ILLINOIS POLLUTION CONTROL BOARD
December 3, 1987

WABASH AND LAWRENCE COUNTIES TAXPAYERS AND WATER DRINKERS ASSOCIATION AND KENNETH PHILLIPS	)	
Petitioners,	)	
v.	)	PCB 87-122
THE COUNTY OF WABASH AND K/C RECLAMATION, INC.,	)	
Respondent.	)	

JOHN A. CLARK APPEARED ON BEHALF OF THE PETITIONERS.

RICHARD L. KLINE APPEARED ON BEHALF OF THE RESPONDENT K/C RECLAMATION, INC.

STEPHEN G. SAWYER, WABASH COUNTY STATES ATTORNEY, APPEARED ON BEHALF OF RESPONDENT WABASH COUNTY BOARD OF COMMISSIONERS.

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

This matter comes before the Board on an appeal of the decision by the Wabash County Board of Commissioners (Commissioners) which approved site location suitability for a regional pollution control facility. The appeal was filed by Wabash and Lawrence Counties' Taxpayers and Water Drinkers Association and Kenneth Phillips (Petitioners) on August 6, 1987. Specifically, the Petitioner's contest the Commissioner's decision which granted site location suitability approval concerning an application filed by K.C. Reclamation Inc. (K.C.). In its application, K.C. proposed the construction of a 45-acre sanitary landfill on a 172-acre parcel of land located in northern Wabash County. The 172-acre parcel abuts the Wabash County/Lawrence County border. The proposed landfill is intended to serve Wabash and Lawrence Counties as well as parts of adjacent counties.

The Commissioners held public hearings on May 11, May 18, May 27, 1987. The Commissioners received numerous written comments and petitions concerning the application. On June 29, July 1 and July 6, 1987, the Commissioners met to deliberate and vote on the application. On July 1, the Commissioners voted to approve site location suitability, and on July 6, the Commissioners adopted a written decision which enunciated the conditions of approval. The Board held a hearing in this matter on October 2, 1987.

At the county level, the site location suitability approval process is governed by Section 39.2 of the Illinois Environmental Protection Act (Act). Ill. Rev. Stat. 1985, ch 111 1/2, par. 1039.2.[1] The appeal of a county's decision is governed by Section 40.1 of the Act. That section requires the Board to evaluate a county's decision given the evidence before the county and the six criteria set forth in Section 39.2. Also, the Board must determine whether the county's decision was the result of a fundamentally fair process.

However, before the Board reviews those two aspects of the county's decision, the Board needs to determine whether the county had jurisdiction to decide site location suitability for the proposed regional pollution control facility.

Courts have held that the notice requirements of Section 39.2(b) are jurisdictional. Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E. 2d 743 (2d Dist. 1985); Browning-Ferris Industries, Inc. v. Illinois Pollution Control Board, No. 5-86-0292, __ Ill. App. 3d __, N.E.2d ____ (5th Dist. 1987). Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 344, 494 N.E.2d 180 (2d Dist. 1986); The Village of Lake in the Hills v. Laidlaw Waste Systems, Inc., 143 Ill. App. 3d 285, 492 N.E.2d 969 (1986); See also McHenry County Landfill, Inc. v. Environmental Protection Agency, 154 Ill. App. 3d 89, 506 N.E. 2d 372 (2d Dist. 1987) (Although the Second District found that the requirements of Section 39.2(b) were jurisdictional, the Board's own failure to provide notice in accordance with Section 40.1 was not jurisdictional). Section 39.2(b) provides:

> 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....Such written notice shall

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[1] The Board notes that amendments concerning Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1039.2 were recently adopted under P.A. 85-0654 and P.A. 85-0859. Also, the legislature passed SB-749. If that bill is certified by the Governor, those amendments will have an effective date of July 1, 1988.

> 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.
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> Ill. Rev. Stat. 1985, ch 111 1/2, par. 1039.2(b)

With regard to the facts at hand, K.C. filed its application with Wabash County on January 12, 1987. Consequently, for jurisdiction to vest, K.C. had to fulfill the requisite notice requirements "no later than 14 days prior to" January 12, 1987.

