ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	PCB 03-125 (Third-Party Pollution Control Facility Siting Appeal)
MERLIN KARLOCK, Petitioner, vs. 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, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	PCB 03-134 (Third-Party Pollution Control Facility Siting Appeal)
KEITH RUNYON, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	PCB 03-135 (Third-Party Pollution Control Facility Siting Appeal)

NOTICE OF FILING

TO: All Counsel of Record (see attached Service List)

PLEASE TAKE NOTICE that on September 26, 2003, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, an original and nine copies of the Response to Waste Management of Illinois, Inc.'s Motion to Reconsider, copies of which are attached hereto.

Dated: September 26, 2003

Respectfully submitted,

On behalf of the COUNTY OF KANKAKEE

By: HINSHAW & CULBERTSON

Charles F. Helsten
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One of Its Attorneys

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on September 26, 2003, a copy of the foregoing was served upon:

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By faxing and by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above

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ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE,

Petitioner,

vs.

COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC.

Respondents.

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

MERLIN KARLOCK,

Petitioner,

vs.

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,

vs.

COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC.

Respondents.

PCB 03-134
(Third-Party Pollution Control Facility Siting Appeal)

KEITH RUNYON,

Petitioner,

vs.

COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC.

Respondents.

PCB 03-135
(Third-Party Pollution Control Facility Siting Appeal)

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

NOW COMES, Respondents COUNTY OF KANKAKEE AND COUNTY BOARD OF KANKAKEE, by and through their attorneys, HINSHAW & CULBERTSON, and in response to Waste Management of Illinois, Inc.'s Motion to Reconsider states as follows:

On September 12, 2003, Waste Management of Illinois filed a Motion to Reconsider. The County of Kankakee and County Board of Kankakee reviewed the authorities cited within the Waste Management brief and concur with the conclusion of Waste Management that the service upon the owners of the Keller property was sufficient under the letter and intent of Section 39.2(b) of the Environmental Protection Act (the "Act"). The County agrees with the analyses and arguments raised by Waste Management and hereby adopts and incorporates the brief of Waste Management as its own as though fully stated verbatim herein. In addition to those arguments the IPCB should reconsider and reverse its opinion and order for the reasons stated *infra*.

I. THE SERVICE OBTAINED ON MRS. KELLER WAS SUFFICIENT TO PUT HER ON NOTICE THAT WASTE MANAGEMENT INTENDED TO FILE AN APPLICATION TO EXPAND ITS LANDFILL.

A motion to reconsider is appropriate and a decision should be reversed if it is apparent that an error has been made in the application of the law. *Continental Casualty Company v. Security Insurance Company of Hartford,* 279 Ill.App.3d 815, 216 Ill.Dec. 314, 317 (1st Dist. 1996); *Citizens Against Regional Landfill v. County Board of Whiteside,* PCB 93-156 (March 11, 1993).[1] In this case the Illinois Pollution Control Board ("IPCB") held that "service on

[1] Despite Mr. Karlock's argument to the contrary, IPCB Rule 101.902 does not restrict or limit the IPCB from reconsidering errors it has made in the application of the law. (See Karlock Response Brief, p. 2). Rather, 101.902 provides the IPCB "will consider factors including new evidence or a change in law to conclude that the Board's decision was in error." 35 Ill.Adm.Code 101.902 (2003) (emphasis added). Therefore, the IPCB must consider factors to determine if its decision was in error. These factors merely include new evidence or a change in law. These factors would also include errors in the application of the law (such as requiring strict compliance with a notice statute or failing to provide appropriate deference to the fact finders). Karlock attempts to deceive the IPCB by stating that "this higher standard in ruling on motions to

[]property owners must be effectuated using certified mail return receipt requested or personal service." (Slip Op. at 15). The IPCB reiterated that in its opinion "the legislature provided clear precise language to the Board detailing what steps an applicant must take to provide notice." *Id.* (emphasis added). Similarly, the IPCB held "failure to meet the strict notice requirements of Section 39.2(b) of the Act (citation omitted) divest the County Board of jurisdiction to hear the matter." *Id.* Therefore, it is apparent that the IPCB based its decision upon the conclusion that service of the pre-filing notice as required under 39.2(b) may only be obtained by personal service or certified mail. With respect, this conclusion is not supported by Illinois law and it should be reconsidered.

