ILLINOIS POLLUTION CONTROL BOARD
August 26, 1991

LAND AND LAKES COMPANY, JMC OPERATIONS, INC., and NBD TRUST COMPANY OF ILLINOIS AS TRUSTEE UNDER TRUST NO. 2624EG,	)	
Petitioners,	)	
v.	)	PCB 91-7 (Landfill Siting)
VILLAGE OF ROMEOVILLE,	)	
Respondent,	)	
COUNTY OF WILL, and PEOPLE OF THE STATE OF ILLINOIS,	)	
Intervenors.	)	

STEPHEN F. HEDINGER APPEARED ON BEHALF OF PETITIONERS,

LAWRENCE C. TIEMAN APPEARED ON BEHALF OF RESPONDENT,

GLENN C. SECHEN, MATTHEW M. KLEIN, AND BARBARA J. SMILES APPEARED ON BEHALF OF THE COUNTY OF WILL,

RICHARD KAVANAGH APPEARED ON BEHALF OF THE FOREST PRESERVE DISTRICT OF WILL COUNTY, AND

MARK W. MONROE APPEARED ON BEHALF OF VARIOUS LANDOWNERS.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board upon the January 15, 1991 filing of a petition for hearing by Land and Lakes Company, JMC Operations, Inc., and NBD Trust Co. of Illinois, as Trustee under Trust No. 2624EG ("Land and Lakes"). Land and Lakes contests the refusal of the Board of Trustees of the Village of Romeoville ("Romeoville") to grant approval to Land and Lakes for location of an expansion of its regional pollution control facility pursuant to Section 40.1(a) of the Environmental Protection Act ("Act")(Ill. Rev. Stat. 1989, ch. 111½, par. 1041.1(a)).[1]

[1]There is some confusion in the record as to whether Romeoville denied Land and Lakes' request for site approval or whether it conditionally approved the request. Please refer to the section entitled "Procedural History" for a more thorough

PROCEDURAL HISTORY

On December 21, 1989, Land and Lakes entered into an annexation agreement with Romeoville.[2] In that agreement, Romeoville obtained landfill siting decision-making authority and Land and Lakes made certain commitments to Romeoville concerning the landfill siting proceeding. On May 14, 1990, Land and Lakes filed with the Clerk of Romeoville an Application for Site Location Approval, in which it requested siting approval for a proposed expansion to its regional pollution control facility. (C-001-2804). Public hearings were held in Will County on the following dates: September 24, 25, 26, and 27, 1990; October 2, 3, 4, 8, 9, 10, and 17, 1990; and December 6 and 12, 1990.

At its December 12, 1990 meeting, Romeoville's Hearing Officer drafted two alternate resolutions. One resolution denied siting approval because Criterion 1 had not been satisfied and the other granted siting approval because all of the criteria had been satisfied. (C-9927). Each resolution also contained five conditions to approval.[3] (C-9928). At that meeting, the Village Board unanimously voted to add a sixth condition, which stated that, if approved, the facility would restrict solid waste received to waste originating in Will County and/or communities partly in Will County.[4] (C-9929-9934, -9938-9939, -9961-9962). When asked to respond to the conditions, Land and Lakes stated that it did not agree with Condition 2 (requiring a full-time independent engineer to oversee daily landfill operations for quality control and assurance to be paid for by Land and Lakes and approved by Romeoville) or to Condition 6, but that it agreed

---

discussion.

[2]At our May 3, 1991 hearing, Land and Lakes presented the Hearing Officer with a Motion to Supplement the Record, asking that the annexation agreement be added to the Village Board's record. (R. 9). In support of its motion, Land and Lakes stated that although the Village Board agreed to take quasi-judicial notice of the agreement at its December 6, 1990 meeting, the agreement was inadvertently omitted from the record that was filed with the Board. (R. 10, C-9770, -9790-9792). The Hearing Officer granted Land and Lakes' motion at the end of the hearing. (R. 245).

[3]The Village Board's written "Findings of Fact and Decision" (which was attached to the final resolution) states that Land and Lakes met its burden with regard to Criteria 2 through 9 provided it agreed to follow and comply with the five conditions (i.e., conditions to Criteria 2, 3, and 5). (C-4354-4372).

[4]We note that the Village Board's written "Findings of Fact and Decision" does not contain this condition. (C-4371).

to Conditions 1, 3, 4, and 5.[5] (C-9939-9943, -9959). Land and Lakes also provided two counter-proposals to Conditions 2 and 6, both of which the Village Board rejected. (C-9940-99431, -9946, -9958). The Village Board then unanimously voted to deny siting approval on jurisdictional grounds and, in the alternative, to deny the approval based on the merits (i.e., that Land and Lakes did not meet its burden of proof with regard to Criterion 1).[6] (C-4334-4372, -9970-9972).

