ILLINOIS POLLUTION CONTROL BOARD
April 11, 1991

MADISON COUNTY CONSERVATION ALLIANCE, RICHARD WORTHEN, CLARENCE BOHM, HARRY PARKER, GEORGE ARNOLD, CLINTON AUFDERHEIDE, MARY AUFDERHEIDE, WILLIAM DORRIS and MARY DORRIS,	)	
Petitioners,	)	PCB 90-239 (Landfill Siting)
v.	)	
MADISON COUNTY and ENVIRONMENTAL CONTROL SYSTEMS, INC.,	)	
Respondents.	)	

MR. GEORGE J. MORAN of CALLAHAN & MORAN APPEARED ON BEHALF OF THE PETITIONERS.

MR. J. THOMAS LONG of FARRELL & LONG APPEARED ON BEHALF OF ENVIRONMENTAL CONTROL SYSTEMS, INC.

MR. LEWIS E. MALLOTT, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF MADISON COUNTY.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a third party petition filed by Madison County Conservation Alliance, Richard Worthen, Clarence Bohm, Harry Parker, George Arnold, Clinton Aufderheide, Mary Aufderheide, William Dorris and Mary Dorris, hereinafter "Petitioners", appealing the decision of the County Board of Madison County ("County Board" or "Madison County") granting site location approval to Environmental Control Systems, Inc. ("ECS") for a regional pollution control facility.

Procedural History

The application for site approval was filed by ECS with Madison County on June 20, 1990. The County Board held three days of hearing on the application: September 26, 27 and October 1, 1990. Madison County granted approval on November 14, 1990. Petitioners filed this third party appeal on December 18, 1990.

On December 20, 1990, this Board accepted the matter for hearing. On January 4, 1991, the hearing officer set the hearing for February 15, 1991 in Edwardsville, Illinois, at the Madison County Courthouse. On January 9, 1991, Madison County filed its certification of record and the record of the County Board's

proceedings. On February 1, 1991, an amended certification and record was filed, pursuant to this Board's Order of January 10, 1991. This Board's hearing was held on February 15, 1991 and transcripts of the hearing were filed on March 8, 1991. ECS filed its brief on March 11, 1991 and the Petitioners' brief was filed on March 14, 1991. By statute, absent a waiver of the decision due date, this Board's decision must be rendered by April 17, 1991, only slightly more than 30 days after completion of the record.

The Facility

The proposed facility is to be located on a 210 acre parcel, approximately one-half mile east of Big Bend Road, south of the Alton and Southern Railroad, west of Illinois Route 111, and north of Interstate 55 and 70 in Nameoki Township, Madison County, Illinois. Although it is being referred to as the Madison County Recycling Center, the facility would serve various waste disposal functions, including recycling, recovery for use as alternative fuel, composting, a 62 acre landfill, and a potential waste-to-energy on-site plant. In the application for site approval these operations were categorized as follows:

1. Material Recovery Facility

2. Fuel Pelletizing and Waste Baling

3. Landscape Waste Composting

4. Bale Storage

5. Waste-to-Energy Facility (Future)

The facility is projected to provide a minimum of 20 years waste management services for Madison County. Additionally, the recycling operation offers the possibility that Madison County may be able to exceed state-imposed recycling goals. The application states that the facility will enable Madison County to recycle in excess of 25 percent of its wastes by the end of the first year of operation.

Introduction

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 the county board or municipal government to approve or disapprove the 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 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 555 (2d Dist. 1983), aff'd 107 Ill. 2d 33, 481 N.E.2d 664 (1985).

Jurisdiction

The notice requirements of Section 39.2(b) are jurisdictional prerequisites to the local county board's power to hear a landfill proposal. On this basis, the lack of jurisdiction at the county board level made it unnecessary to review petitioners' other arguments in The Kane County Defenders, Inc. v. The Pollution Control Board, County Board of Kane County, Illinois, Sanitary District of Elgin and City of Aurora, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2d Dist. 1985). In that case, failure to publish the appropriate newspaper notice 14 days prior to the request for site approval resulted in the court's vacating the county board's decision and the PCB decision upholding it. The court applied the reasoning of Illinois Power Company v. Pollution Control Board, 137 Ill. App. 3d 449, 484 N.E.2d 898 (4th Dist. 1985), which found that the PCB's failure to publish notice as required by Section 40(a) of the Act divested it of jurisdiction.

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 and County of St. Clair, Illinois, 162 Ill. App. 3d 801, 516 N.E.2d 804 (5th Dist. 1987).

