BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE, Petitioner, v. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB 03-125 (Third-Party Pollution Control Facility Siting Appeal)
MERLIN KARLOCK, Petitioner, v. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB 03-133 (Third-Party Pollution Control Facility Siting Appeal)
MICHAEL WATSON, Petitioner, v. 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, v. 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: See Attached Service List

PLEASE TAKE NOTICE that on August 20, 2004, we filed with the Illinois Pollution Control Board, the attached **MOTION TO SCHEDULE ORAL ARGUMENT TO CONSIDER WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR RELIEF FROM JUDGMENT** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

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MOTION TO SCHEDULE ORAL ARGUMENT TO CONSIDER WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR RELIEF FROM JUDGMENT

Respondent Waste Management of Illinois Inc. ("WMII"), pursuant to Illinois Pollution Control Board ("IPCB") Procedural Rules 101.700(a) and (d), moves for the entry of an order scheduling oral argument on WMII's Motion for Relief From Judgment. In support of this motion, WMII states the following:

I. PROCEDURAL BACKGROUND

1. On July 20, 2004, during the course of discovery conducted in WMII's pending appeal of the IPCB's vacation of the Kankakee County Board's January 31, 2003 siting approval decision ("January 31 Approval"), WMII took the deposition of County Board Member Lisa Latham Waskosky ("Waskosky"). Waskosky testified to a conversation with Mr. Robert Keller in August of 2002, prior to her election to the County Board in November, 2002. During the conversation Mr. Keller admitted to Waskosky that both he and his wife Brenda had actual knowledge of the pre-filing notice posted at their home, and that he instructed his wife on how to avoid being properly served with such notice.

2. On August 6, 2004, WMII filed a Motion for Relief from the August 7, 2003, and October 16, 2003 Orders vacating the January 31 approval based upon the new evidence establishing Mrs. Keller's actual receipt of pre-filing notice. On August 6, 2004, WMII also filed a Motion for Stay of Appeal and *Instanter* Remand for Presentation of Newly Discovered Evidence to the Illinois Pollution Control Board in the Third District Appellate Court. On August 13, 2004, the IPCB filed its Response in Opposition of the Illinois Pollution Control Board to the Motion for Stay of Appeal and *Instanter* Remand for Presentation of Newly

Discovered Evidence to the Board ("IPCB Response"). The IPCB Response argues that the newly discovered evidence is inadmissible as hearsay. Even if the evidence is admissible, the IPCB contends, the evidence is irrelevant, because the issue is not whether Mrs. Keller received notice but, rather, whether such notice was served by the proper method. According to the IPCB, remand would serve no purpose because the evidence does not relate to the method of service, which is the only issue that might affect the IPCB ruling.

3. Based upon the IPCB's response, it appears that the IPCB has rendered its decision on the Motion for Relief from Judgment. Such decision is based upon a misconstruction of applicable law. Oral argument is necessary to address this misapplication and resolve the legal questions concerning pre-filing notice on Mrs. Keller.

II. ARGUMENT

A. The Newly Discovered Evidence Establishing Actual Notice to the Kellers is Relevant and Must be Reviewed by the IPCB.

4. Mr. Keller's statements to Waskosky established that both he and Mrs. Keller received and had actual knowledge of the posted notice. The evidence of actual pre-filing notice to the Kellers is material to the outcome of this jurisdictional issue, as the alleged absence of such notice was the sole basis for the IPCB's decision to reverse the Approval. The IPCB Response argues that actual notice to Mrs. Keller is irrelevant, and that the method of service is the only determinative factor to be considered when reviewing whether or not service was sufficient to confer jurisdiction. This position is contrary to Illinois law and runs counter not only to the plain language of the Act, but also to the legislative intent behind Section 39.2(b). *See Wabash & Lawrence Co. Taxpayers v. Pollution Control Board,* 198 Ill.App.3d 388, 391, 555 N.E.2d 1081, 1084 (5th Dist. 1990)(notice in compliance with the Act that puts interested

persons on inquiry is sufficient to confer jurisdiction); *Sandberg v. City of Kankakee*, PCB 04-33, 04-34, 04-35 (consol.) (March 18, 2004)(notice by certified mail to one of six co-owners is sufficient notice to all); *ESG Watts, Inc. v. Sangamon County Board,* PCB 98-2, slip op. at 9 (June 17, 1999) (section 39.2(b) can be met through constructive notice).