As previously stated, Land and Lakes filed its petition for hearing with the Board on January 15, 1991. Subsequent to such time, the Board received three petitions for leave to intervene in support of Romeoville's refusal to grant siting approval. The first petition was filed by the States Attorney for Will County on January 16, 1991. The second petition was filed by Paul and Ann Jurca, John and Marlene Jurca, Kelby and Mary Briddick, Lawrence and Diane Kollins, James and Ann Dralle, Robert and Jean Hastert, Robert C. and Doris Hastert, Blanche Hassert, and Fillup, Inc. (d/b/a as White Fence Farms, Inc.) ("Jurca") on January 18, 1991. The third petition was filed by the Forest Preserve District of Will County on February 4, 1991. The Board denied the Jurca's motion on January 24, 1991. On February 7, 1991, the Board denied the Forest Preserve District's petition, but granted the States Attorney's petition because it found that the States Attorney, when acting on behalf of the People of Will County, has interests analogous to those asserted by the Attorney General, and that the interests of the People of Will County could be adversely affected by the Board's decision in the case.

The Board's hearing on this matter was held on May 3, 1991, in Romeoville, Will County, Illinois. Land and Lakes filed its closing argument on June 10, 1991, and Romeoville and Will County filed their closing argument on July 10, 1991. On July 11, 1991 the Attorney General filed a petition for leave to intervene on behalf of the People of the State of Illinois for the purpose of presenting a brief in support of the constitutionality of the siting approval provisions of Section 39.2 of the Act. The Hearing Officer granted the request for leave to intervene on July 26, 1991. Land and Lakes filed its reply brief on July 24, 1991.

BACKGROUND

---

[5]We note that the Village Board's written "Findings of Fact and Decision" indicates that Land and Lakes agreed to be bound by Condition 2. (C-4358).

[6]We note that, when voting on the resolution, a majority of the Village Board members articulated their concerns and/or disagreement with certain aspects of Criterion 2. (C-9971-9972).

Land and Lakes has operated the Willow Ranch Sanitary Landfill since 1981. (C-05, -095). The landfill is part of a project site that is subdivided into three parcels (A, B, and C). (C-05, -012-013, -034, -095). Parcel A consists of approximately 99.3 acres, Parcel B consists of approximately 41.5 acres, and Parcel C consists of approximately 15.3 acres. (C-035). The landfill itself is located on 33 acres of land in Parcel A and at the southeast corner of the intersection of Joliet Road and Bluff Road in Romeoville, Will County, Illinois. (C-05, -035, -2981). About 30.6 acres of Parcel A have been permitted for landfill operations and have already received wastes. (C-342). The landfill currently accepts non-hazardous solid waste and services communities in northern Will County, the extreme southeastern portions of DuPage County, and the far western communities of Cook County. (C-014, -035). Although wastes will not be landfilled within Parcels B and C, drainage facilities to divert the flow of water around the landfill will be located on those two parcels. (C-115-116, -3827-3828).[7] Parcel B may also be used as a borrow source for landfill liner and/or cover soils in the future. (C-095, -3827, 7647-7648).

Because the existing landfill is reaching capacity, Land and Lakes submitted a siting application for the expansion of the landfill in order to increase the capacity of the site. The expansion will extend the approximate life of the facility an additional 12.2 years and will be located immediately north and west of the existing site. (C-013, -014, -035). The total acreage of the existing and expanded facility will be approximately 99.3 acres, all located on Parcel A. (C-05, -035, -095). The proposed expansion involves additional filling on 23 acres in the 30.6 acre area currently permitted and the filling of an additional 43.4 acres to the west and north of the currently permitted area. (C-342). As a result, approximately 73.6 acres of Parcel A will be used for the actual landfilling of wastes. (C-035).

The landfill expansion will continue to accept non-hazardous solid waste as well as Village-approved, state-permitted, non-hazardous, non-liquid special waste (i.e., de-watered waste water treatment plant sludge from Romeoville). (C-05, -013, -014-015, -035). Land and Lakes also intends to develop, at a later date, an on-site material recovery/recycling facility at the northwest corner of the property, and to continue the operation of a compost facility at the site. (C-05, -013, -035).

PRELIMINARY MATTERS

[7]Land and Lakes, in its siting application, states that Parcels B and C are designated for manufacturing and commercial use, respectively. (C-035, -095).

