ILLINOIS POLLUTION CONTROL BOARD
February 16, 2012

AMERICAN DISPOSAL SERVICES OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 11-60
	)	(Third-Party Pollution Control Facility Siting Appeal)
COUNTY BOARD OF MCLEAN COUNTY, ILLINOIS; HENSON DISPOSAL, INC.; and TKNTK, LLC;	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by T.A. Holbrook):

On March 22, 2011, American Disposal Services of Illinois, Inc. (ADS) filed a petition asking the Board to review a February 15, 2011 decision of the County Board of McLean County, Illinois (County Board). *See* 415 ILCS 5/40.1(b) (2008); 35 Ill. Adm. Code 101.300(b), 107.204 (Time for Filing Petition). That decision granted an application by Henson Disposal, Inc. (Henson) for approval of the site of a pollution control facility recycling construction and demolition materials at 2148 Tri Lakes Road, Bloomington; 510 East Hamilton Road, Bloomington; and 2014 Bunn Street, Bloomington. On April 20, 2011, respondents Henson and TKNTK, LLC (TKNTK) (collectively, movants) filed a motion to strike and dismiss.

For the reasons stated below, the Board today denies the motion. In this order, the Board first provides the procedural history and factual background before summarizing the petition for review. The Board then summarizes the motion to strike and dismiss and the responses filed by ADS and the County Board. After discussing the issues raised, the Board reaches its conclusion and issues its order.

PROCEDURAL HISTORY

On March 22, 2011, ADS filed a petition for review (Pet.) of a decision by the County Board to grant an application by Henson for approval of the site for operation of the Henson Disposal Recycling Center, a waste treatment and waste transfer facility on property owned by TKNTK. In an order dated April 7, 2011, the Board accepted the petition for hearing and directed the County Board to file the entire record of its proceedings within 21 days.

On April 29, 2011, the County Board filed the record (C-1 - C-167) and its certificate of the record on appeal. On May 6, 2011, the County Board filed a supplement to the record consisting of a single 3-page document (C-168 - C-170), the minutes of a February 15, 2011 meeting of the County's Pollution Control Site Hearing Committee, and its second certificate of the record on appeal.

On April 20, 2011, movants filed a motion to strike and dismiss (Mot.). On May 6, 2011, the County Board filed its response to the motion to strike and dismiss (County Resp.). Also on May 6, 2011, ADS filed a response to the motion to strike and dismiss (ADS Resp.), accompanied by a motion for leave to file *instanter*. In an order dated May 9, 2011, the hearing officer noted that respondents did not object to ADS' motion for leave to file *instanter* and granted the motion.

In an order dated June 2, 2011, the Board directed Henson to submit a filing addressing adequacy of service of notice under Section 39.2 of the Act (Board Order). Specifically, the Board directed Henson at a minimum to list:

> the owners of all property within the subject area not solely owned by the applicant, and [] 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 requirement; provided further, that in no event shall this requirements exceed 400 feet, including public streets, alleys and other public ways; (415 ILCS 5/39.2(b) (2010))

and the "members of the General Assembly from the legislative district in which the proposed facility is located. . . ."

On June 15, 2011, the Board received a response from Henson and TKNTK to the Board's June 2, 2011 order (Movants' Resp.). On June 23, 2011, the Board received ADS' response to the Board's June 2, 2011 order (ADS Reply). On August 24, 2011, ADS filed a motion for leave to file a supplement to its June 23, 2011 response, accompanied by the supplemental response (Supp.). In an order dated October 18, 2011, the hearing officer noted that respondents did not object to ADS' motion for leave and granted the motion.

On October 17, 2011, the Board received a public comment consisting of 103 signatures on 15 copies of a petition directed to the Bureau of Land in the Illinois Environmental Protection Agency (Agency) (PC 1), each of which requests a public hearing on a site proposed by Henson, "or other businesses also operating under the name of Kirk C&D Recycling or Kirk Holding, LLC," at the 2100 block of Tri-Lakes Road in Bloomington. Also on October 17, the Board received a public comment consisting of 47 letters (PC 2), each of which requests that "the Illinois Pollution Control Board deny Kirk C&D Concrete and Recycling, Inc.'s operating permit for its plant located at 2148 Tri Lakes Road, Bloomington, IL 61704." On November 21, 2011, the Board received 88 additional letters (PC 3 - PC 90) making the same request for denial of an operating permit as PC 2. On November 23, 2011, the Board received from Anthony Penn, Business Manager of Laborers' International Union Local 362 of Bloomington, a public comment requesting that the Board "deny the permit to operate Henson Disposal's new C&D Recycling facility" (PC 91).

FACTUAL BACKGROUND

Ownership of Siting Applicant

Mr. Thomas Kirk is "the President of Kirk C&D Recycling and Henson Disposal." C-91. Thomas Kirk and his brother, Mr. Timothy Kirk, each own 50% of the business, which was incorporated in 1998. *Id*. Kirk C&D Recycling works primarily on demolition in McLean County. C-91 - C-92. It also performs "on-site crushing and grinding of materials" and serves roll-off dumpsters. C-92; *see* C-110. Kirk C&D later purchased Henson Disposal, "and Henson Disposal is doing business as Kirk C&D Recycling." C-108. Mr. Thomas Kirk testified that, beginning January 1, "Henson will operate as its own business with its own employees and its own location." *Id*. He clarified that "it will be a separate entity from Kirk." *Id*.; *see* C-110.

Henson Disposal provides curbside garbage pick-up for residents outside of Bloomington and Normal. C-91. It also offers services including "curbside recycling, commercial dumpster pick up, roll off dumpsters, [and] curbside bulk pick up." *Id*. For the City of Bloomington, Henson also handles commingled recycling by accepting materials such as bottles and cans and transporting it to Chicago for separation. *Id*.

Another entity, T. Kirk Brush, "is on this property." C-92. T. Kirk Brush handles wood waste collected by the City of Bloomington by grinding it, processing it, and providing it to customers, most of which are in McLean County. *Id*.

Application for Site Approval

On April 3, 2010, Henson published notice in *The Pantagraph* that, on April 19, 2010, it would submit "a request to McLean County for site approval of a regional pollution control facility, named Henson Disposal Recycling Center, that will recycle construction and demolition materials including wood, metal, drywall, cardboard, concrete, brick, block, aggregate materials, and shingles from 2.75 acres of their 6.1 acre property at 2148 Tri Lakes Road, Bloomington, IL." C-1; *see* 415 ILCS 5/39.2(b) (2010). Henson submitted to the County Board a "Site Location Application" dated "April 2010." C-2; *see* C-23 (indicating filing with McLean County Clerk on April 19, 2010). The application addressed nine statutory criteria for site approval (C-3 - C-22; *see* 415 ILCS 5/39.2(a) (2008)) and included five appendices (C-24 - C-55).

The County Board's record includes a brief letter from Ms. Adeline M. Berner of Bloomington, which states in pertinent part that "I oppose the request from Henson Disposal. . . ." C-57. Although the letter itself is not plainly dated (*see id*.), the County's Index of the Record indicates a date of May 11, 2010. *See* C-1. The County's record also includes a letter dated May 14, 2010 from Ms. Mary Berner of St. Louis, MO. C-58- C-59. She stated that, "[a]s a potential owner I am very concerned with my property adjacent to the facility and have many questions for the McLean County Board." C-58. Ms. Berner cited four specific issues that should be addressed before issuance of a permit: Henson's request for a waiver from the Water Well Protection Plan, possible acceptance of municipal solid waste, disclosure of documents pertaining to complaints of environmental violations, and control of dust from a "cement batching center located on their property." C-58 - C-59. In a separate letter dated May 14, 2010,

Ms. Mary Berner also submitted to the McLean County Clerk an attachment, which consists of various definitions and undesignated regulatory or statutory provisions. *See* C-60 - C-62; *see also* C-82 (referring in transcript to "two letters of commentary from the public on this permit).

