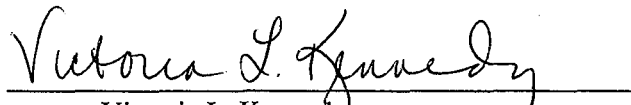
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Victoria L. Kennedy

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SEP 15 2003

STATE OF ILLINOIS  
Pollution Control Board

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PCB 03-125  
(Third-Party Pollution Control  
Facility Siting Appeal)

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 Pollution Control Board

**MOTION TO SUBMIT CORRECTED PAGES INSTANTER**

Respondent WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by its attorneys, Pedersen & Houpt, files this motion to submit corrected pages of its Motion to Reconsider filed on September 12, 2003. In support thereof, WMII states as follows:

1. On September 12, 2003, WMII filed a Motion to Reconsider requesting that the Illinois Pollution Control Board ("Board") reconsider and reverse the ruling it issued in its Opinion and Order entered on August 7, 2003.
2. WMII's Motion to Reconsider contained the inadvertent typographical and/or syntactical errors on pages 6, 7, 14 and 15.
3. WMII has corrected said pages as follows:
  - A. Page 6, paragraph 9, second sentence - Section 39.2(b) provides that " applicants shall cause written notice to be ~~serve~~ served "in person.";
  - B. Page 7, paragraph 12, fourth sentence - ~~The fact that~~ Because WMII actually caused notice to be served on Mrs. Keller by mail and by "in person" posting to her residence, WMII satisfied the notice requirements of Section 39.2(b), and the Board's ruling to the contrary was erroneous and should be reversed.;
  - C. Page 7, paragraph 13, last citation - ~~See eg-~~ e.g.;
  - D. Page 14, paragraph 28, last citation - ; ~~(defendant's self-serving denials that it received notice was rejected). In Montalbano Builders, at \*3~~ (despite the plaintiff's claims that he did not receive the request to admit, court presumed that, since the request was mailed, it was received four days after the date the notice of

service was filed). ~~Montalbano Builders~~, at \*3;

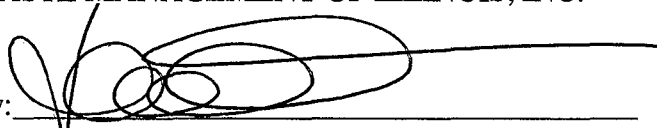
- E. Page 14, paragraph 29, last sentence - There was sufficient evidence presented before the County Board to support its finding, and conflicts in the evidence is are not enough to render that finding against the manifest weight of the evidence.;
- F. Page 15, paragraph 30, last sentence - The issue of whether WMII's attempts to notify Mrs. Keller were sufficient to constitute constructive notice for purposes of satisfying the notice requirements of Section 39.2(b) presents a mixed question of law and fact in that a factual determination must be made as to whether WMII's efforts at serving notice on Mrs. Keller were timely and diligent, and a legal determination must be made as to whether such efforts were sufficient to constitute constructive notice ~~under the law.~~; and
- G. Page 15, paragraph 32, first sentence - As stated above in paragraphs 14-16, the Board did not determine whether WMII's efforts at serving notice on Mrs. Keller were timely and diligent, or make a legal determination as to whether such efforts were sufficient to constitute constructive notice ~~under the law.~~

4. WMII has attached the corrected pages hereto and requests that the Board review the corrected pages 6, 7, 14 and 15 in lieu of the originally filed pages 6, 7, 14 and 15.

5. As the changes to pages 6, 7, 14 and 15 are limited to correcting typographical and/or syntactical errors, no prejudice will result in the granting of this Motion.

WHEREFORE, WASTE MANAGEMENT OF ILLINOIS, INC. respectfully requests that the Board grant WMII's Motion to Submit Corrected Pages *Instantly*, and for such other and further relief as it deems appropriate.

Respectfully submitted,  
WASTE MANAGEMENT OF ILLINOIS, INC.

By:   
One of Its Attorneys

Donald J. Moran  
Lauren Blair  
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161 North Clark Street, Suite 3100  
Chicago, Illinois 60601  
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seeking to site a pollution control facility to undertake appropriately reliable and diligent efforts to cause notice of the request to be served on surrounding property owners. *City of Columbia*, slip op. at 13; *Village of Bensenville*, slip op. at 6; *DiMaggio*, slip op. at 10; *ESG Watts, Inc.*, slip op. at 9. Therefore, under the proper construction, providing notice through posting notice and regular mail complies with Section 39.2(b).

9. Indeed, the plain language of Section 39.2(b) establishes that posting is an acceptable method of service. Section 39.2(b) provides that applicants shall cause written notice to be served "in person." This is not synonymous with the term "personal service." The term "personal service" refers to the person being served, whereas the phrase "cause written notice to be served in person" refers to the person doing the serving. *See Reynolds v. City of Tuscola*, 48 Ill. 2d 339, 270 N.E.2d 415 (1971) ("personally serve" refers to the person doing the serving, and "personal service" refers to the person being served). Causing notice to be served "in person" is not limited to attempts at personal service. It includes any other reliable method of delivering the notice in person, including sending a process server to post notice to a property owner's residence "in person." *Greene v. Lindsey*, 456 U.S. 444 (1982) (posted notice is reliable means of providing notice).

10. Moreover, Section 39.2(b) permits service by regular mail, in addition to registered mail and certified mail. The Board has already expanded the type of mailed service permitted to include service of notice via certified mail return receipt requested. *Ash*, slip op. at 7. Given that regular mail is a reliable method of providing notice, *Montalbano Builders, Inc. v. Rauschenberger*, 2003 Ill App. LEXIS 949 at \*3 (3d Dist. July 23, 2003), evidence of actual service via regular mail should be held to satisfy Section 39.2(b).