Costs for Certifying Record

On May 6, 1991, Land and Lakes filed a motion requesting that it not be required to reimburse Romeoville for preparing and certifying certain portions of the record. Romeoville filed its response to the motion on May 22, 1991. On May 23, 1991, the Board issued an order taking the motion with the case. The Board need not rule on the motion, however, because Land and Lakes withdrew its motion on May 29, 1991.

Attorney General's Motion for Leave to Amend Brief

On July 11, 1991, the Illinois Attorney General filed a brief on behalf of the People of the State of Illinois and in support of the constitutionality of Section 39.2 of the Act. On July 29, 1991, the Attorney General filed a motion for leave to amend the first sentence of the "history" section of the brief to state that the Village of Romeoville denied rather than approved the siting of Land and Lakes' proposed facility.

Land and Lakes filed a response to the motion on August 8, 1991, stating that it has no objection to the Attorney General's motion. However, Land and Lakes requests that if the Board grants the motion, it should also recognize the Attorney General's implicit position that Romeoville possessed jurisdiction over Land and Lakes' application for siting approval.

We hereby grant the Attorney General's motion. Because the Attorney General's brief addresses only the issue of the constitutionality of Section 39.2 of the Act, we do not agree that the amendment reflects an inherent belief that Romeoville possessed jurisdiction in this matter, nor do we equate a statement regarding the outcome of Romeoville's vote with a recognition of its jurisdiction.

Land and Lakes' Motion for Sanctions Against Will County's Special Assistant States Attorney

In its post-hearing briefs, Land and Lakes renewed its request (made during the Board's May 3, 1991 hearing) that sanctions be imposed upon Will County's Special Assistant States Attorney, Glenn Sechen, for his behavior at that hearing. (Pet. Br. pp. 2-5). Specifically, Land and Lakes argues that Mr. Sechen's testimony was bellicose and failed to reveal any relevant information. (Id.). It also argues that Mr. Sechen engaged in verbal harassment of a witness with no purpose but to embarrass, browbeat, and intimidate, that he misrepresented the witness's testimony, and that he unjustly accused the witness of lying. (Pet. Br. pp. 2-4; Reply Br. pp. 21, 22). Land and Lakes then points to several places in the transcript in support of its allegations. (Id.).

In response, Romeoville and Will County argue that Land and Lakes is really asking for a finding of contempt against Mr. Sechen because sanctions can only be imposed when there is a violation of express rules. (Resp. Br. p. 44). Specifically, Romeoville and Will County argue that Land and Lakes misplaces its reliance on 35 Ill. Adm. Code 101.280 because Mr. Sechen has not violated any Board or Hearing Officer order.[8] (Id. p. 45). They add that if the Board deems Mr. Sechen's conduct contemptuous, it does not have the authority to grant the requested relief but must refer a request for a finding of contempt to the Attorney General or to the States Attorney for prosecution before the Circuit Court. (Id. pp. 44-45). Finally, Romeoville and Will County note that nothing in Mr. Sechen's conduct was improper, that Land and Lakes failed to object to the questioning, and that Mr. Sechen's cross-examination was continued with the countenance of the Hearing Officer. (Id. pp. 45-46).

A review of our May 3, 1991 transcript indicates that Mr. Sechen did indeed go beyond the usual scope of cross-examination. However, we find it unnecessary to impose sanctions because Mr. Sechen's line of questioning yielded no relevant information.

Constitutionality of Section 39.2 of the Act

In its post-hearing brief, Land and Lakes challenges the constitutionality of Section 39.2 of the Act by arguing that Romeoville lacked subject matter jurisdiction because Section 39.2 violates the Separation of Powers Clause of the Illinois Constitution. (Pet. Br. p. 5). Specifically, Land and Lakes argues that the siting scheme embodied in Section 39.2 contravenes Article II, Section 1 of the Illinois Constitution (1970) in that it requires a legislative body (i.e., a county board or a municipal governing body, as opposed to an administrative body), to act in a quasi-judicial capacity by making factual determinations on the nine criteria listed in Section 39.2(a) of the Act. (Id. pp. 6, 8).

In response, Romeoville and Will County argue that the Board has no power to rule on the constitutionality of a statute because the Act does not authorize the Board to do so. (Resp. Br. p. 41). Romeoville and Will County add that, in any case, Land and Lakes' position on this issue is without merit because many courts have upheld the legislative delegation of discretionary functions to local government. (Id. p. 42).