On July 24, 2010, Henson published notice in *The Pantagraph* that, on August 9, 2010, it would a submit "a request to McLean County for site approval of a new pollution control facility, named Henson Disposal Recycling Center that will be a waste transfer station and waste treatment facility of landscape waste and construction and demolition materials including wood, metal, drywall, cardboard, concrete, brick, block, aggregate materials, and shingles on seven acres of their 10.4 acre property. . . . C-63; *see* 415 ILCS 5/39.2(b) (2010).

<u>Criterion 1: Need for Facility (415 ICLS 5/39.2(a)(i) (2010))</u>

Henson's application states that its proposed facility will recycle construction and demolition materials including "wood, metal, drywall, cardboard, concrete, brick, block, aggregate materials, and shingles." C-5, C-56. It adds that "[t]he facility does not intend to accept garbage or food scrap." C-56 (revised page).

Citing the requirement that a "facility is necessary to accommodate the waste needs of the area it is intended to serve" (C-5, C-56 (citation omitted)), the application notes that "[t]he McLean County landfill accepted 120,460 tons of total waste in 2007, averaging 463 tons per day." C-5, C-56 (citation omitted). The application cites a projection by the Agency that "the McLean County Landfill will reach its full capacity by the year 2014." C-5, C-56 (citation omitted). The application states that Henson's proposed facility will extend the operation of the landfill by diverting recyclable materials from it. C-5, C-56; *see* C-92 - C-94.

The application claims that this diversion of recyclable materials will reduce demand for virgin materials. C-5, C-56; *see* C-92. As one example, it states that "recycled aggregate material can be used in place of mining new material from a gravel pit." C-5, C-56.

The application notes that the Leadership in Energy and Environmental Design (LEED) program certifies building that meet environmental standards. C-5, C-56. It argues that the proposed facility would make it easier for contractors to satisfy those standards by providing an opportunity to recycle construction waste such as wood, metal, and cardboard. C-5, C-56; *see* C-93.

The application also states that Henson's facility will initially generate six full-time jobs. C-5, C-56. It predicts that, "within three years, a total of twelve full-time jobs will be needed for day-to-day recycle center operations." C-5, C-56.

<u>Criterion 2: Protection of Public Health, Safety, and Welfare(415 ILCS 5/39.2(a)(ii) (2010))</u>

Henson's application first addresses this criterion by describing its proposed processing of construction and demolition debris to be transported by truck to its facility. "Incoming materials will first be weighed on a scale, then emptied into a 'pre-sorting' area where large

items will be removed with an excavator or skidloader." C-7. Henson lists "large pieces of concrete and bulky metal" as items that will be sorted out, because they are "too large to be sorted by hand." *Id.* After this pre-sorting, "[t]he remaining materials will be loaded onto a vibrating screen, whose purpose is to remove materials 2" and smaller such as dirt, rock, and small pieces of glass, wood, etc." *Id.* After this removal,

> [t]he material will travel up a conveyor belt to a sorting belt. This belt will be approximately 5' wide by 100' long. The material will travel this distance at a slow pace to allow for manpower to reclaim recyclable materials. Each recyclable material will be placed in its own bin located under the conveyor belt. The leftover materials with no end use will go directly into a transfer trailer to be hauled to a landfill. *Id.*; *see* C-25 (site plan drawing), C-26 - C-46 (photos and drawing of process and equipment), C-112 - C-114 (noting photos from Midwest Recycling Center in East Dundee, IL).

Dust Control. Henson's application acknowledges that emptying trucks of incoming materials will generate dust. C-7. During this step, dust will be suppressed by a water sprinkling system misting the pre-sorting area from above. *Id.* The application also acknowledges that processing equipment will also generate dust. *Id.* To address this, a "pressurized water system will be placed over the conveyor belts, misting downward onto the materials being sorted." *Id.* The application adds that, while these systems will adequately wet materials, they will not be "saturated to the point where any run-off is created." *Id.*; *see* C-47 - C-49 (Appendix C: Photo of Dust Control Equipment).

Noise Control. Henson's application acknowledges that "[n]oise will be generated from truck traffic, equipment used to pre-sort the materials, the vibrating screen, conveyor belts, back-up alarms on equipment, and the processing equipment such as grinders and crushers." C-7. The application states that "[h]ours of operation will be limited to accommodate neighboring properties. No noisy equipment will be operated during neighboring properties' special events." *Id.* The application also states that there is a nine-foot fence along the southern and western sides of the property. *Id.* The application adds that, "[i]f necessary, trees can also be planted to further buffer noise." *Id.*

Odor Control. Henson's application states that, because the proposed facility would accept only non-perishable items, "[t]he recyclable materials accepted will not have an odor." C-7. The application notes that a small amount of non-recyclable materials will inevitably be included in loads of materials transported to the facility. *Id.* The application states that "[m]aterials that cannot be processed will immediately be loaded into transfer trailers and transported to a landfill within 24 hours." *Id.* The application argues that these measures ensure that odors will not leave the site. C-7 - C-8.

Mud Tracking. Henson's application states that, because vehicles will arrive at and depart from the site only on paved roads, mud tracking on public roads will not become a problem. C-8; *see* C-104 - C-106. The application adds that, "should any mud tracking occur on the roadways, it will be removed within 24 hours." *Id.*

Windy Conditions. Henson's application states that the proposed facility "will operate in all weather conditions." C-8. The application adds, however, that if wind speed exceeds 35 miles per hour, "all work will cease" and "portable windscreens will be put in place to stop and/or catch blowing material." *Id*. The application also indicates that the facility will daily monitor for and collect litter and blown debris. *Id*.

Fire Protection. Henson's application states that the facility will institute the following fire prevention measures:

1) No smoking allowed on-site.

2) All recyclable materials will be kept adequately wet through dust control methods.

3) Placing fire extinguishers on each piece of equipment.

4) The property has a well, which is hooked to hoses that could be used to extinguish a small fire.

5) There is a fire hydrant located 600' from the property. C-8; *see* C-115 (confirming smoking ban).

The application reports that the Bloomington Township Fire Chief stated that "the fire hydrant at Tri Lakes Road adequately covers the area" and that "he had no issues with the proposed operations." C-8 (citation omitted).

Criterion 3: Minimizing Incompatibility with Surrounding Area and Effect on Property Values (415 ILCS 5/39.2(a)(iii) (2010))

Henson's application states that the proposed facility would operate on property zoned M-2, General Manufacturing District. C-10. The application also lists surrounding properties also zoned M-2. *Id*. To the north are railroad tracks, and to the "[n]orth of the railroad tracks are multiple use commercial properties." *Id*. To the east is a private recreation facility. *Id*.; *see* C-123 (noting surrounding properties). To the south is both property used by the private recreation facility and vacant property. C-10. To the west is property having multiple commercial uses, including "McLean County Auto Parts, which is a car junkyard, plumbing supplier Bradford Supply, and auto salvage yard Bill Smith Auto Parts." *Id*. Farther west from these properties is the Hilltop Mobile Home Park. *Id*.; *see* C-121 - C-122. The application argues that, "[g]iven the neighboring properties, a recycling center would be consistent with the nature of other businesses in the vicinity and should not prove detrimental to either the property values or business operations of neighbors." C-10.