A recent Board decision discussed just how the fourteen days are to be counted. In Ash v. Iroquois County Board, PCB 87-29 (July 16, 1987), the issue concerned the timing of the publication of the newspaper notice:

> The Board concludes that Ash has complied with the 14 day requirement. Ill. Rev. Stat. 1985, ch. 100, par. 6 specifies that the "first day", or in this instance the date of publication, must be excluded (not counted), while the "last" day, or in this case the date of filing of the application, must be included (counted), unless that day is a Sunday. Applying these directives to the case at bar, the Board finds that Ash filed his application on the fourteenth day after publication. This meets the requirements of Section 39.2(b), which states, inter alia, that publication of the intent to file a request for site approval must occur "no later than 14 days prior" to the time the application is filed (emphasis added). A plain reading of this provision is that it allows filing of the application to occur on the fourteenth day after publication, but that if filing were to occur on any date closer to the date of publication, the 14 day requirement would not be met. That is, the fourteenth day after publication is the soonest day that application can take place and still comply with Section 39.2(b).
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> Id. slip. op. at 8.

The same rationale would apply to the timing of service of notice upon nearby landowners and appropriate members of the General Assembly. As a result, K.C. should have completed such service on or before December 29, 1987, since the application was filed on January 12, 1987.

The transcript of the Commissioner's June 29, 1987 meeting (hereafter cited as R IV) indicates that the Commissioner's realized that one nearby landowner, Charles Scott Clark, and one State Senator, William L. O'Daniel, were served on December 30, 1986. Also, Stephen Sawyer, the Wabash County States Attorney, who helped conduct the hearing, recognized that December 29, 1987 would be the date 14 days prior to the filing of K.C.'s application. (R IV. 13-14). However, Sawyer stated that since the certified mail receipts indicate that the notices were each mailed to Clark and Senator O'Daniel on December 26, 1986, the notice requirement was met. Sawyer advised the Commissioners:

> The statute speaks to mailing rather than to delivery. It refers to service by registered mail as I would advise the Board that the applicable date is the date of mailing.
>
> (R IV. 14)

Sawyer then told the Commissioners that all the necessary persons had been timely served. The Commissioners accepted Sawyer's conclusion. (R IV. 15, 19).

The Board disagrees with Sawyer's legal conclusion that the date of service of the notice is the date of the mailing of the notice. In the City of Columbia v. County of St. Clair, PCB 85-177, PCB 85-220, PCB 85-223 (Consolidated), (April 3, 1986), the Board discussed the issue of timeliness concerning the service of notice on neighboring landowners and members of the General Assembly.

> The Board notes that in Section 101.105 "Computation of Time" of the Board's procedural rules, in subsection (b) the Board has provided that:
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> > "Notice requirements shall be construed to mean notice received, but proof that notice was sent by means reasonably calculated to be received by the prescribed date shall be prima facie proof that notice was timely received."
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> The Board will not, at this time, construe the "cause to be served" language of Section 39.2 of the Act as absolutely requiring that notice be received by all parties 14 days prior to an applicant's filing. To so hold could, as a practical matter, prevent or greatly delay an application being considered by a county because of an applicant's

> inability to perfect notice: an opposing landowner could frustrate, or cause endless renoticing of, the filing of an application by refusing to receive or pick-up mail or by evading personal service. However, the Board does construe the Act as requiring that service of the notice be initiated sufficiently far in advance to reasonably expect receipt of notice 14 days in advance of the filing of a notice. (emphasis added). BFI's [Browning Ferris Industries] initiation of registered mail service on the 15th day in advance of the filing date was unreasonable under the circumstances; in Section 103.123(b) of the Procedural Rules, the Board does not presume its service by first class mail complete until four days after mailing. Service was therefore defective for this reason. (original emphasis). Id., slip. op. at 13.

Consequently, the date of mailing is not considered the date of service with regard to the 14 day requirement. Also, in the City of Columbia the Board notes its own procedural rule would provides that service is presumed accomplished four days after the date of first class mailing.

The Board's decision in City of Columbia has been recently affirmed by the Appellate Court of Illinois, Fifth District. Browning-Ferris Industries of Illinois, Inc. v. Illinois Pollution Control Board, No. 5-86-0292 (November 18, 1987).[2] In its decision the Fifth District refused to distinguish Kane County Defenders and followed Kane County Defenders rule that the notice requirements of Section 39.2(b) are jurisdictional. Browning-Ferris Industries of Illinois, slip. op. at 8.