---

[8] 35 Ill. Adm. Code 101.280(a) provides that the Board may order sanctions if a party or any person unreasonably refuses or fails to comply with any provision of 35 Ill., Adm. Code 101 through 120, or any Board or Hearing Officer Order.

For his part, the Attorney General argues that Illinois Supreme and Appellate Courts have held that the legislature, as an adjunct to its power to enact laws, can adopt procedures for the administration of those laws and thus, can delegate adjudicatory powers to an administrative body provided that there is an opportunity for judicial review. (AG's Br. pp. 2-4, 6-7, 9). The Attorney General adds that the Illinois Supreme Court has consistently held that the Separation of Powers doctrine does not prohibit the exercise of similar powers by more than one branch of government and thus, does not prevent the legislature from delegating adjudicatory powers to an administrative agency. (Id. pp. 4-5).

Although Land and Lakes, Romeoville, and Will County address the issue of whether the Board has the authority to consider and rule upon the constitutionality of various provisions of the Act, we need not make a determination on this issue at this time. Land and Lakes accurately cites to those cases in which the Illinois Supreme and Appellate Courts have held that Section 39.2 of the Act establishes a quasi-judicial procedure for the local siting approval of regional pollution control facilities by a county board or municipal governing body. E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 587, 596, 598, 451 N.E.2d 555, 564, 566 (2d Dist. 1983), aff'd 107 Ill. 2d 33, 43, 481 N.E.2d 664, 668 (1985); A.R.F. Landfill, Inc. v. PCB, 174 Ill. App. 3d 82, 89, 528 N.E.2d 390, 394 (2d Dist. 1988); Waste Management of Illinois, Inc. V. PCB, 175 Ill. App. 3d 1023, 1040, 530 N.E.2d 682, 696 (2d Dist. 1988); Waste Management of Illinois, Inc. v. PCB, 123 Ill. App. 3d 1075, 1080, 463 N.E.2d 969, 973-74 (2d Dist. 1984); Town of Ottawa v. PCB, 129 Ill. App. 3d 121, 124-25 (3d Dist. 1984). (See also People of the State of Illinois v. PCB, 83 Ill. App. 3d 802, 404 N.E.2d 352 (1st Dist. 1980)). We construe that these courts, in making the above determination, have also implicitly accepted the notion that elected county boards and municipal governing bodies can function in a quasi-judicial capacity. Accordingly, we will construe Section 39.2 of the Act as constitutional until the courts hold otherwise.

STATUTORY BACKGROUND

Public Act 82-682, commonly known as SB-172, is codified in Sections 3.32, 39(c), 39.2 and 40.1 of the Act. It vests authority in a county board or municipal government to approve or disapprove the siting request for each new regional pollution control facility. These decisions may be appealed to the Board which derives its authority to review the landfill site location decisions of the local governments from Section 40.1 of the Act. The Board's scope of review encompasses three principal areas: (1) jurisdiction, (2) fundamental fairness of the county board's site approval procedures, and (3) statutory criteria for site location suitability. Pursuant to Section 40.1(a) of the Act,

the Board is to rely "exclusively on the record before the county board or the governing body of the municipality" in reviewing the decision below. However, with respect to the issue of fundamental fairness, the Illinois Supreme Court has affirmed that the Board may look beyond the record to avoid an unjust or absurd result. E & E Hauling, Inc. V. PCB, 116 Ill. App. 3d 587, 594, 451 N.E.2d 55 (2d Dist. 1983), aff'd 107 Ill.2d 33, 481 N.E.2d 664 (1985).

JURISDICTION

In addition to Land and Lakes' constitutional argument to challenge Romeoville's jurisdiction, Romeoville and Will County argue that Land and Lakes failed to establish Romeoville's jurisdiction in this matter. Specifically, Romeoville and Will County argue that Land and Lakes issued defective notices in that it failed to file its application on the date specified in its notice, that it failed to notify two persons who owned property within 250 feet of the lot line of the subject property pursuant to Section 39.2(b) of the Act, and that it failed to notify General Assembly members from the district of the public hearing pursuant to Section 39.2(d) of the Act. (Resp. Br. pp. 1-9).

Section 39.2 of the Act contains certain notice requirements that a petitioner must follow for site location approval. These notice requirements are jurisdictional prerequisites to the county board's or municipal government's power to hear a landfill proposal. Accordingly, a finding of a lack of jurisdiction at the county board or municipal government level (in this case, Romeoville) would make it unnecessary to review a petitioner's other arguments. Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 494 N.E.2d 180 (2d Dist. 1986); Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2nd Dist. 1985). The notice requirements of Section 39.2 are to be strictly construed as to timing, and even a one day deviation in the notice requirement renders the county without jurisdiction. Browning-Ferris Industries of Illinois, Inc. v. IPCB, 162 Ill. App. 3d 801, 516 N.E.2d 804, 807 (5th Dist. 1987).