Criterion 4: Flood Plain Evaluation (415 ILCS 5/39.2(a)(iv) (2010))

Henson's application states that the proposed facility "is not located in a flood plain." C-12. Appendix D to the application is a letter to Kirk C&D Recycling from Lewis, Yockey &

Brown, Inc., Consulting Engineers and Land Surveyors. C-50 - C-53. The letter states that, after reviewing the applicable Flood Insurance Rate Map (C-53), "the subject area is not located within the boundary of a Special Flood Hazard Area (SFHA)." C-52.

Criterion 5: Minimize Danger from Fire, Spills, and Accidents (415 ILCS 5/39.2(a)(v) (2010))

Henson's application states that its proposed facility will institute rules to minimize the dangers: C-14.

Fire. Fire prevention measure at Henson's proposed facility will include allowing no on-site smoking, keeping all recyclable materials "adequately wet through dust control methods," and "placing fire extinguishers on each piece of equipment." C-14; *see* C-115. The application also notes that "[t]he property has a well, which is hooked to hoses that could be used to extinguish a small fire," and that there is "a fire hydrant located 600' from the property." *Id.*; *see* C-8 (noting discussion with township fire chief).

Spills. Henson's application states that its proposed facility will not accept liquids such as paint or oil. C-14. In the event that spills occur, however, the facility's standard procedure will be to identify the substance or rely on a qualified third party to assist, use an absorbent to contain the liquid, and then "properly dispose of the substance once fully absorbed and contained." *Id.*

Accidents. Henson's application states that, "[i]n an effort to minimize the risk of accidents, all Henson Disposal and Recycling Center employees will undergo safety awareness training for all of our facilities and equipment." C-14. This training will identify "on-the-job safety hazards and emergency action plans." *Id.* The application states that each employee will have access to "[t]he locations of fire extinguishers and first aid kits, [e]mergency contact numbers, [and] [t]he location of and directions to the nearest hospital." *Id.* In addition, the application indicates that "[s]afety glasses, hard hats, and reflective vests will be required and provided." *Id.*

Criterion 6: Minimizing Impact on Existing Traffic Flows (415 ILCS 5/39.2(a)(vi) (2010))

Henson's application states that the proposed facility will minimize truck traffic to the facility "by using the roads that are already constructed and intended for truck traffic," including Hamilton Road, Bunn Street, and Tri Lakes Road. C-16. The application further states that the northern part of the site has access to Tri Lakes Road, which "is being upgraded as part of a road agreement with Roanoke Concrete for a concrete plant being developed on the same property as the Henson Disposal Recycling Center." *Id.* The application indicates that "[t]he Bloomington Township Road Commissioner has approved the proposed use for the existing entrance to Tri Lakes Road." *Id.*

The application also states that [t]rucks will not be allowed to queue or park on public roadways, in front of, or near the entrance to the Henson Disposal Recycling Center." C-16.

In addition, the application reports that the County Highway Engineer has toured the site of the proposed facility and "approves of the project, assuming that the roads will be cleaned within 24 hours of any mud tracking and the Bloomington Township Road Commissioner approves of the project." C-16; *see* C-104 - C-105. The application states that Henson has satisfied both conditions. C-16; *see* C-54 - C-55 (Appendix E: McLean County Highway Engineer Letter).

Criterion 7: Hazardous Waste Response Plan (415 ILCS 5/39.2(a)(vii) (2010))

Henson's application states that, although the facility "will not knowingly accept hazardous materials of any kind, it has in place procedures to address such materials. C-18; *see* C-106 - C-107. Specifically, the application states that, "[i]f any hazardous materials are identified by random load checking or otherwise discovered, the site foreman will notify the City of Bloomington, McLean County government offices, and Illinois EPA." The waste generator and transporter will also receive notification. *Id*. The application further states that "[a]ny other waste loads identical to the waste identified as hazardous will not be accepted. The area where the hazardous waste was deposited will immediately be cordoned off from unauthorized access." *Id*. The facility will then engage the services of a third party to perform clean-up and transportation of the hazardous waste for disposal at a permitted facility. *Id*.

Criterion 8: Consistency with County Solid Waste Management Plan (415 ILCS 5/39.2(a)(viii) (2010))

Henson's application notes that the McLean County Solid Waste Management Plan, last updated in 2007, "defines the goals of the County for managing solid waste disposal and recycling efforts." C-22. The application indicates that two general goals of the plan are "expansion of commercial and industrial recycling throughout McLean County" and "development of opportunities for recycling of construction and demolition waste." *Id*. (citing plan). Among more specific goals, the plan seeks a 40% recycling rate by 2012 and identifying "an additional 5% of the commercial and industrial waste stream that could be recycled." *Id*. (citing plan).

The application states that "[t]here are currently no construction and demolition recycling facilities in McLean County. C-22. It argues that operation of the facility would help meet the county's goals by recycling construction and demolition debris that would otherwise be disposed of in a landfill. *Id*. The application concludes that the proposed facility "is consistent with the goals of the McLean County Solid Waste Management Plan." *Id*.

Criterion 9: Regulated Recharge Area (415 ILCS 5/39/2(a)(ix) (2010))

Henson's application states that a "regulated recharge area" is "a geographical area in which the geology makes the groundwater susceptible to contamination." C-20; *see* 415 ICLS 5/3.390 (2010) (definition). The application indicates that "[t]here are no regulated recharge areas established in McLean County" and that the proposed facility is not within one. C-20. The application states that "[t]his fact was confirmed in a phone conference with Joe Konczyk of the

Illinois EPA Groundwater Section on December 9, 2009." *Id.* The application concludes that this criterion "is not applicable to the Henson Disposal Recycling Center." *Id.*

Amendment to Application

The County Board's Index of the Record lists an "Amendment to Site Application; 8/9/10" at C-64 - C-76. C-1; *see* C-76 (indicating filing with McLean County Clerk on August 9, 2010). The listed pages include a document dated July 20, 2010, and indicating that "[t]his narrative will outline how the recycle center property will be used." C-64 - C-67.

Development of Facility

Henson reports that it would complete construction of a "materials processed building" by approximately August 15, 2010. C-66 (indicating size of 5,000 square feet); *see* C-75. Henson further reports that a "200' x 185' 'future building' would be erected within five to ten years," at which time materials to be separated will be stored there. C-66.

Construction and Demolition Materials

Henson's narrative elaborated on operation of the proposed facility. It reports that "[t]rucks containing construction and demolition debris will enter the site and proceed to the truck scale to be weighted." C-64; *see* C-25 (Site Plan/Map). Trucks will then dump those materials in a "materials to be separated and processed area." C-64; *see* C-25. The facility will then re-weigh the empty truck and issue it a weight ticket. C-64; *see* C-102.

From the "materials to be separated and processed area," the facility will load construction and demolition material onto picking station equipment. C-64; *see* C-25. On that equipment, "[t]he material will then be sorted on the conveyor, separated out, and placed into roll-off containers or storage areas." C-64; *see* C-28 (drawing including conveyor belt); C-30 (photo of elevated picking station); C-34 (photo of picking station interior); C-114. Henson reports that "[n]on-recyclable materials will be loaded into a semi trailer and taken to the landfill." C-64; *see* C-46 (photo of open-top trailer), C-114. Henson adds that "[n]o unsorted materials will be stored outside of the 'materials to be processed area.'" C-64; *see* C-25.

Cardboard, paper, and plastic. Henson reports that sorters will drop cardboard into a compactor, use of which "allows large quantities of cardboard to be stored in a small space." C-37; *see* C-36, C-38 (photos of cardboard compactor). When the compactor fills, the compacted materials "will be shipped to a cardboard recycler for processing." C-37.