Many courts have held that whether a party receives actual or constructive notice is more important than the form of notice provided. *Schumacher v. Wolf*, 125 Ill.App. 81, 84 (1st Dist. 1905); *In Re Marriage of Garde*, 118 Ill.App.3d 303, 308, 454 N.E.2d 1065, 1069 (5th Dist.); *Vole v. George Akopolis*, 181 Ill.App.3d 1012, 1019, 538 N.E.2d 205, 210 (2nd Dist. 1909); *Bateman v. Bishop*, 120 Ill.App.3d 138, 144, 457 N.E.2d 994, 998 (5th Dist. 1984); *Olin Corporation v. Bowling Manufacturing*, Ill.App.3d 113, 420 N.E.2d 1047; *People ex. rel. Head v. Board of Education of Thornton Fractional Township's South High School*, 95 Ill.App3d 78, 81, 419 N.E.2d 505, 507 (1st Dist. 1981); *People ex rel. Loeser v. Loeser*, 51 Ill.2d 567, 571, 283 N.E.2d 884, 887 (Ill.S.Ct. 1972); *Stratton v. Winona Community Unit District No. 1*, 133 Ill.2d 413, 431, 551 N.E.2d 640, 647 (1990).

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reconsider has been approved by the Appellate Court in *Turlek v. Pollution Control Board*, 274 Ill.App.3d 244, 653 N.E.2d 1288 (1st Dist. 1995)." First, *Turlek* has never held there was any "higher standard" at the IPCB than the Illinois Courts and on the contrary *Turlek* merely points out that the IPCB denied the motion to reconsider because there was no new evidence or change in law "or any other reason to conclude that the (original IPCB) decision was in error." *Turlek v. PCB*, 234 Ill.App.3d 1, 653 N.E.2d 1288, 94 (1st Dist. 1288). Second, there is no indication in *Turlek* that the IPCB ever even argued that there was a different standard at the IPCB for ruling on motions to reconsider than in the Illinois courts. Third, the *Turlek* case makes it clear that the IPCB did review not only new evidence and changes in law, but also "errors in the [IPCB's] previous application of the existing law." *Id.* Finally, the IPCB has explicitly held that the purpose of a motion to reconsider is not only to bring to the IPCB's attention new evidence or changes in law, but also "errors in the application of the existing law." *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 93-156 (Mar. 11, 1993).

"The object of notice is to inform the party notified, and if information is obtained in any other way than by formal notice, the object of notice is attained." *In Re Marriage of Garde,* 118 Ill.App.3d 303, 308, 454 N.E.2d 1065, 1069 (5th Dist. 1983) (*quoting Schumacher*, 125 Ill.App.81, 84 (1st Dist. 1904)). "Illinois Courts have interpreted the strict requirements of notice by examining how effectively a party did in fact notify the other side rather than simply by basing rights solely on whether every phrase of the statute was followed in exact detail." *Matthews Roofing Company v. Community Bank and Trust Co.*, 194 Ill.App.3d 200, 205, 550 N.E.2d 1189, 1193 (1st Dist. 1990). "The form of mailing a notice is not decisive" when alternative service will accomplish the purpose. *Fultman v. Bishop*, 120 Ill.App.3d 138, 143, 457 N.E.2d 994, 997 (5th Dist. 1984) (held certified mailing was sufficient though a statute called for registered mail).

The Courts have already held that alternative service is appropriate to meet the requirements of Section 39.2(b) of the Act. *Bishop v. Pollution Control Board*, 235 Ill.App.3d 925, 601 N.E.2d 310 (5th Dist. 1992) (held that service by certified mailing was sufficient under Section 39.2(b) of the Act). Likewise, the First District has held that how notice is obtained is "not of pivotal importance" to the issue of determining whether or not notice was provided. *People ex rel. Head,* 95 Ill.App.3d 881, 419 N.E.2d 505, 507. The Supreme Court also has acknowledged that notice provisions may be satisfied by methods other than those explicitly referenced in the statute. *People ex rel. Loeser*, 51 Ill.2d at 571, 283 N.E.2d 884, 887 (Ill.S.Ct. 1972).