Section 39.2(b) Notice of Site Application to General Assembly Members

Although it is not completely clear from a reading of the post-hearing briefs and the Board's transcript, there is some indication that Romeoville and Will County believe that Land and Lakes' notice of its application to the General Assembly members was defective because the notices were not mailed to the legislators' Springfield offices.

Section 39.2(b) states in part as follows:

> No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested....upon members of the General Assembly from the legislative district in which the proposed facility is located....

The record clearly indicates that Land and Lakes mailed notice of its application to the legislators' district offices via registered mail, return receipt requested. (C--039-040, -042-043, -3462-3463, -3465-3466). Accordingly, any argument that the legislators were not notified is without merit.

Content of Section 39.2(b) Notice

Romeoville and Will County argue that Land and Lakes' notice of its site application was defective because it failed to file its siting application on the date specified in the notice. (Resp. Br. p. 9). Romeoville and Will County add that Land and Lakes should have renoticed the new filing date in order to establish jurisdiction. (Id. p. 10).

Section 39.2(b) of the Act provides in part as follows:

> ....Such notice shall state the name and address of the applicant, the location of the proposed site, the nature and size of the development, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted, and a description of the right of persons to comment on such request as hereafter provided.

Land and Lakes' pre-filing notices state that its application would be filed on May 14, 1990. (C-3457-3459, 3460). Although Land and Lakes filed its application on that date, approximately three weeks later, Romeoville's attorney notified Land and Lakes that its application was rejected because there was an insufficient number of copies of some of the material in the application. (C-001, -002, -2895, -2896, -2897, -3440). Without withdrawing its application, Land and Lakes submitted the additional copies on June 19, 1990, and agreed to an extension of the decision deadline. (C-2897, -2898, -2899-2900, -3440).

After examining the record on this issue, we do not believe that the above facts rise to the level of a jurisdictional infirmity that results in all subsequent proceedings being void. In making this determination, we wish to emphasize that the amendment was non-substantive (i.e., Land and Lakes simply

submitted extra copies of previously-filed material), that Romeoville's Village Clerk notified Land and Lakes that its original filing was complete and in compliance with Romeoville's landfill siting procedural ordinance (C-2895, -2896), that Romeoville's procedural ordinance provides for a subsequent filings (C-2860), and that Land and Lakes did not withdraw its application but voluntarily submitted the extra copies as requested (C-2897, -3440).

Section 39.2(b) Notice of Site Application to Surrounding Landowners

As stated above, Romeoville and Will County argue that Romeoville lacked jurisdiction over the siting proceedings because Land and Lakes did not serve notice of the filing of its siting application on the owners of two properties located within 250 feet of the lot line of the subject site. (Resp. Br. pp. 1, 3). Specifically, Romeoville and Will County note that both properties are located across Bluff Road from the lot line of Parcels B and C and that those parcels were defined in Land and Lakes' site application and notice to be the subject site. (Id. p. 3).

In response, Land and Lakes argues that no credible or probative evidence was introduced establishing the location of the properties. (Pet. Br. p. 15; Reply Br. pp. 4-6). Specifically, Land and Lakes notes that the evidence only indicates that the two properties are located in the vicinity of Parcel B. (Id.). Land and Lakes adds that the owners of the two properties are not entitled to 39.2(b) notice because it consistently referred to Parcel A rather than Parcel B as the subject, or landfill, property and because Will County has calculated that Parcel A is at least 1,300 feet from either of the two properties. (Pet. Br. pp. 15, 19; Reply Br. p. 6).

Section 39.2(b) of the Act provides in part:

> No later than 14 days prior to a request for location approval, the applicant shall cause written notice of such request to be served...on the owners of all property within the subject area...and on the owners of all property within 250 feet in each direction of the lot line of the subject property... provided that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways....

The evidence clearly indicates that Land and Lakes did not notify the two property owners of its intent to file its site application. (C-3453, -3479, -3480, -3461-3469). The evidence also indicates that the properties are located directly across Bluff Road from Parcel B. (C-3156, -3444-3446, -3453, -3478, -3479, -3480, -3536). There is some dispute, however, regarding the exact distance between the properties and Parcel B. (Pet. Br. p. 15; Reply Br. pp. 4-6). In any event, based on our discussion below, there is no need to determine the exact distance between the properties and Parcel B.