Generally, Henson reports that "[c]ardboard, paper, and plastic will be sorted off the picking station line and loaded directly into a roll-off dumpster." C-64. Henson adds that "[t]he loaded dumpster will be moved to the south part of the property and stored in the 100' x 50' 'materials processed building.'" C-64; *see* C-25. From that location, "[t]hese materials will then be loaded in to semi trailers and sent to its final destination for processing." C-64.

Wood. Henson indicates that these materials "will be sorted off the picking station line and loaded directly into a roll-off dumpster." C-64; *see* C-37 (photo including container holding reclaimed wood). When these dumpsters fill, Henson will move them to a "wood to be process area" at the southeast corner of the property. C-64; *see* C-25; C-75. Henson's will process the wood by grinding it and sending it to its final destination, where it may be used as animal bedding, boiler fuel, mulch, or alternate daily cover at landfills. C-37, C-64.

Metal. Henson indicates that "[m]etal will be sorted off the picking station line and loaded directly into a roll-off dumpster or semi trailer." C-64; *see* C-40 (photo including container of reclaimed non-ferrous metals). Henson reports that metals including aluminum "will be sent to a metal processing company/metal recycler." C-64; *see* C-39. Henson adds that ferrous scrap such as appliances will also collected and "hauled to a scrap metal recycler." C-41; *see* C-42 (photo of trailer collecting ferrous scrap metal).

Concrete. Henson reports that separated concrete "will be moved to the south end of the property and placed in the 'concrete processing storage area.'" C-64; *see* C-25. Henson states that "concrete will be processed on site and sent back to the market as a usable product." C-64. Concrete may also be hauled to another facility for processing. *Id*. The proposed facility will also collected aggregate material such as brick, block, and stone. C-43; *see* C-44 (photo of container of aggregate materials).

Landscape Materials

Henson reports that trucks with loads limited to landscape waste such as brush, branches, trees, and leaves "will enter the facility off of Hamilton Road, entering Lot 2 through the existing asphalt-paved private 25' entry road." C-65; *see* C-75 (site plan); C-92. After entering Lot 2, trucks "will travel on the concrete paved pad and dump the brush materials on the pad." C-65; *see* C-75. Henson states that trucks will leave the facility on the same path, remaining on paved surfaces for the entire time. C-65.

Once the brush materials are on the concrete pad, "a loader will push the material into a pile in the brush storage area." C-65; *see* C-75. Henson will then grind the materials and store them in a "Future Building Area." C-65; *see* C-25, C-75, C-118 - C-119. Henson will then sell the processed materials as mulch, boiler fuel, or animal bedding. C-65.

Commingled Recycling

Henson reports that trucks with loads consisting of commingled recycling "will enter the site and proceed to the truck scale to be weighed." C-65; *see* C-75; C-91. Those trucks will next back up to the "materials processed building" and unload materials there. C-65; *see* C-75. Trucks will then be re-weighed and issued a weight ticket before leaving the facility. C-65.

Henson states that the "'materials processed building' will only house co-mingled recycle material," which may include paper, cardboard, aluminum and steel cans, plastics, and glass. C-65. After being unloaded into the "materials processed building," this commingled recycling will be reloaded into semi trailers and transported to recycling centers for processing there. *Id*.;

see C-117. Henson emphasizes that these commingled recycling materials "will not be mixed with construction and demolition materials." C-65; *see* C-117.

Electronics Recycling

Henson states that, "[w]ithin the next 5 years, we intend to pursue the electronics recycling market." C-65. Henson indicates that these recyclable products could include computers, monitors, printers, and television sets. *Id*. Henson would perform handling and processing of these materials in the "materials processed building." *Id*.; *see* C-75; *see also* C-96 - C-101.

Service of Notice

The county's record includes the following U.S. Postal Service materials regarding service of notice of the request for siting approval. *See* 415 ILCS 5/39.2(b) (2010).

HO1615CP Partnership

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to HO1015CP Partnership at 405 N. Hershey Road in Bloomington. C-70. The record includes a return receipt or "green card" for the same article number. *Id*. The green card includes a signature that is not clearly legible but indicates delivery on August 2, 2010. *Id*.

Bradford Supply Company

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Bradford Supply Company at P.O. Box 246 in Robinson. C-71. The record includes a return receipt or "green card" for the same article number. *Id*. The green card includes the signature of Robin Goss and indicates delivery on July 27, 2010. *Id*.

David Capodice

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to David Capodice at 2820 Capodice Rd. in Bloomington. C-72. The record includes a return receipt or "green card" for the same article number. *Id*. The green card includes the signature of Janet Capodice and indicates delivery on July 26, 2010. *Id*.

McLean County Trustee

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to McLean County Trustee at P.O. Box 96 in Edwardsville. C-72. The record includes a return receipt or "green card" for the same article number. *Id*. The green card includes a signature that is not clearly legible and does not clearly indicate a date of delivery. *Id*.

City of Bloomington

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to the City of Bloomington at 109 E. Olive St. in Bloomington. C-72. The record includes a return receipt or "green card" for the same article number. *Id.* The green card includes the signature of Larry Walsh and indicates delivery on July 26, 2010. *Id.*

Tri Lakes Conservation Recreation Club

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Tri Lakes Conservation Recreation Club at 2100 Bunn St. in Bloomington. C-73. The record includes a return receipt or "green card" for the same article number. *Id.* The green card includes a signature that is not clearly legible and does not clearly indicate a date of delivery. *Id.*

BCA LLC

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to BCA LLC at 14 Timber Ridge Dr. in Lexington. C-73. The record includes a return receipt or "green card" for the same article number. *Id.* The green card includes a signature that is not clearly legible but indicates delivery on July 24, 2010. *Id.*

Morgan & Grimshaw

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Morgan & Grimshaw at 11 Currency Dr. in Bloomington. C-74. The record includes a return receipt or "green card" for the same article number. *Id.* The green card includes a signature that is not clearly legible and does not clearly indicate a date of delivery. *Id.*

Adeline Berner

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Adeline Berner at 34 Hodgehaven Cir. in Bloomington. C-74. The record includes a return receipt or "green card" for the same article number. *Id.* The green card includes the signature of Bob Branom but does not clearly indicate a date of delivery. *Id.*

Raymond Fairchild

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Raymond Fairchild at 20 Currency Dr. in Bloomington. C-69. The record does not include a return receipt or "green card" corresponding to the same article number. *See id.* at 69-74.

Kipp Connour

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Kipp Connour at 1902 Bunn St. in Bloomington. C-69. The record does not include a return receipt or "green card" corresponding to the same article number. *See id*. at 69-74.

Norel Enterprises

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Norel Enterprises at 206 W. Washington in Bloomington. C-69. The record does not include a return receipt or "green card" corresponding to the same article number. *See id*. at 69-74.

Representative Dan Brady

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Representative Dan P. Brady at 202 N. Prospect, Suite 203 in Bloomington. C-73. The record includes a return receipt or "green card" for the same article number. *Id*. The green card includes a signature that is not clearly legible but clearly indicates delivery on July 26, 2010. *Id*.

Representative Keith Sommer

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Representative Keith Sommer at 121 W. Jefferson St. in Morton. C-70. The record includes a return receipt or "green card" for the same article number. *Id*. The green card includes the signature of Ann Armitage and clearly indicates delivery on August 2, 2010. *Id*.

Representative Shane Cultra

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Representative Shane Cultra at 104 W. Lincoln Ave. in Onarga. C-70. The record includes a return receipt or "green card" for the same article number. *Id*. The green card includes the signature of Lindsey T. Ishmiel and clearly indicates delivery on August 3, 2010. *Id*.