In *Loeser* the Supreme Court found that sending a copy of a summons other than by "restricted mail delivery" as required by Illinois law was acceptable. The Court explained: "the requisites of due process are satisfied if the manner of effecting service of summons gives reasonable assurance that notice will actually be given and the person against whom the action is brought is given reasonable time to appear and defend on the merits." 51 Ill.2d at 572, 283

N.E.2d at 887. Additionally, in *Stratton v. Winona Community Unit District No. 1*, 133 Ill.2d 413, 431, 551 N.E.2d 640, 647 (1990) the Supreme Court held that delivery of a notice of expulsion by hand was sufficient even though the statute required notice only by registered or certified mail. The Supreme Court explained:

> Due process entails an orderly proceeding wherein a person is served notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights. A fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information. [Citation omitted]. Due process does not require useless formality in the giving of notice, [citation omitted] requiring only a reasonable assurance that notice will actually be given and the person whose rights are going to be affected be given a reasonable time to appear and defend.

133 Ill.2d at 432-33. 551 N.E.2d at 648. (emphasis added).

Furthermore, the Illinois Pollution Control Board itself has held on several occasions that other methods of service beyond personal service and registered mail may be utilized to provide the Section 39.2(b) notice. See *Environmentally Concerned Citizens Organization v. Landfill LLC*, PCB 98-98, (May 7, 1998); *Ash v. Iroquois County Board*, PCB 87-29 (July 16, 1987); *Environmentally Concerned Citizens Organization v. Landfill LLC*, PCB 98-98 (May 7, 1998).

In this case, the Kellers were sent notice by certified mail, regular mail, personal service was attempted on several occasions, and notices were firmly affixed to the door of their home (the home which is allegedly affected by the landfill) as established by the unrefuted testimony of the process server. Though the certified mailing was sent to Mrs. Keller's husband, the regular mailings and posting of notice were all effectuated on Mrs. Keller. Furthermore, Mr. Keller lives at the same address as Mrs. Keller.

The IPCB's holding that there must be "strict" compliance with the notice language of Section 39.2(b) is simply unsupported by the overwhelming case law on the topic. On occasion after occasion the courts, and even the IPCB, have held that the issue is only whether the service

methods utilized were "reasonably calculated under the circumstances, to apprise interested parties of the pendency of the action". *Stratton*, 133 Ill.2d at 431. All of the numerous methods of service that the applicant utilized were reasonably calculated to apprise Mrs. Keller of the proceedings at issue. Indeed, the Kellers (including Mrs. Keller) attended the hearing, and even testified in an effort to defeat the application. In this case the IPCB explicitly based its decision as to Mrs. Keller on the failure to utilize the two specific means of service referenced in the statute. The County respectfully submits that pursuant to the applicable Illinois case law, such a decision was erroneous and should be reconsidered and vacated.

II. THE ILLINOIS POLLUTION CONTROL BOARD SHOULD GRANT THE MOTION TO RECONSIDER FILED BY WASTE MANAGEMENT OF ILLINOIS BECAUSE KANKAKEE COUNTY WEIGHED THE EVIDENCE AND CREDIBILITY OF THE WITNESSES TO DETERMINE THAT SERVICE WAS EFFECTIVE.

At the 39.2 hearing Petitioner Watson called Mr. and Mrs. Keller to testify and motioned to quash the proceedings based on lack of service upon the Kellers. On December 5, 2001, the Kankakee County Board listened to the testimony of Mrs. Keller, Mr. Keller, and observed their conduct on the witness stand. They also heard the testimony of the process server who attempted personal service upon the Kellers on several occasions and accomplished service via certified mail, regular mail and by posting the notice on their door. (WMII Pub. hrg. Ex. 7B, App at additional information, Tab A, 12/5/02 Tr at 5-15, 18, 21-223, 26-27, 35, 44, 46-47, 58-590, 73-74).