11. The Board's overly restrictive interpretation would enable objectors to use Section

39.2(b) as a mechanism to upset the local siting process by engaging in tactics to frustrate attempts at those two types of service. Such a result would be manifestly unjust to applicants and is not consistent with Section 39.2(b). *ESG Watts, Inc.*, slip op. at 9. Nor could the legislature have intended that a property owner with actual notice but not through personal or certified mail service would be able to defeat jurisdiction, whereas an applicant who merely presented returned certified mailing receipts that were stamped "unclaimed" would obtain jurisdiction. Clearly, Section 39.2(b) should not be construed to bring about such an absurd result.

12. In this case, WMII actually served notice on Mrs. Keller in accordance with Section 39.2(b) through posted service and mailed service. The notices that WMII sent to Mrs. Keller via mail were never returned. While Mrs. Keller contended that she never actually saw the posted notice, such flat denials are insufficient. *See Montalbano Builders, Inc.*, 2003 Ill App. LEXIS 949 at \*3. Because WMII actually caused notice to be served on Mrs. Keller by mail and by "in person" posting to her residence, WMII satisfied the notice requirements of Section 39.2(b), and the Board's ruling to the contrary was erroneous and should be reversed.

## **II. THE BOARD ERRED IN ITS APPLICATION OF THE DOCTRINE OF CONSTRUCTIVE NOTICE**

13. In addition to actual service, Mrs. Keller was also constructively served. However, the Board misapplied the doctrine of constructive notice. First, the Board incorrectly stated that the concept of constructive notice was enunciated in *ESG Watts, Inc.*, and was nothing more than dicta. (Slip op. at 16). In fact, the doctrine of constructive notice was announced in *City of Columbia* and has been recognized as binding precedent in subsequent Board and Illinois court decisions. *See e.g., Ogle County*, 272 Ill. App. 3d at 195, 649 N.E.2d at 553; *DiMaggio*, slip op. at 9-10.

14. Second, in determining whether Section 39.2(b) has been satisfied through



notice of constructive termination, despite evidence that the notice was faxed, was against the manifest weight of the evidence); *Montalbano Builders*, at \*3 (despite the plaintiff's claims that he did not receive the request to admit, court presumed that, since the request was mailed, it was received four days after the date the notice of service was filed).

29. In any event, the record before the Board contained conflicting evidence that Mrs. Kellers knew that WMII was attempting to serve notice on her and conveniently made herself unavailable to be notified, in person or by mail. The hearing before the County Board provided the only opportunity to hear the conflicting testimony and to assess witness credibility. The County Board was also in the best position to analyze Mr. Keller's testimony in the context of the other evidence presented concerning the Kellers' relationship with Petitioner Watson, Petitioner Watson's influence on the Kellers to claim they did not receive notice, and the contradictions in the Kellers' own testimonies. The County Board ultimately determined that Mrs. Keller's denials were not credible and found that the notice requirements of Section 39.2(b) were satisfied. There was sufficient evidence presented before the County Board to support its finding, and conflicts in the evidence are not enough to render that finding against the manifest weight of the evidence.

*McLean County Disposal, Inc.*, 207 Ill. App. 3d at 482, 566 N.E.2d at 29.

**B. The Issue Of Whether WMII Accomplished Constructive Notice Presents A Mixed Question Of Law And Fact And, Therefore, Should Have Been Reviewed By The Board Under The Clearly Erroneous Standard**

30. The Board also erred in failing to apply the clearly erroneous standard of review to the question of whether Mrs. Keller should be deemed to have received constructive notice. The issue of whether WMII's attempts to notify Mrs. Keller were sufficient to constitute constructive notice for purposes of satisfying the notice requirements of Section 39.2(b) presents a mixed question of law and fact in that a factual determination must be made as to whether

WMII's efforts at serving notice on Mrs. Keller were timely and diligent, and a legal determination must be made as to whether such efforts were sufficient to constitute constructive notice.

31. Where an adjudicatory body's "determination presents a mixed question of law and fact, [its] decision will be set aside only if it is clearly erroneous." *Land and Lakes Co.*, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. Under a clearly erroneous standard of review, reversal is appropriate only if, after review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 369, 776 N.E.2d 166, 177 (2002).

32. As stated above in paragraphs 14-16, the Board did not determine whether WMII's efforts at serving notice on Mrs. Keller were timely and diligent, or make a legal determination as to whether such efforts were sufficient to constitute constructive notice. However, the evidence in the record clearly demonstrates that WMII made sufficiently diligent and timely attempts to serve the Kellers through a variety of reliable means.

33. There was no dispute at the hearing before the County Board that WMII employed extensive efforts to notify the Kellers of its intent to file an application for site location approval. The process server made five separate attempts over four days to serve the Kellers. In addition to attempts at personal service, WMII sent notices to Mr. Keller via certified mail, and to Mr. and Mrs. Keller via regular mail. The process server also sent separate notices to Mr. and Mrs. Kellers via regular mail. Thus, five separate mailings were sent to the Kellers. Finally, WMII posted notice to the Kellers' residence. In total, 11 notices were sent or delivered to the Kellers.

34. There was also no dispute that WMII's efforts were timely. In order to be timely, attempts to serve notice must also be initiated sufficiently in advance to reasonably expect receipt