Senator Dan Rutherford

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Senator Dan Rutherford at 105B State House in Springfield. C-71. The record includes a return receipt or "green card" from Senator Rutherford for a different article number. *Id*. That green card indicates delivery to Illinois Senate District 53 in Pontiac, includes the signature of Fran Siders with a partially obstructed delivery date. *Id*.

Senator Bill Brady

A receipt for payment of postage and fees for certified mail indicates that, on July 23, 2010, notice was mailed to Senator Bill Brady at 2203 Eastland Dr., Suite 3 in Bloomington. C-74. The record includes a return receipt or "green card" for the same article number. *Id*. The green card includes the signature of Amy Glasscock and with a partially obstructed delivery date. *Id*.

Agency

A receipt for payment of postage and fees for certified mail indicates that, on July 27, 2010, notice was mailed to the Agency at 1021 N. Grand, P.O. Box 19276 in Springfield. C-69. The record includes a return receipt or "green card" for the same article number. C-71. The green card was date-stamped by the Agency with the signature of Warren Viles with a delivery date that is not clearly legible. *Id*.

A second receipt for payment of postage and fees for certified mail indicates that, on July 27, 2010, notice was mailed to the Agency's asbestos unit at P.O. Box 19276 in Springfield. C-71. The record does not include a return receipt or "green card" corresponding to the same article number. *See id*. at 69-74.

Hearing

On November 20, 2010, November 27, 2010, and December 4, 2010, the McLean County Department of Building and Zoning published notice in *The Pantagraph* that

> a public hearing will be held on Thursday, December 9, 2010, at 5:00 P.M. in Room 400, Government Center, 115 E. Washington St., Bloomington, IL, concerning an application of Henson Disposal, Inc. for site approval of a new pollution control facility that will be a waste transfer station and waste treatment facility of landscape waste and construction and demolition materials including wood, metal, drywall, cardboard, concrete, brick, block, aggregate materials, and shingles on seven acres of their 10.4 acre property. . . . C-77; *see* 415 ILCS 5/39.2(b) (2010); *see also* C-79.

The notice also stated that "[p]ersons have the right to comment on the request at the public hearing" and that "[t]he application is available for review at the office of the McLean County Clerk. . . ." C-77.

The transcript of the hearing (C-78 - C-130) indicates that the hearing of the Pollution Control Site Hearing Committee took place as scheduled on December 9, 2010, with all members present. C-78, C-79. The transcript also indicates that those present included county officials, representatives of the applicant, and "Members of the Public." C-78.

The first witness, Mr. Michael Brown, "Solid Waste Coordinator and Executive Director of Ecology Action Center," testified to "present information from a staff perspective on the

case." C-80. He addressed the statutory background for approving the site of a pollution control facility. C-81 - C-82 (citing Section 39(c) of the Act and McLean County Code Chapter 33). Mr. Brown noted that two letters from the public had identified concerns. C-82; *see* C-57 - C-62 (letters). He added that "[t]hose concerns have internally been reviewed with Mr. Kirk of Henson Disposal and satisfactorily addressed between Mr. Kirk and the staff." C-82.

Next, Mr. Thomas Kirk testified on behalf of Henson as applicant. Addressing the capacity of the proposed facility, he testified that "we'll be capable of processing about 500 tons a day of incoming material. . . . Our goal is to do 500 tons a week." C-93. He added that, if the facility processed only material already collected by Kirk C&D Recycling, "we'll recycle about 150 tons a week, which is 7,000 tons in a year." *Id*. He further testified that a recycling operation of this magnitude "could extend the life of the McLean County landfill by years and years," resulting in cost savings for the community. C-94.

In response to a question, Mr. Thomas Kirk projected that the proposed facility would process materials generated in McLean County. C-95 - C-96. For materials originating outside of McLean County, he indicated that the cost of transportation to the facility would be greater than landfill disposal. He added that the recycling requirements of the LEED program may draw construction and demolition materials from job outside of the county. C-96.

Another question noted a requirement limiting "the percentage of incoming non-recycled general construction and demolition debris to 25% or less of the total incoming debris on a daily basis." C-101, citing 415 ILCS 5/22.38 (2010); *see* C-66 - C-67, C-104, C-116. Mr. Thomas Kirk responded that, to monitor compliance with this requirement, "everything that comes in that place has to be weighed. Everything. Everything that goes out has to be weighed." C-102. He added that the facility will have tickets providing "proof of recycling, proof of disposal." *Id*. He also stated that, because of the limit on non-recycled material, the requirements prevent Henson from using the site as a transfer station. *Id*. He added that "[a]nything that's not recyclable, can't be used, has to leave the site within 48 hours. So that will then be hauled to a landfill." C-104.

In response to a question about mud tracking from the site, Mr. Thomas Kirk noted that the County Highway Department had required removal within 24 hours. C-104 - C-105. He indicated that this would be addressed by an employee of the facility monitoring the property and roads. He added that, although in the past much of the property was unpaved and not covered by aggregate, the facility has placed aggregate over the entire site. C-105.

In response to a question about monitoring for hazardous waste, Mr. Thomas Kirk testified that it would be performed by employees trained to check sources and loads. C-106. He indicated that the facility would check particularly for paint and paint cans and will clean up spilled paint with absorbent. C-106 - C-107.

In response to a question about used tires, Mr. Thomas Kirk indicated that the proposed facility would not pursue them, "although people throw them in dumpsters because they're not sure how to get rid of them." C-111. He testified that the facility would have on-site a covered container specifically to collect these used tires. *Id*. He testified that, when filled to its 400-tire

capacity, the facility would transport the container off-site for processing and shredding. C-111 - C-112. He added that this would reduce the risk of a tire fire, as would prohibiting on-site smoking. C-112, C-115.

In response to a question about commingled recycling, Mr. Thomas Kirk indicated that it involved containers including plastic, glass, and cardboard and must be processed entirely separately from construction and demolition materials. C-117. He stated that "we will not process that on-site at all." *Id.* He elaborated that the facility does not intend ever to process commingled recycling, citing both costs and a lack of space to do so at the facility. C-118. He added that the facility must also separately process landscape waste at "the far south end of our property." C-118.

The transcript of the committee hearing also includes the following statement: "Mr. Chairman, I'm not here to testify. I just wanted to file an appearance to show that we are participating in the process, but we're not asking questions. I'm an attorney. My name is Jennifer Sackett-Pohlenz. I'm here representing American Disposal Services of Illinois, and I just wanted to file documentation showing that we're participating."[1] C-126 - C-127. The hearing concluded by setting a 30-day deadline to file written comments with the McLean County Clerk and continuing the hearing to February 3, 2011, at 5:00 PM. C-128 - C-129; *see* C-80 (noting February 3, 2011 meeting date to make recommendation to County Board).

On January 8, 2011, ADS filed with the McLean County Clerk its comment on Henson's proposed site location. C-133 - C-143. ADS' comment consisted of three sections: one addressing the siting process (C-133 - C-135); a second applying the siting criteria under Section 39 of the Act (C-135 - C-139; *see* 415 ILCS 5/39.2 (2010)); and a third proposing 22 conditions for the county board to consider if it approves Henson's application (C-139 - C-142).

<u>Decision</u>

The County Board's Second Certificate of Record on Appeal lists "Notice of the Pollution Control Site Hearing Committee meeting 2/15/10" at C-146 in the original record and "Minutes of the Pollution Control Site Hearing Committee" at 9:00 AM on February 15, 2011 at C-168 - C-170 in the supplemental record filed May 6, 2011.

