ILLINOIS POLLUTION CONTROL BOARD
July 11, 1986

EVERETT ALLEN, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-34
	)	
CITY OF MOUNT VERNON,	)	
	)	
Respondent.	)	

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

This matter comes to the Board on a March 6, 1986, Petition for Review filed by Everett Allen, Inc., an Illinois Corporation d/b/a/ Allen Waste Management (hereinafter "Everett Allen"). The petition seeks review of a February 3, 1986, decision by the City of Mount Vernon (hereinafter "Mt. Vernon") denying Everett Allen's August 12, 1985, application for local site location approval for a new regional pollution control facility. The Pollution Control Board hearing in this matter was held on May 7, 1986, in the Jefferson County Courthouse. Final briefs were filed by Everett Allen on May 28 and June 3, and by Mt. Vernon on May 29 and June 2, 1986.

As a threshold issue, Mt. Vernon has raised the question of jurisdiction in light of the Second District's opinion in The Kane County Defenders' Inc. v. Pollution Control Board, 93 Ill. Dec. 918, 487 N.E.2d 743 (1985) (hereinafter "Kane County"). Mt. Vernon claims that:

> "Allen Waste Management both within the publication notice and within the notice to adjoining property owners misstated the rights of persons to comment on the request and also misstated the time requirements for a public hearing." (Brief, p. 3)

Consequently, the Board must review the requirements for siting requests and the facts of this case. Mt. Vernon's arguments are poorly developed in that the Board is left to discover what "misstatements" occurred, but the Board will evaluate the matter as it is jurisdictional.

Requests for landfill siting approval are governed by Section 39.2 of the Environmental Protection Act ("Act"). That section sets certain procedural requirements for filing landfill siting applications and local governmental determinations. It also establishes certain requirements regarding the timing and

content of public notice regarding the process. At the outset, the Board notes that, effective July 1, 1985, Sections 39.2(c) and (d) were substantially amended regarding the timing of both the public comment period and the municipal (or county) hearings. Section (b) was not amended. Prior to July 1, 1985, the county was required to consider any comment submitted within 30 days after the filing of the application, and hold at least one public hearing within 60 days of the filing of the application. Since the application in this proceeding was filed after July 1, 1985, the relevant portions of Section 39.2 are as follows:

> b. 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, on the owners of all property within the subject area not solely owned by the applicant, and 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; 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 requirements; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.
>
> Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located. 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 to the county board, and a description of the right of persons to

comment on such request as hereafter provided.

c. An applicant shall file a copy of its request, accompanied by all documents submitted as of that date to the Agency in connection with its application except trade secrets as determined Under Section 7.1 of this Act, with the county board of the county or the governing body of the municipality in which the proposed site is located. Such copy shall be made available for public inspection at the office of the county board or the governing body of the municipality and may be copied upon payment of the actual cost of reproduction.

Any person may file written comment with the county board or governing body of the municipality concerning the appropriateness of the proposed site for its intended purpose. The county board or governing body of the municipality shall consider any comment received or postmarked not later than 30 days after the date of the last public hearing.

d. At least one public hearing is to be held by the county board or governing body of the municipality no sooner than 90 days but no later than 120 days from receipt of the request for site approval, such hearing to be preceded by published notice in a newspaper of general circulation published in the county of the proposed site, and notice by certified mail to all members of the General Assembly from the district in which the proposed site is located and to the Agency. The public hearing shall develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of this Act. [Emphasis added]

The provisions of the statute relating to notice were first interpreted in City of Aurora v. Kane County Board, et al, No. 84-940 (Ill. App. Second District, December 30, 1985). In the Kane County case, the Elgin Sanitary District ("ESD") filed its application August 11, 1983. Newspaper notice was not published until August 10. However, as this notice stated only that the

application would be filed "within 14 days," ESD published a new notice on August 20 which stated the date the application was filed, the last date of the comment period, and the date of the public hearing. The petitioners in that case argued that the 14-day notice provision of paragraph 1 of Section 39.2(b) (individual notice to land owners) applied to paragraph 2 (newspaper notice), and that ESD violated the notice provisions, "thereby substantially shortening the length of the comment period available to the general public." The Board takes administrative notice of the fact that, had notice been published 14 days in advance of a specified filing date, the public would have had 44 days to consider and to formulate written comments. Because notice of the filing date, from which the comment period ran, was not published until August 20, the period was effectively reduced from 44 to 22 days.

The Appellate Court for the Second District held that "ESD's failure to publish appropriate newspaper notice and notice of the date it filed the site location request rendered the Kane County Board hearing invalid for lack of jurisdiction," finding the notice requirements of Section 39.2(b) to be "jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal." In reaching this result, the court applied the reasoning employed by the Third District Appellate Court in Illinois Power Co. v. IPCB, 137 Ill. App. 3d 449, 484 N.E.2d 898 (1985). In Illinois Power, in a situation where the Board had failed to give both the 21-day notice to individuals and the newspaper notice to the general public required by Section 40(b), the court found that the statutory notice requirements were jurisdictional, given the statutes' use of the mandatory term "shall," and the general principle that an administrative agency derives power solely from its enabling statute.