The County Board weighed the credibility of all of these witnesses and came to the conclusion that both of the Kellers were constructively placed on notice of the Section 39.2 hearing. This is further supported by the fact that Mr. Keller testified that he knew about the siting hearing at least two weeks before it commenced. (12/5/02, Tr. 105). Furthermore, Mr. Keller testified that he picks up all of the mail and his wife "does not take care of the mail" that is sent to both her and Mr. Keller. (*Id.* at 107). The evidence is irrefutable that appropriate

notice was sent by certified mail to Mr. Keller and indeed the IPCB has ruled that service was effective as to him. Since Mrs. Keller did not collect, open or otherwise take care of the mail sent to the Kellers, as that the task was solely performed by Mr. Keller, there was ample evidence that Mr. Keller was the appropriate agent to accept service of notices concerning their property.

"It is for the local siting authority to determine the credibility of witnesses, to resolve conflicts in the evidence and to weigh the evidence presented". *Land and Lakes Co. v. Illinois Pollution Control Board,* 319 Ill.App.3d 41, 53, 743 N.E.2d 188, 197 (3d Dist. 2000) (quoting *Concerned Adjoining Owners v. Pollution Control Board*, 288 Ill.App.3d 565, 680 N.E.2d 810 (1997)). It is well established that the IPCB is not to reweigh the evidence or make new credibility determinations. See *McLean County Disposal, Inc. v. County of McLean*, 207 Ill.App.3d 477, 487, 566 N.E.2d 26, 33 (4th Dist. 1991); *Fairview Area Citizens Task Force v. Illinois Pollution Control Board*, 198 Ill.App.3d 541, 550-551, 555 N.E.2d 1178, 184 (3d Dist. 1990).

In this case, it was up to the Kankakee County Board to determine if it believed the testimony of the process server as to the numerous attempts at personal service. Furthermore, the County Board witnessed the process server's demonstration as to how he affixed the notice to the Mrs. Keller's door by taping all four sides of the document firmly to the door with duct tape. Finally, the County Board considered the credibility of the Kellers, the fact that Mr. Keller was a voluntary employee of a competitor to Waste Management and objection at the hearing, and the fact that the Kellers also participated at the hearing when they were called as witnesses. The County Board also considered the hearing officer's factual finding that Mr. Keller's testimony suggests he may have discarded the notices with his junk mail. (12/5/02 Tr. at 148). Ultimately, the County Board concluded that the service was reasonably calculated to provide notice or lack of receipt was incredible.

Once there has been receipt of notice (actual or constructive) the technical requirements of a notice statute need not be followed. See *Stratton,* 133 Ill2d at 432-33; *People v. Toyota Super Vehicle Registration Number*, 202 Ill.App.3d 797, 801, 560 N.E.2d 390, 392 (1990); *Prairie Vista, Inc. v. Central Illinois Light Company*, 37 Ill.App.3d 909, 912, 346 N.E.2d 72, 74 (4th Dist. 1976); *Estate of Abott v. First National Bank*, 38 Ill.App.3d 141, 144-45; 347 N.E.2d 215, 218 (2nd Dist. 1976).

It is respectfully submitted that the IPCB did not consider that a determination of whether notice was received was a factual determination which hinged upon consideration of the credibility of the witnesses and weighing of the testimony as to the reasonable expectation of receipt of the notice. It is beyond the province of the Illinois Pollution Control Board to rejudge the credibility of the witnesses or their the testimony. Clearly the determination of whether actual notice was received was a question of fact that could only be overturned if against the manifest weight of the evidence. In this case there was more than ample evidence that the Kellers had constructive notice of the application. Therefore, the Motion to Reconsider filed by Waste Management of Illinois should be allowed.

DATED: 9-26, 2003

Respectfully Submitted,

On behalf of the COUNTY OF KANKAKEE

By: Hinshaw & Culbertson

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