The minutes of the Pollution Control Site Hearing Committee reflect that the committee first addressed questions and comments about financial assurance and review of the amount of required financial assurance. C-168 - C-169. The committee also noted five suggestions by the Fire Department and Emergency Management Agency:

1) All Structures have a Fire Detection System installed and a monitoring service in place.

[1] While the committee chair appears to suggest that Ms. Sackett-Pohlenz gave documentation to the Director of Building & Zoning to "[m]ake it part of the case file," the Board's review of the county's record does not reveal documentation of that nature. *See* C-126 - C-127.

2) A Knox-Box key entry system is installed.

3) A fire extinguisher vendor asses[ses] the property and suitable fire extinguisher is installed.

4) A flammable liquid storing cabinet be available on the shop area.

5) A suitable First Aid kit is available on the property including an Automated Electrical Defibrillator. C-169.

Responding to the committee on the issue of these conditions, Mr. Kirk of Henson indicated that they were "acceptable." *Id*.

After adoption of a motion to close the committee hearing, the committee turned to its first Action Item, the Findings of Fact and Recommendation. A motion to recommend approval of the findings and recommendation carried. C-169. Next, a motion to recommend approval of the performance agreement between Henson and the county also carried. *Id*. A motion to recommend approval of the IEPA Certification for Siting Approval also carried. *Id*. Finally, a motion to recommend approval of the Host Agreement between Henson and the county also carried. C-170.

The County Board's Index of Record lists a "Notice of County Board Meeting" at 9:30 AM on February 15, 2011. C-144 - C-148. The notice lists the following four items to be considered for approval and presented for action by the Pollution Control Site Hearing Committee: "Request Approval of Findings of Fact and Recommendation of the McLean County Pollution Control Site Hearing Committee -- Building and Zoning;" "Request Approval of Performance Agreement Between the County of McLean and Henson Disposal, Inc. -- Building and Zoning;" "Request Approval of IEPA Certification of Siting Approval Form -- Building and Zoning;" and "Request Approval of Host Agreement between Henson Disposal, Inc. and the County of McLean -- Building and Zoning." C-146. The Notice also includes a single item to be presented for information: "Spill Prevention & Emergency Response Plan, Henson Disposal, Inc. -- Building and Zoning." *Id*.

The County Board's record includes the minutes of the County Board's February 15, 2011 meeting. C-149 - C-167. In its proposed findings of fact and recommendation, the Pollution Control Site Hearing Committee found, "[b]ased upon the information provided in the [Henson] application and amendment thereto and testimony provided at the public hearing," that the proposed facility met six statutory criteria. First, the committee found that "[t]he facility is necessary to accommodate the waste needs of the area it is intended to serve." C-152; *see* 415 ILCS 5/39.2(a)(i) (2010). Second, the committee found that "[t]he facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." C-152; *see* 415 ILCS 5/39.2(a)(ii) (2010). Third, the committee found that "[t]he facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." C-152 - C-153; *see* 415 ILCS 5/39.2(a)(iii) (2010). Fourth, the committee found that "[t]he plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operations

accidents." C-153; *see* 415 ILCS 5/39.2(a)(v) (2010). Fifth, the committee found that "[t]he traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows." C-153; *see* 415 ILCS 5/39.2(a)(vi) (2010). Sixth, the committee found that, "[i]f the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning Act, the facility is consistent with that plan. . . . C-153 - C-154; *see* 415 ILCS 5/39.2(a)(viii) (2010).

Also "[b]ased upon the information provided in the [Henson] application and amendment thereto and testimony provided at the public hearing," the Pollution Control Site Hearing Committee found that three of the statutory criteria were not applicable to Henson's proposed facility. C-152 - C-154. Specifically, after finding it inapplicable to the proposed facility, the committee made no finding on the criterion whether,

> (A) for a facility other than a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100 year flood plain or the site is floodproofed, (B) for a facility that is a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100-year floodplain, or if the facility is a facility described in subsection (b)(3) of Section 22.19a, the site is floodproofed. C-153; *see*415 ILCS 5/39.2(a)(iv) (2010); *see also* 415 ILCS 5/22.19a (2010) (Floodplain).

The committee also found inapplicable and made no finding on the criterion whether, "if the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release." C-153; *see* 415 ILCS 5/39.2(a)(vii) (2010). Finally, the committee also found inapplicable and made no finding on the criterion whether, "if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met." C-154; *see* 415 ILCS 5/39.2(a)(ix) (2010).

Finally, "[a]fter considering all the evidence and testimony presented, the McLean County Pollution Control Site Hearing Committee finds that the [Henson] application meets all the criteria as found in Chapter 33 of the McLean County Code for Pollution Control Facilities, provided the following stipulations are met." C-154.

> 1. A Spill Prevention and Emergency Response Plan[2] shall be submitted to and approved by the Director of the County Emergency Management Agency and the Director of Building and Zoning before the commencement of operations of this pollution control facility and shall be reviewed annually;

[2] Although the Notice of the February 15, 2011 Board meeting refers to a "Spill Prevention & Emergency Response Plan, Henson Disposal, Inc. -- Building and Zoning" at pages 76-83 (C-146), the Board's review of the County's record reveals no such document with that title or at those page numbers. *See also* C-167.

2. The Fire Chief of the Bloomington Township Fire Protection District shall inspect and approve the fire protection plan before the commencement of operations of this pollution control facility;

3. The applicant will pay for additional costs of processing the application such as for a transcript, publications, etc.

4. Development follows the plans and documents submitted with the application and

5. Approval of a Performance Agreement and approval of a Host Agreement. *Id.*

After reciting these findings, the McLean County Pollution Control Site Hearing Committee recommended approval of Henson's application for site approval, provided compliance with the stipulations listed above. C-154. On a motion that the County Board approve the committee's findings of fact and recommendation, all members present voted in favor with the exception of one member voting present. *Id.*; *see id.* at C-151 (two members absent).

In addition to its findings of fact and recommendation, the Pollution Control Site Hearing Committee also presented a Performance Agreement among Henson as operator, TKNTK as owner, and McLean County. C-155 - C-161. The proposed performance agreement included provisions requiring Henson to deliver to the County an irrevocable $120,000 letter of credit or other form of security. C-156. The $120,000 figure is based upon the estimated cost to transport construction debris in an amount equal to the facility's maximum storage capacity and to clear the total landscape processing area. C-157- C-158. The proposed agreement added that this security "shall remain in place until such time as Henson Disposal, Inc. ceases to conduct any of the activities permitted by the County under the siting approval or it's E.P.A. permit." *Id.* The proposed agreement provides that the County may draw upon the letter of credit or other security in two specified circumstances:

a) Henson Disposal, Inc. ceases to do business for any reason and fails to appropriately clean up all rubbish, debris, excess material, temporary structures, tools and equipment after notice and opportunity to cure . . .

b) Cancellation or non-renewal of the letter of credit or other security provided by Henson Recycling, Inc. to guarantee the clean up and failure of Henson to provide the County a commitment to renew or extend its letter of credit, or other agreed upon security provided in lieu of a letter of credit, within sixty (60) days of the date such letter of credit or other security will expire." C-156; *see* C-125, C-168.

The document also reflects an agreement by the parties to review the amount of the financial security "one year after Henson Recycling, Inc. commences operation of the pollution control facility to determine if the amount should be increased or decreased taking into consideration any increase in tipping fees, transportation costs, disposal cost for landscape waste and taking into

consideration the average amount of material on the property." C-158; *see* C-169. The agreement also requires review of the amount of financial security every five years after the first year to ensure that it reflects current costs; "provided however that the amount of security shall never be less than $120,000, unless the average amount of material is less than what is assumed and in such case the requisite security shall be adjusted accordingly." C-158; *see* C-169.