The record indicates that notices to Clark and Senator O'Daniel were mailed on December 26. Consequently, if one uses the Board's procedural rule, which presumes that service is accomplished after four days, service of these notices would not have been presumed completed until December 30th. December 30, in fact, is the actual date that service was accomplished. As a

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[2]The Board notes, however, that the Fifth District apparently has concluded that the Board had based its decision on defective newspaper notice alone. Browning-Ferris Industries of Illinois, slip. op. at 4. The Board's original Opinion suggests that defective notice to neighboring landowners was also determinative of the outcome. City of Columbia, PCB 85-177, PCB 85-220, PCB 85-223 (consolidated), slip. op. at 10. (April 3, 1986).

result, the service of the notices on Clark and to Senator O'Daniel were one day late with respect to the provisions of the Act. Kane County Defenders clearly states that the notice requirements of the Act must be met before jurisdiction is vested with the County. Since the notices to Clark and Senator O'Daniel did not meet the requirements of the Act, Commissioners did not have jurisdiction to decide K.C.'s application. As a result, their decision is invalid.

Although this may appear to be a harsh outcome due to the fact that two notices were only one day late, the courts have clearly and strictly applied the requirements set forth in the Act. A similar case is that of Concerned Boone Citizens v. M.I.G. Investments, Inc., 144 Ill. App. 3d. 334, 494 N.E.2d 180 (2d Dist. 1986).

> In Kane County Defenders, Inc., v. Pollution Control Board, [citation omitted], this Court held that the fourteen day limitation which applied to the written notice also applied to the notice by publication. This Court further stated that the notice requirements were "jurisdictional" prerequisites which must be filed in order to vest the County Board with the power to hear a landfill proposal [citation omitted]. Because M.I.G. filed its application 13 days after it published notice of its application. M.I.G.'s application is defective, and the County Board lacks jurisdiction to act on it.
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> 494 N.E. 2d at 183.

Also, in Browning-Ferris Industries of Illinois, the Fifth District addressed the issue of a one-day-late notice:

> Since the notice requirements of Section 39.2(b) are jurisdictional, even the one day deviation from the requirement of newspaper publication here was not de minimus but, rather, rendered the County without jurisdiction to consider BFI's request.
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> Id. slip. op. at 8.

The Board is constrained by such strict judicial interpretation of the notice requirements as jurisdictional requirements. Consequently, the Board must vacate the decision here on review.

Today, the Board is basing its decision upon the fourteen day notice requirement as applied to the neighboring landowners and appropriate legislators. However, after reviewing the

record, it is apparent that other jurisdictional issues exist. First, Section 39.2(b) of the Act also provides that the notice must be served 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." Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1039.2(b). The Board notes that the Act's use of the word "County", in its singular form, may not be appropriate in all instances. A proposed facility could be sited across a county boundary. As a result, the facility would be located in two different counties. The County of Wabash interpreted this language to mean that notice need only be served on property owners who are located within the county in which the site is to be located. The Board interprets the intent of the language of the Act differently.

The Board holds that all property owners within 250 feet of the lot line of the property on which the facility is to be located must be served regardless of whether or not they own property in the same county as the proposed facility. Such an interpretation is consistent with purpose behind the notice. That is, nearby landowners are notified simply because the proposed facility may impact upon their property. Often, the impacts from operations of a landfill are not constrained by political boundaries. For example, litter and vectors are not limited by county boundaries. For these reasons, the Board feels it proper to interpret this statutory language in a broad manner. K.C. should serve notice on all landowners within 250 feet of the 172-acre parcel regardless of whether those landowners own property in Wabash County or Lawrence County.

Finally, it is apparent that service was accomplished via certified mail, return receipt requested. Section 39.2(b) of the Act provides that notices are "to be served in person or by registered mail, return receipt requested." (emphasis added). The Board concluded in Ash, PCB 87-29, slip. op. at 7 (July 16, 1987), that certified mail, return receipt requested, complied with the service requirements of Section 39.2(b).

In summary, the Board finds that the Commissioners did not have jurisdiction to decide K.C.'s application due to K.C.'s failure to comply with the notice requirements of Section 39.2(b). Consequently, the decision by the Commissioners is vacated. If K.C. wishes to pursue its proposal further, it must re-notice and re-file its application. Pursuant to Section 39.2(d), at least one public hearing will have to be held again. A new application will be subject to testimony from all interested persons. However, the Board does not believe that today's Order precludes the Commissioners from incorporating the direct, sworn testimony from the previous hearings into new hearings. However, if such a mechanism is utilized, the new hearings must provide an opportunity for any additional direct

testimony by, and cross-examination of, any witnesses which previously testified subject to reasonable efforts to preclude repetition.

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

ORDER

The decision by the Wabash County Board of Commissioners, which granted site location suitability approval is hereby vacated.

Section 41 of the Environmental protection Act, Ill. Rev. Stat. 1985 ch. 111 1/2 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.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 3rd day of December, 1987, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board