ECS argues that the Hearing Officer erred in admitting certain new evidence concerning the alleged notice deficiencies. ECS points to Section 40.1 of the Act, which states that this Board's "hearing shall be based exclusively on the record before the County Board". However, ECS cites no authority for its proposition that Section 40.1 applies to the notice requirements of Section 39.2(b), which position would result in jurisdiction being conferred if the issue of jurisdiction is not raised in the proceeding below. Similarly, ECS cites no authority in claiming that Petitioners waived the issue of notice.

On the contrary, "(a)n objection to jurisdiction may be raised at any time, even by the appellate court on its own motion". Concerned Boone Citizens v. M.I.G. Investment, 494 N.E.2d 180, 144 Ill. App. 3d 334 (1986). Without the statutory notice, the County Board simply has no power to hear the matter. Likewise, jurisdiction cannot be conferred by waiver.

Madison County and ECS objected to the admission of tax record exhibits on the basis that they were available prior to September 26, 1990 for submission at the County Board hearing. The Hearing Officer overruled the objection and this Board affirms that decision since the evidence goes to jurisdiction and

waiver is inappropriate. Tr. at p. 40, 41.

ECS also argues that parcel 007 will not be shown as being within 250 feet of parcel 005 if the testimony is stricken as requested by ECS. Resp. Br. at p. 12. The Board denies this motion to strike and affirms the Hearing Officer's ruling on ECS' objection.

The Board finds that the Hearing Officer did not err in admitting evidence of possible notice defects. Such evidence is admissible based on the jurisdictional requirements of Section 39.2(b) of the Act.

Alleged Notice Defects

Petitioners assert that Madison County lacked jurisdiction because the notice of public hearing published in the Edwardsville Intelligencer was "fatally defective" since it "described the siting request as a request for siting approval for a recycling center rather than a site for a regional pollution control center". Pet. at p. 2. This Board has reviewed the Certificate of Publication and the notice. The notice is captioned:

REGIONAL POLLUTION
CONTROL FACILITY SITING
PUBLIC HEARING NOTICE

The first sentence of the notice begins: "Notice is hereby given that the County of Madison has received an application for Regional Pollution Control Facility Siting Approval for Recycling Center and that a Public Hearing on said application will be held". The legal description identifies the site as approximately two hundred ten acres, encompassing 5 parcels whose legal descriptions are provided. Several sentences detail the scope of the operations as including more than recycling activities:

> NATURE AND SIZE OF DEVELOPMENT: The proposed facility is a comprehensive waste management center including the following units: material recovery-facility, fuel pelletizing and waste baling, landscape waste composting, bale storage and future waste-to-energy facility.
>
> * * *
>
> The bale storage area will be developed in stages as needed.
>
> * * *
>
> NATURE OF PROPOSED ACTIVITY: All incoming wastes (except landscape waste and construction/demolition waste) will be unloaded within the material recovery

building.

* * *

Materials not to be recycled will be moved to the fuel pelletizing and waste baling facility.

* * *

The storage area is designed to be constructed with a double liner of one composite liner overlying a second recompacted earth liner.

* * *

A groundwater and a gas monitoring system will be installed around the perimeter of the storage area. PROBABLE LIFE OF ACTIVITY: Applicant estimates that the life of this facility will be a minimum of 20 years.

This Board finds that the above language adequately informs interested persons of the subject matter of the required hearing. The caption itself does not refer to the recycling center and the content of the notice clearly states that more than recycling is planned for the site. However, use of the words "bale storage" and "storage area" for the more commonly used term "landfill" could result in some public misunderstanding. Generally, less commonly used expressions should be avoided in public notices. Notwithstanding, this Board concludes that the notice was not so confusing or misleading that jurisdiction should be denied on this basis.

A second issue regarding jurisdiction involves the statutory requirement that notice shall be served on property owners within 250 feet of the proposed property not less than 14 days prior to a request for site approval being filed with the County or local government. Section 39.2(b) states this requirement as follows:

> "No later than 14 days prior to 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, on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the county in which such facility is to be located..."
>
> Section 39.2(b).

Petitioners assert that jurisdiction is lacking because "(a)t least one or more of the property owners within the 250

feet lot line of the subject property were not notified as required by statute. Pet. at p. 2.