5. The IPCB's Response relies on the mistaken belief that Section 39.2(b) must be strictly construed to require service of notice only by one of two means: personal service or certified mail. This position is also contrary to Illinois law. *See Splett v. Splett*, 143 Ill.2d 225 (1991) (when patient had actual notice, formal statutory notice of involuntary admission proceeding excused); *Waite v. Green River Special Drainage Dist.*, 226 Ill. 207 (1907) (irrelevant that notice of condemnation action did not comply with Farm Drainage Act requirements where owners received actual notice); *Prairie Mgmt. Corp.*, 289 Ill. App. 3d 746 (1st Dist. 1997) (landlord's failure to strictly comply with the notice service requirements provided in forcible statute excused because of actual notice to tenant). The evidence clearly establishes that Mrs. Keller received actual notice. It would be an illogical and unjust result to conclude that actual receipt of notice was insufficient because it was obtained by posted service or regular mail. Indeed, the fact that Mrs. Keller received actual notice is directly relevant to the legal issue in this case and should be given careful consideration.

B. The New Evidence Submitted by WMII is Admissible as an Admission by a Party.

6. Citing the IPCB's August 7 Order, the IPCB Response argues that the "newly discovered evidence" presented by WMII is hearsay and therefore it cannot be considered by the IPCB or the Appellate Court. However, the new evidence is admissible as a party admission because the Kellers were required to receive notice pursuant to Section 39.2(b) of the Act for the

Board to have jurisdiction to consider the Application. Here, the Kellers are "necessary parties" to the action because notice to the Kellers was statutorily required by Section 39.2(b). Thus, Mr. Keller's admission that he and his wife received actual notice can be admitted as a party admission.

7. In addition, the IPCB has viewed opponents to a siting application as parties in other contexts. In *Land and Lakes Company v. Randolph County Board of Commissioners,* PCB 99-69, slip op. at 19 (September 21, 2000), the IPCB determined that contacts between non-party opponents to a siting application (i.e. members of the public) and members of the Randolph County Board of Commissions, were impermissible *ex parte* contacts. This is significant because *ex parte* communications are defined as those that take place outside the record between a decision maker and a *party* to the action. *Id.* Thus, as members of the public, the Kellers are considered in the siting proceedings.

8. It is a well settled principle under Illinois law that a party's own statement in his individual capacity may be offered by an opposing party as an admission, and the matter need not be related to a matter of which the party had personal knowledge and it may contain opinions or conclusions of law. *Gutherie v. Van Hyfte,* 36 Ill.2d 252, 222 N.E.2d 492 (1967); *Breslin v. Bates,* 14 Ill.App.3d 941, 303 N.E.2d 807 (1973). Here, Mr. Keller made a statement to Waskosky admitting that both Mr. and Mrs. Keller had received pre-filing notice. The statement is an unequivocal admission that service had been effectuated upon Mrs. Keller.

C. The IPCB's Decision with Respect to WMII's Motion for Relief from Judgment and the Newly Discovered Evidence is Premature.

9. In its Response, the IPCB seems to have already decided WMII's Motion for Relief from Judgment. The IPCB's decision at this juncture is inappropriate. In essence, the

IPCB Response requests that the Appellate Court deny WMII's request to stay the appeal and remand the case to the IPCB for consideration of the "newly discovered evidence" because the IPCB has already determined that the method of service of Mrs. Keller was insufficient. As detailed above, this argument contravenes Illinois law and does not consider the legislative intent, Illinois precedent or the plain meaning of Section 39.2(b).

10. Waskosky's testimony established the admission of actual notice and constructive service on the Kellers under circumstances where they were affirmatively avoiding service. WMII requests an opportunity to be heard with respect to the newly discovered evidence. If the IPCB were to determine that both Mr. and Mrs. Keller had actual receipt and knowledge of the pre-filing notice, it is highly probable that the IPCB would reverse its August 7 Order, which was based solely on the determination that Mrs. Keller had not been sufficiently served pre-filing notice. The new evidence is critical to a fair and complete determination of the jurisdictional question, and should be explained and considered in the context of the lengthy, complex and contested siting proceedings before the Kankakee County Board. The IPCB Response sends an inappropriate message to the Appellate Court indicating that there is no need to remand the case because the IPCB has already decided the issue.

III. CONCLUSION

For the reasons set forth above and those in WMII's Motion for Relief from Judgment, WMII respectfully requests that the IPCB schedule oral argument on WMII's Motion for Relief from Judgment and award such other and further relief as the IPCB deems appropriate.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

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PROOF OF SERVICE

Victoria L. Kennedy, a non-attorney, on oath states that she served a copy of the foregoing **MOTION TO SCHEDULE ORAL ARGUMENT TO CONSIDER WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR RELIEF FROM JUDGMENT** on the following parties by hand delivery to Hearing Officer Bradley Halloran at 100 West Randolph Street, Suite 11-500, Chicago, Illinois 60601 on this 20th day of August, 2004, and by depositing said copy in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, on this 20th day of August, 2004 to all other parties at their addresses indicated below:

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