In Kane County, the Second District asserted the Illinois Power rationale applied "even more strongly" because

> "This broad delegation of adjudicative power to the county board clearly reflects a legislative understanding that the county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the landfill site approval process. We find support for this view also in the statutory notice requirements themselves, which are more demanding at the county board phase of the process. In view of the significance of this critical stage, we apply the reasoning of the Illinois Power Co. court, which recognized jurisdictional safeguards at the review stage of site approval proceedings, to the county

> board proceedings. The notice requirements contained in Section 39.2(b) of the Environmental Protection Act (Ill. Rev. Stat. 1983, ch. 111½, par. 1039.2(b)) are jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal (citations omitted).

The Board recently applied the Kane County rationale in City of Columbia, et al., v. County of St. Clair, et al., PCB 85-177, 220, 223 (April 3, 1986) (hereinafter "Columbia"). In Columbia, the Board found that a one day deficiency in notice directives rendered the application deficient. The Second District recently applied the Kane County decision to a factually similar situation involving a one-day deficiency in notice in Concerned Boone Citizens v. M.I.G. Investments, No. 85-309 (Ill. App. Second District, June 4, 1986). Against this background, the Board must consider the facts presented today.

The site location approval process began when Everett Allen prepared a notice of intent to file a site location suitability approval application. That notice was mailed, by certified mail, to the adjacent property owners on July 25, 1985. The legal notice was published in the Mt. Vernon Register-News on July 29, 1985. The actual application was filed with the City of Mt. Vernon on August 12, 1985. Both the notice to adjacent property owners and the newspaper notice contained the following language:

> Any person may file written comment with the Office of the City Clerk, 1100 Main Street, Mount Vernon, Illinois, concerning the appropriateness of the proposed site for its intended purpose. The City Council of the City of Mount Vernon shall consider any comment received or postmarked not later than 30 days from the date of receipt of the request in making its final determination. Additionally,, at least one public hearing is to be held by the City Council of the City of Mount Vernon within 60 days of receipt of the request for site approval, such hearing to be preceded by published notice in a newspaper of general circulation published in Jefferson County, Illinois. (Emphasis added)

While this notice was published and mailed in a timely manner, it did not accurately describe the right of persons to comment on the request. At all times relevant to this proceeding, the statute has provided for a public hearing to be held not less than 90 days nor more than 120 days from filing the application and provided that comments postmarked not later than

30 days after hearing must be accepted. Under the statute, the public and adjacent landowners have a minimum of 104 days to prepare for hearing and a minimum of 134 days to provide written comment. Under the time frames described in the notice, the public and adjacent landowners had a minimum of 14 days to prepare for hearing and 44 days to provide written comment.

The importance of the public comment opportunities before the local government body was clearly recognized by the Second District in Kane County, supra.

The Board has previously recognized the importance of the public comment opportunities and the key role of proper notice in allowing the public adequate time to prepare for hearing and comment. "The function of notice and the required time period between notice and hearing is first to inform the affected public that a landfill site suitability approval process has been initiated and, second, to allow time for the public to review the application to determine whether, or in what manner, further participation is warranted." McHenry County Landfill, Inc., et al., v. County Board of McHenry et al., PCB 85-56, 61-66 (September 20, 1985, at 4). Also, the Board has previously held that where a defective notice is exclusively the fault of the applicant and the defective notice can be cured by an alternative mechanism (filing a new application), the site applicant is held to the letter of the law regarding notice:

> "...the rationale here is that the intent of the Act is to provide a mechanism and a county or municipal forum for the consideration of site location suitability issues. Where an alternative mechanism for resolution and review of an issue [defective notice] exists, e.g. filing of a new application, a party may be held to the letter of the law, when that party alone bears the burden of any omission. Where a slight omission may substantially impair, if it does not extinguish, a right of a party who bears no culpability, e.g., a deemed issued approval, the Board must look to the spirit of the law." (Id. at 12)

The Board finds that the incorrect description published by Everett Allen constitutes a substantial and material failure to state "...a description of the right of persons to comment on such request as hereafter provided" (Section 39.2(b) of the Act). The magnitude of that failure is apparent when viewed from the perspective of a member of the public or adjacent landowner who relied on the notice to prepare for hearing or to prepare comments.

	Time to Prepare For Hearing		Time to Prepare Public Comments	
	Minimum	Maximum	Minimum	Maximum
Under the Terms of the Statute	104 days	134 days	134 days	164 days
According to the Notice from Everett Allen	14 days	74 days	44 days	44 days

After the August 12, 1985, application had been filed, Everett Allen republished notice. That notice was mailed to adjacent landowners on November 12, 1985, and published in the Mt. Vernon Register-News on November 13. That notice more accurately reflects the statutory provisions for public comment; however, it cannot fulfill the statutory notice requirements since it was mailed and published about 90 days after the application was filed. Also, while the notice is not required to contain the date of public hearing, this notice contained a hearing date that was incorrect.

The notices provided by Everett Allen do not fulfill the mandate of Section 39.2(b) of the Act. Consequently, under the theory of Kane County, the application was invalid and Mt. Vernon lacked jurisdiction to proceed. The Board will, therefore, vacate the February 3, 1986, decision by Mt. Vernon in this matter.

ORDER

The February 3, 1986, decision of the City of Mt. Vernon denying Everett Allen's August 12, 1985, application for site location suitability approval is hereby vacated, as the City could not exercise jurisdiction over the improperly noticed application.

IT IS SO ORDERED.

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 July, 1986, by a vote of 6-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board