Proof of Service submitted on behalf of ECS is found at C2044-2062, Exhibit 2, in the Affidavit of Patsy S. Hubbard and attached copies of receipts. The affidavit states:

I, Patsy S. Hubbard, being duly sworn and on oath state as follows:

* * *

2. That, on the 30th day of May, 1990, I caused to be mailed the written notice attached hereto as Exhibit A and by this reference made a part hereof by registered mail, return receipt requested, on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of Madison County in which the proposed facility is located. (Attached as Group Exhibit B, are the return receipts of said notices).

* * *

5. That, a thorough search of the authentic tax records of Madison County was made by your affiant, and all property owners within 250 feet in each direction of the subject lot line determined, and required notices were mailed registered mail to said owners of record.

C2044, 2045.

The affidavit indicates that ECS used registered mail to serve owners within 250 feet. No reference was made to personal service.

A description of the property was attached to the affidavit. See C2046, 2048. The description of the property, on which the regional pollution control facility will be located, refers to 210 acres and includes the parcel of property identified by the permanent parcel number 17-1-20-33-00-000-005 ("005"). The issue here is whether owners within 250 feet of the lot line of this property, parcel 005, were served with the statutory notice. Petitioners claim that the owners of two such properties, 1) Harold Ord and Laverne Powell Ord and 2) Louis S. Dennig, Sr. and Louis S. Dennig, Jr., Co-Trs., did not receive notice. Their properties are identified by the permanent parcels numbered 17-1-20-34-00-000-007 ("007") and 17-1-20-33-00-000-013

("013"). The affidavit does not include proof of service on these individuals.

At this Board's hearing the Petitioners called Allen Martin to testify. Mr. Martin identified himself as Director of the Mapping Department for Madison County, a Division of the Supervisor of Assessments' Office. Tr. at p. 10. He has been employed there twenty-six years. He testified that as part of his duties in the office of Supervisor of Assessments he regularly handles and maintains the "authentic tax records of the county". Tr. at p. 16. He presented some of those records. Specifically, he brought the "property record card" as the county's authentic tax record and the "tax lot card" as other authentic tax records under the old system maintained by the county. Tr. at pp. 16-17. He brought these records for the following parcels, identified by parcel numbers as follows:

Parcel								Owner
#	17	1	20	33	00	000	005	Jerry W. Fowles
	17	1	20	34	00	000	007	Harold Ord and Laverne Powell Ord
	17	1	20	33	00	000	013	Louis S. Dennig, Sr & Louis S. Dennig, Jr. Co-Trs.

The records for the above parcel numbers ending in 007 and 013 showed that the owners were Harold Ord and Laverne Powell Ord for 007 and Louis S. Dennig, Sr. and Louis S. Dennig, Jr. for 013. See Exhibits 3 and 4. Additionally, Mr. Martin provided a computer print-out from the computer records in the Supervisor of Assessments' Office. This confirmed the information from the above records and was described as a compilation of the official authentic Madison County tax records. Tr. at p. 20; Exhibit 5.

Mr. Martin presented "a blue-print, run in (his) office, of the official tax maps stored in (his) office for the property in Madison County," depicting Section 33 and another blue-print showing Section 34. Tr. at pp. 20,21, Exhibits 6,7. He marked these to show the above three parcels identified as numbers 005, 007, and 013. Tr. at pp. 21-22. The two exhibits were connected to show Sections 33 and 34 together since the two sections are contiguous. Tr. at pp. 30-31. Mr. Martin testified that the maps are prepared from aerial photographs to a scale of 400 feet to one inch. Tr. at p. 23. Mr. Martin and his employees transfer measurements from deeds to these maps to the same scale. Tr. at pp. 33-34.

Parcel 005 is identified by ECS as being part of the subject property. See C11 and C2048. Mr. Martin testified that parcel 013 is directly adjacent to and has a common boundary with parcel 005. Tr. at p. 22. Mr. Martin also stated that Parcel 005 and Parcel 007 are "easily within 250 feet of each other", and he "suspect(s) that they would have a common corner." Tr. at p. 34.

Mr. Martin indicated that parcel 013 has been in the name of Dennig since 1979 and was put into a trust in 1990, and that parcel 007 has been in the name of Pole at least since 1958 and

that the name Laverne Pole Ord probably represents an heir of the Poles. Tr. at p. 35.

On cross-examination by ECS, Mr. Martin acknowledged that there may be inaccuracies in his maps and that he cannot testify as to their accuracy from a surveyor's standpoint. He did not know whether the information regarding these particular parcel records was based upon a survey, and stated that his records are not based entirely on surveys.