The first question we must ask is whether Parcels A, B, and C are separate "lots" such that they may each have their own "lot line", as that term is used in Section 39.2(b) of the Act. It is not disputed that property owners can, subject to public regulations, subdivide their tract as they see fit and that such subdivision will be given the construction of "lots". Lehman v. Revell, 354 Ill. 262, 188 N.E.2d 531 (1933), Gage v. City of Chicago, 223 Ill. 602, 79 N.E. 294 (1906). Here, Land and Lakes has accomplished such subdivision and labelled the lots A, B, and C.[9]

Next, we must determine whether the two property owners are entitled to "lot line" notice pursuant to Section 39.2(b). In other words, we must determine which parcels are part of the "subject property", as that phrase is used in Section 39.2(b).[10]

Land and Lakes argues that the subject site referred to in Section 39.2(b) is limited to the actual sanitary landfill which, in this instance, is confined to Parcel A. (Pet. Br. pp. 18-21; Reply Br. pp. 6-9). In support of its position, Land and Lakes cites to the definition of the term "regional pollution control facility" that is found in Section 3.32(a) of the Act. (Pet. Br. p. 18). That section defines a regional pollution control facility as:

> ...any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility or waste incinerator....

We agree with Land and Lakes that the definition of "regional pollution control facility" equates the term "subject property" with a "sanitary landfill". Section 3.42 of the Act

---

[9]We wish to note that a determination of what constitutes "subject property" does not turn on who owns the property.

[10] Romeoville's Village Board focused on the language of Section 39.2(b) to conclude that Parcels A, B, and C comprise the subject property. (C-4334-4336, -4337-4340).

defines "sanitary landfill" as follows:

> ...a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act...and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the board may provide by regulation.

The above definition indicates that we must look to the activities taking place at each parcel in order to determine which parcels contain the sanitary landfill and thus, the subject property. There is no question that Parcel A contains the existing landfill and proposed expansion, and was so identified throughout these proceedings. Thus, it is a part of the subject property for Section 39.2(b) notice purposes. Although one may argue that Parcels B and C should be considered as part of the sanitary landfill because they will be used for drainage diversion and/or borrow purposes, it would be difficult to construe (and we do not so construe) these non-contact, ancillary activities as part of the definition of "sanitary landfill" in Section 3.42 of the Act.

Based on the above, we conclude that only Parcel A contains the regional pollution control facility. The scope of Romeoville's siting authority in Section 39.2(a) of the Act is expressly limited to the regional pollution control facility. Thus, only Parcel A is the "subject property" for Section 39.2(b) notice purposes. In other words, the subject property for notice purposes is the property (or properties), as legally recorded, that encompassed the regional pollution control facility. The 250 foot notice is to be computed from the lot line of that property. As a result, Land and Lakes was not required to notify the two property owners in question of its application because their properties are more than 250 feet from the "subject property".

The question remains, however, as to whether Land and Lakes fatally confused this issue by including all three parcels in request for approval in its notices. We conclude that it did not because, although the request refers to all three parcels, Parcel A is clearly identified in the notices and in the prior annexation agreement and siting application as the only parcel on which the current landfill and expansion will be located. (Annexation Agreement; C-034-037, -3457-3460). We also note that the notices comport with the informational requirements in Section 39.2(b) of the Act, and go beyond what the Appellate

Court has found acceptable. (See Daubs Landfill, Inc. v. PCB, 166 Ill. App. 3d 778, 520 N.E.2d 977, 978 (5th Dist. 1988) holding that a defect in the legal description of the proposed landfill location did not invalidate an otherwise accurate narrative description of the property in the Section 39.2(b) notice or divest the county board of its jurisdiction). Finally, we again emphasize that Parcel A is all that Romeoville has authority to approve and that it stands independently from any areas that the applicant may perceive to be necessary for siting approval.