On a motion that the County Board approve a request for approval of the Performance Agreement, all members present voted in favor with the exception of one member voting present. *Id.*; *see id.* at C-161 (two members absent).

In addition, the Pollution Control Site Hearing Committee presented an Agency form document entitled "Certification of Siting Approval." C-162 - 163. As completed by the county's Director of Department of Building and Zoning, the document provides that, on February 15, 2011, the County Board approved with conditions an application from Henson Disposal, Inc. for approval of the site for a waste treatment and waste transfer operation. *Id.* On a motion that the County Board approve a request for approval of the Certification of Siting Approval for, all members present voted in favor with the exception of one member voting present. *Id.*; *see id.* at C-151 (two members absent).

The Pollution Control Site Hearing Committee also presented a Host County Agreement between Henson and the County. C-164 - C-167; *see* C-125 (noting requirement of County Code). Among its provisions the Host County Agreement establishes a host county fee of "$0.50 per ton of all incoming materials." C-164. The County seeks payment of this fee to offset costs including those "associated with solid waste planning, management, and environmental enforcement, as well as traffic enforcement and maintenance of County highways in the County's jurisdiction in areas impacted by the pollution control facility operation." *Id.*

The agreement also requires Henson to provide copies of specified documents connected with Henson's operations free of charge to the County. C-166. The agreement provides that, "[i]n return, the County agrees not to disclose or release any documents, records, or other information that is proprietary or confidential business information of the Henson Disposal Recycling Center. This includes, but is not limited to customer information and pricing. *Id.* In addition, the agreement establishes that

> [t]he Henson Disposal Recycling Center will not knowingly accept any hazardous materials, as defined by the Illinois EPA. . . . The Henson Disposal Recycling Center will comply with the regulations set by the Illinois Pollution Control Board to complete random load checking. If any hazardous waste is discovered, the County government, City of Bloomington, and Illinois EPA will immediately be notified. *Id.* at 165.

The Host County Agreement addresses a number of other issues. It states that guaranteeing disposal capacity for McLean County waste is inapplicable to Henson "because no waste of any kind will be stored on-site long-term." C-165. It also states that Henson desires "to be exempt from providing a Property Value Protection Program." *Id.* The agreement elaborates that "[t]he site is not a landfill, and no materials will be stored on-site long-term. Therefore, the

property value of existing homes in the surrounding area will not be affected by the operations. At any given time, the recycling center could cease operations and the property would revert back to its original condition and form." *Id.* The Host County Agreement also addresses an Environmental Contingency Fund. C-166. The agreement states that, because "the recycling center is not a long-term storage site, no significant environmental impact should occur. Therefore, the Henson Disposal Recycling Center does not want to contribute money to the Environmental Contingency Fund." *Id.* In addition, the agreement states that no procedure to determine remaining disposal capacity should apply to Henson's facility "because no waste of any kind will be stored on-site long-term." *Id.*

The Host County Agreement also refers to an "Indemnification Agreement, attached hereto as Exhibit A." However, the Board's review of the County's record reveals no exhibit addressing indemnification. Similarly, the agreement indicates that Henson "wishes to be exempt from the Water Well Protection Plan. Please see the request for waiver." Again, the Board's review of the County's record reveals no request of this nature.

On a motion that the County Board approve a request for approval of the Host Agreement between Henson and McLean County, all members present voted in favor with the exception of one member voting present. *Id.*; *see id.* at C-161 (two members absent).

ADS' PETITION FOR REVIEW

Before the Agency can issue a permit to develop or construct a new or expanded pollution control facility, the permit applicant must obtain approval for the site of the facility from the appropriate unit of local government, *i.e.*, the county board if in an unincorporated area or the governing body of the municipality if in an incorporated area. *See* 415 ILCS 5/39(c) (2008). If the unit of local government approves the site, specified third parties may appeal the decision of the unit of local government to the Board. *See* 415 ILCS 5/40.1(b) (2008); 35 Ill. Adm. Code 107.200(b). In this case, ADS contests the County Board's decision granting Henson's application for approval of the site of its proposed facility for recycling construction and demolition materials.

Initially, ADS describes itself as "a company that does business in McLean." Pet. at 2. ADS states that it "attended the public hearing and decision in the subject local siting review." *Id.* ADS further states that it entered its appearance at the siting hearing on December 9, 2010 on the subject of Henson's application for site approval. *Id.*; *see* C-126 - C-127. ADS adds that, through its attorney, it "timely filed written comments concerning or relating to the subject application with McLean." Pet. at 1.

ADS appeals on various grounds. First, ADS claims that the County Board "did not have proper jurisdiction to conduct the local public hearings or make a decision on Henson's siting Application" because "[t]he pre-filing notice was not accurate, was misleading, and was insufficient under the requirements of Section 39.2(b) of the [Environmental Protection] Act" (Act). Pet. at 2, citing 415 ILCS 5/39.2(b) (2010). ADS argues that the Board and the courts "have consistently held that Section 39.2(b) pre-filing notice requirements are a jurisdictional

prerequisite to the local new pollution control facility site location process." Pet. at 2 (citations omitted).

In addition, Section 39.2(a) of the Act requires that "[a]n applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance [with], and local siting approval shall be granted only if the proposed facility meets" nine criteria. 415 ILCS 39.2(a) (2008) (listing criteria (i) - (ix)). ADS claims that "Criteria 1, 2, 3, 4, 5, 6, 7, 8, and 9 were not met by Henson" and that the County Board's "approval of Henson's siting Application on those Criteria is not supported by the record and against the manifest weight of the evidence." Pet. at 3. ADS further claims that the County Board "did not make a finding as to Criterion 4, and incorrectly determined that Criterion 4 was not applicable." *Id*.

Third, ADS claims that "the local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair due to, at a minimum, the unavailability of the public record." Pet. at 3.

ADS' petition requests that the Board enter an order

> (a) finding that no jurisdiction existed on Henson's siting application; (b) alternatively and notwithstanding or waiving jurisdictional issues, setting for hearing this contest of the County Board siting approval decision; (c) alternatively and notwithstanding or waiving the jurisdictional issues, reversing the County Board's approval and denying Henson's siting application; (d) alternatively and notwithstanding or waiving the jurisdictional issues or item(c) above, remanding this matter for further local public hearings to address the fundamentally unfair local proceeding; and (e) providing such other and further relief as the Illinois Pollution Control Board deems appropriate. Pet. at 3.

MOTION TO STRIKE AND DISMISS

Movants state that, on August 9, 2010, Henson filed with the County Board an application requesting approval of the site of a construction debris and landscape waste treatment facility. Mot. at 1. Movants further state that, on December 9, 2010, McLean County's Pollution Control Site Hearing Committee "conducted a public hearing on the siting application." *Id*. Movants add that the Henson presented evidence to the committee, which recommended that the County Board approve the application. *Id*. at 1-2. Movants note that ADS filed its petition for review with the Board on March 22, 2011. *Id*. at 2; *see* Pet.

Movants make a number of arguments in support of their motion to strike and dismiss. The Board summarizes each of those arguments separately in the following subsections of the order.