In its brief ECS argues that Petitioners' assertion that notice was not given must fail because Petitioners did not rely on actual surveys and legal descriptions. ECS cites no authority for this argument. The Board finds that the testimony regarding the authentic tax records and official maps offers proof on which reasonable persons would rely. The Board also relies on ECS's application and its own notice describing the subject property.

ECS states that the actual location of the "site" is partially contained within parcel 005. ECS refers to the part of parcel 005 which is not in the flood plain and is situated in the western part of parcel 005 above elevation 406'. ECS seems to be alluding to the bale storage (landfill) or other specific operations on the subject property. Resp. Brief at p. 8. ECS argues "at no time did Mr. Martin testify as to the relation of Permanent Parcel 13 to the actual boundary of the site location at elevation 406'". Resp. Brief at p. 11.

As Petitioners state in their Reply, the Board cannot interpret the Section 39.2(b) language "lot line of the subject property" to mean that only certain portions of the subject property are relevant. The Board has reviewed the record, particularly maps and diagrams at C45, C50, C53 as suggested by ECS at page 10 of its brief. In fact, the lot line of parcel 005 outlined by Mr. Martin in red on the County Assessor's map at Exhibit 6 appears identical to the outline of the property in ECS's application at C45.

Parcel 013 clearly shares a common boundary approximately 1200 feet long with the southwest part of parcel 005 and at least a corner of parcel 005 is adjacent to, or well within 250 feet of, parcel 007. No intervening parcels are depicted as lying between these common boundaries. This appears consistent with the above referenced ECS maps and diagrams. The possible lack of surveying accuracy on the exact location of the common boundary is not fatal to the Board's concluding that the proof is adequate to establish the relevant lot lines.

Additionally, the Board notes that ECS also gave notice regarding parcel 005.001 and also listed it in its application as permanent parcel 17-1-20-33-00-000-005.001, Parcel 4. See Notice at C2048 and application at C11. Parcel 007 clearly seems to share a common boundary of approximately 500 feet along the entire eastern boundary of parcel 005.001, as well as meeting with the corner of parcel 005. This, too, indicates that one or more property owners within 250 feet of the lot line did not

receive the Section 39.2(b) notice.

ECS has not adequately shown that all owners within 250 feet of "the lot line of the subject property" received notice. Although the affidavit of Ms. Hubbard made a prima facie case that notice was given, once Petitioners brought forth credible evidence that notice was defective, ECS had the burden of going beyond its prima facie proof. ECS did not prove that the required notice was given based on the authentic tax records and that the property referred to in the public notice is not within 250 feet of parcels 007 and 013.

The Board rejects ECS claim that Petitioners should prove that personal service was not made on owners of parcels 007 and 013. This can only be viewed as an attempt to shift the burden of proof of service to Petitioners. As noted earlier, paragraphs 2 and 5 of ECS' affidavit indicated that ECS only claims to have made service by registered mail.

Upon review of the affidavit, proof of service, testimony and exhibits, this Board concludes that at least one owner within 250 feet of the subject property's lot line was not given notice as required by Section 39.2(b) of the Act. The Board finds no legal basis for Respondent's assertion that not all of permanent parcel 005 should be considered. Resp. Brief at pp. 9-14. ECS' own notice refers to 210 acres, and lists parcel 005 as including parcels it references with the numbers 1, 2, and 3. See C11 and C2048. The application also corroborates that parcel 005, in its entirety, is part of the 210 acre assemblage of land. See C9-11. Under the statute ECS must give notice to affected property owners who are defined as owners within 250 feet of the lot line, not 250 feet from some other point within the lot lines. The only "lot line" is that shown in the authentic tax records or assessor's map for parcel 005 as outlined in red on Exhibit 6. Where the flood plain begins or ends on the subject property is irrelevant. See Resp. Brief at. p. 10.

Although in matters of fundamental fairness this Board may consider whether remand may serve a useful purpose, this Board has no authority to confer jurisdiction on the County Board. See DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138, 107 PCB 49 (January 11, 1990). The notice provision of Section 39.2(b) is a statutory jurisdictional prerequisite and notice is here found to be defective. The Board finds, therefore, that the County Board lacked jurisdiction to reach a decision on ECS' application. The decision of Madison County approving the application of Environmental Control Systems, Inc., is hereby vacated.

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

ORDER

The Board hereby vacates the decision of the County Board of Madison County granting site location approval for a regional pollution control facility to Environmental Control Systems, Inc.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987, 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.

J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 11th day of April, 1991, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board