Section 39.2(d) Notice of Hearing to General Assembly Members

Romeoville and Will County argue that the final jurisdictional defect is Land and Lakes' failure to assure that those General Assembly members from the district in which the proposed expansion is to be located were notified of the public hearing. (Resp. Br. pp. 10-11). In response, Land and Lakes argues that the affidavits of two legislators that Romeoville and Will County rely on to support the above argument were improperly admitted into evidence at the Board's May 3, 1991 hearing. (Pet. Br. pp. 22-24). Land and Lakes adds that the affidavits fail to prove that either Section 39.2(d) was complied with or that Romeoville lacked jurisdiction because neither affiant makes an express affirmative statement that he did not receive notice. (Id. pp. 25-26). Land and Lakes also argues that a failure to comply with Section 39.2(d) is not tantamount to a jurisdictional default. (Id. p. 26). Rather, Land and Lakes notes that after a siting authority is vested with jurisdiction by an applicant's compliance with 39.2(b), all further steps, including those mandated by Section 39.2(d) are procedural and require a showing of prejudice before they can be overturned. (Id. pp. 26-27). In the alternative, Land and Lakes argues that any failure to serve 39.2(d) notice results in its siting application being deemed approved. (Id. pp. 27-30).

Section 39.2(d) states in part:

> At least one public hearing is to be held...such hearing to be preceded by ...notice by certified mail to all members of the General Assembly from the district in which the proposed site is located....

Before we can address Romeoville's and Will County's argument, we must first answer Land and Lakes' allegation that the notice requirements of Section 39.2(d) are procedural rather than jurisdictional. Although we agree with Land and Lakes that there is no definitive authority at this point in time that states that Section 39.2(d) notice is a jurisdictional requirement, we do not agree that the requirements of Section 39.2(d) are procedural. In Illinois Power Company v. IPCB, 137 Ill. App. 3d 449, 484 N.E.2d 898 (4th Dist. 1985) the court held

that, in a permit appeal, the failure of this Board to provide Section 40 notice of its hearing to the public and to the General Assembly rendered its decision invalid. As a result, the court determined that a valid hearing was not held within the statutory time frame and that the permits were deemed issued pursuant to Section 40 of the Act. In making the above holding, the court stated that it deemed the notice requirements of Section 40 of the Act jurisdictional. Illinois Power, 137 Ill. App. 3d at 451, 484 N.E.2d at 900.

We recognize that the court, in Illinois Power, pointed to the phrase "[t]he Board shall give 21 days notice...and shall publish notice" to buttress its finding that the notice requirements of Section 40 are mandatory. We also recognize that Section 39.2(d) is unlike Section 40 in that it does not contain the word "shall" and is not written in the active voice. However, we do not believe that this difference is a point on which we can distinguish Illinois Power from the instant case. We note that, although Section 39.2(d) of the Act states that "...hearing is to be preceded by published notice... and notice...to all members of the General Assembly...." (emphasis added), it also states that "[a]t least one public hearing is to be held...."(emphasis added). If we were to construe the absence of the word "shall" as meaning that the notice requirements of Section 39.2(d) are not mandatory or jurisdictional, we would also have to construe the absence of the word "shall" as meaning that the hearing requirement of Section 39.2(d) is not mandatory. Accordingly, we are unwilling to distinguish Illinois Power on this basis.

Moreover, we do not believe that the cases cited by Land and Lakes stand for the proposition that the requirements of Section 39.2(d) are procedural. As for Land and Lakes' citation of Tate v. PCB, 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989), the Court in that case merely noted, "[m]erely because subsection (b) has been held to be jurisdictional does not necessarily mean that compliance with subsection (c) also must be had before the County Board has jurisdiction. It is possible the legislature intended subsection (c) to provide a procedural requirement...." Tate, 188 Ill. App. 3d at 1016, 544 N.E.2d at 416. Because of the speculative nature of the above statement, we cannot state that it is tantamount to a court holding that the notice requirements of Section 39.2(d) are procedural in nature.[11] As for the remainder of the cases cited by Land and Lakes in its post-hearing brief, each can be distinguished from the case at hand. See McHenry County Landfill, Inc. v. EPA, 154 Ill. App. 3d 89, 95-97, 506 N.E.2d 372, 376-378 (2d Dist. 1987) (holding that

[11]The Tate Court even affirmatively stated that it was not considering whether the Section 39.2(c) was jurisdictional. 188 Ill. App. 3d at 1016, 544 N.E.2d at 416.

appellant could not deem its proposed site approved because the Board's action in giving 20 day notice of hearing rather than the 21 day notice as required by Section 40.1 of the Act was inadvertent and resulted in no prejudice to appellant); A.R.F. Landfill Corp. v. Village of Round Lake Park, PCB 87-34, 79 PCB 92, 96, 97, 98-99 (July 16, 1987) (holding that when a local unit of government takes an action upon an application for jurisdictional reasons, even those which stem from procedural errors of the applicant, the deemed approved provision of Section 39.2(e) does not apply [i.e., that a failure to hold a hearing within the time frames of Section 39.2(d) does not result in the site application approval pursuant to Section 39.2(e) of the Act because subsection (e) relates to the 180 day final action deadline in Section 39.2(e) rather than the 120 day hearing deadline of Section 39.2(d)]).

Accordingly, because the courts have not directly addressed this issue and because the courts have held that the similar notice requirements of Sections 39.2(b) and 40 are jurisdictional (see Illinois Power, supra, and Browning-Ferris Industries of Illinois, Inc., Concerned Boone Citizens, and Kane County Defenders, supra p. 7), we will hold that the requirements of Section 39.2(d) of the Act are jurisdictional until the courts hold otherwise.

The next question now becomes whether Land and Lakes had the duty to notify the legislators of the public hearing. Unlike Section 39.2(b) of the Act which directly places the burden of mailing notice directly upon the applicant, Section 39.2(d) does not, on its face, assign the duty to mail or publish notice to a particular party. However, we suggest that to construe the language as leaving the decision maker without authority to control the notice and hearing process would be a strained construction indeed. Accordingly, because the burden is on a county board or municipal governing body to assure that a hearing is held, we hold that those entities have the duty to see that notice of the hearing is issued.[12]

In any event, there are several indications in the record that Romeoville interpreted the notice requirements of Section 39.2(d) as being directed toward it. First, Romeoville's SB-172 procedural ordinance states that the Village Clerk has the duty to provide Section 39.2(d) notice. (C-2862-2863). Second,

---

[12]We are not here saying that a party is precluded from providing notice (in addition to any other notice that is given) in order protect its interests, or that a county board or municipal government cannot assign its Section 39.2(d) responsibilities to another person or entity. (See A.R.F. Landfill, Inc. v. PCB, 174 Ill. App. 3d 82, 89, 528 N.E.2d 390, 394 (2d Dist. 1988)).

Romeoville's Hearing Officer, attorney, and Acting Village Manager directed Romeoville's Village Clerk to issue notice. (C-2901-2902, -2903, -2907, -2914, -2938). Third, the record indicates that Romeoville's Village Clerk, in fact, provided some subsection (d) notice when it published notice of the hearings in area newspapers. (C-2904-2906, -2908-2912, -2916-2937). Based on the above, we conclude that Romeoville had the burden of assuring compliance with the Section 39.2(d) notice requirements. Accordingly, we cannot state that Land and Lakes had a duty to assure that the General Assembly members of the district were notified of the public hearings.

The final question now becomes whether Romeoville notified the legislators of the district of the hearing. There is no evidence in the record to show that Romeoville notified the legislators of the public hearing and no one argued that it did. Romeoville, by failing to provide Section 39.2(d) notice, failed to secure its own jurisdiction. This lack of jurisdiction divests Romeoville of its power to act in this matter and renders its subsequent actions (including its final determination) void. As a result, we conclude that Romeoville did not render a timely decision in this matter. Section 39.2(e) of the Act states, in part, as follows:

> ...If there is no final action by the county board or governing body of the municipality within 180 days after the filing of the request for site approval the applicant may deem the request approved.

Section 39.2(e) makes it clear that Land and Lakes may deem its siting request approved as a result of Romeoville's failure to issue a timely decision in this matter. Accordingly, siting approval for Land and Lakes' landfill expansion shall issue by operation of law.

We wish to emphasize that the above result relates only to the landfill expansion on Parcel A, which as we understand it will extend the life of the landfill approximately 12 years. We also wish note that the fact that siting approval issues by operation of law does not negate any of the sworn commitments made by Land and Lakes during the siting approval process and that any permit Land and Lakes obtains will be pursuant to the Board's new landfill regulations.

We would not be honest if we were to refuse to acknowledge that our decision in this case might be unfair to Romeoville. Regrettably, every case barring relief because of the expiration of a statute of limitations or because a decision-making body has lost jurisdiction may lead to a harsh result. We wish to note, however, that the potential for injury to litigants lies in the statute itself. The solution to the problem is in the hands of

the legislature; it is not the province of the Board to amend a statute via its interpretation of the statute.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The failure of Romeoville to comply with Section 39.2(d) of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½ par. 1039(d), renders its December 12, 1990 decision void. Land and Lakes' request for siting approval of its proposed landfill expansion on Parcel A is deemed issued because a decision was not issued within 180 day deadline set forth in Section 39.2(e) of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½, par. 1039.2(e).

Section 41 of the Environmental Protection Act, Ill. Rev. Stat 1989, ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Member R.C. Flemal concurred and Board Member J. Dumelle dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 26th day of August, 1991, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board