Statutory Decision Deadline

Movants state that Henson filed its application for siting approval on August 9, 2010. Mot. at 2. Movants argue that the Act required the County Board to issue a final decision on or before February 4, 2011, "within 180 days after the date on which it received the Application." *Id.*, citing Peoria Disposal Co. v. PCB, 89 N.E.2d 460, 473 (3rd Dist. 2008). Movants acknowledge that the County Board conducted a public hearing within the 180-day period. Mot. at 2. Movants claim, however, that the County Board did not make a final decision approving the application until February 15, 2011. *Id.* Movants argue that Henson did not waive the 180-day deadline and that the application for approval of the site is deemed granted effective February 4, 2011. *Id.* at 2-3.

Movants argue that the deadline to appeal siting approval to the Board is triggered either by a final decision of the County Board within 180 days of receiving an application "or the failure of the Board to take action within 180 days." Mot. at 3, citing 35 Ill. Adm. Code 107.204. Movants claim that, "[w]ithout a decision made by the county board within the 180-day timeframe, the siting is deemed approved, and the appeal rights provided in the Act are not triggered." Mot. at 3. Movants argue that, "[e]ven if this Board concludes that the appeal rights still exist, the time frame in which an appeal must be filed would begin to run from the date approval is granted. . . ." *Id.*, citing 35 Ill. Adm. Code 107.204. Having argued that Henson's application was deemed approved on February 4, 2011, movants claim that the appeal period expired 35 days later on March 11, 2011. Mot. at 3, citing 35 Ill. Adm. Code 107.204. Movants conclude that ADS' petition filed on March 22, 2011, is "untimely and therefore subject to dismissal." Mot. at 3.

Petition Content Requirements

Participation

Movants note that the Board's procedural rules establish requirements for the contents of a petition for review of siting decisions. Mot. at 4, citing 35 Ill. Adm. Code 107.208. Movants claim that ADS' petition "fails to establish the necessary components and is facially defective. . . ." Mot. at 4.

Movants claim that ADS' petition alleged "only a general conclusory basis in trying to establish the Petitioner participated in the public hearing." Mot. at 4. Movants argue that ADS "fails to plead facts and fails to adequately apprise the Respondent, or the Board as to the specific facts establishing this alleged participation." Mot. at 4. Movants discount ADS' allegation of participation: "no questions were asked, no exhibits offered, no statements made. This is insufficient to establish actual participation within the public hearing." Mot. at 5. Movants suggest that ADS has mistaken "attendance" at the hearing for "participation" in it. *See id.*

Movants claim that, "[a]lthough a party may plead only ultimate facts rather than evidence upon which he relies, the words used must give the opponent sufficient information as to the character of the evidence to be introduced or the issues to be tried and if the words do not

provide that information, the allegations may be deemed conclusory and stricken." Mot. at 4, citing J. Eck & Sons, Inc. v. Reuben H. Donnelly Corp., 213 Ill.App. 3d 510 (1991). Movants argue that ADS must allege facts sufficient to establish that it is eligible to file a third-party petition for review of the County Board's decision. Mot. at 4, citing 35 Ill. Adm. Code 107.200; *see* 415 ILCS 5/40.1 (2008). Movants state that "[t]he fact that pleadings are to be liberally construed does not relieve a Petitioner of a duty to include substantial factual allegations in its complaint." Mot. at 4-5, citing Campbell v. Haiges, 152 Ill. App.3d 246, 251 (1987).

Movants conclude that ADS' allegations regarding participation "are conclusory and inadequate to meet both the jurisdictional requirements of the Board rules and the general pleading requirements of Illinois law." Mot. at 5. Movants argues that "[t]hese allegations should be stricken and the Petition dismissed for failure to establish a necessary jurisdictional element." *Id.*

Located So As To Be Affected

Movants note the Board rule providing that persons may file a petition for review of a local siting decision if, among other factors, they are "so located as to be affected by the proposed facility." Mot. at 5, citing 35 Ill. Adm. Code 107.200(b). Movants claim ADS alleges that it "conducts business in McLean County." Mot. at 5; *see* Pet. at 2 (¶5). Movants argue that this "general allegation" is "facially defective as it fails to plead any basis of how they are 'affected.'" Mot. at 5, 6.

Movants claim that ADS' allegation "fails to establish any facts regarding the location of the business, what the business does, how the business is impacted or any other allegations which the Pollution Control Board could consider in establishing the Petitioner is so located as to be 'affected.'" Mot. at 5-6, citing Pet. at 2 (¶5). Movants argue that, '[i]f mere presence in McLean County is all that is required, then any business in McLean County would be affected, as would any individual residing in McLean County." Mot. at 6. Movants claim that "[t]he statute and decided cases law requires more. . . ." *Id.*

Movants again claim that, "[a]lthough a party may plead only ultimate facts rather than evidence upon which he relies, the words used must give the opponent sufficient information as to the character of the evidence to be introduced or the issues to be tried and if the words do not provide that information, the allegations may be deemed conclusory and stricken." Mot. at 6, citing J. Eck & Sons, Inc. v. Reuben H. Donnelly Corp., 213 Ill.App. 3d 510 (1991). Movants argue that ADS must allege facts sufficient to establish that it is eligible to file a third-party petition for review of the County Board's decision. Mot. at 6, citing 35 Ill. Adm. Code 107.200; *see* 415 ILCS 5/40.1 (2008). Movants state that "[t]he fact that pleadings are to be liberally construed does not relieve a Petitioner of a duty to include substantial factual allegations in its complaint." Mot. at 6, citing Campbell v. Haiges, 152 Ill. App.3d 246, 251 (1987).

Movants conclude by arguing that ADS' petition "is factually insufficient insofar as it fails to include a factual basis upon which the Board could conclude that Petitioner is a third party that is 'so affected' by the proposed facility as to give it standing to appeal the decision of the local siting authority." Mot. at 6. Movants argue that, because ADS has not adequately

demonstrated that it is "so located as to be affected," ADS lacks standing, and the Board must dismiss its petition. *Id*.

Pre-Filing Notice and Jurisdiction

Movants claim that, in addressing the issue of pre-filing notice and jurisdiction, ADS made "only general conclusory allegations." Mot. at 7, citing 35 Ill. Adm. Code 107.208(c). Movants argue that ADS alleged "only generally that the Public Notice was not accurate, was misleading, and was insufficient under the requirements of Section 39.2(b) of the Act." Mot. at 7, citing 415 ILCS 5/39.2(b) (2008).

Movants claim that, "[a]lthough a party may plead only ultimate facts rather than evidence upon which to rely, the words must give the opponents sufficient information as to the character of the evidence to be introduced or the issues to be tried and if the words do not provide that information, the allegations may be deemed conclusory and stricken." Mot. at 7. Movants argue that ADS must allege facts sufficient to meet the requirements of the Board's procedural rules. Mot. at 7; *see* 35 Ill. Adm. Code 107.208(c). Movants conclude that ADS has made no specific claim regarding the alleged deficiency of pre-filing notice and has provided no information on the evidence to be introduced on this issue. Mot. at 7.

Statutory Criteria

As noted above, ADS alleged that "Criteria 1, 2, 3, 4, 5, 6, 7, 8, and 9 were not met by Henson, and McLean's approval of Henson's siting Application on those Criteria is not supported by the record and against the manifest weight of the evidence." Pet. at 3 (¶10). ADS also alleged that "McLean did not make a finding as to Criterion 4, and incorrectly determined that Criterion 4 was not applicable." Pet. at 3 (¶11). Movants characterize these allegations as "conclusory" and argue that ADS has failed "to include any specific basis for its challenge to the local siting authority's decision. . . ." Mot. at 7. Movants conclude that ADS has failed to satisfy pleading requirements and argue that the petition "should be stricken as inadequate and conclusory and dismissed." *Id*. at 8.

Fundamental Fairness

As noted above, ADS alleged that "the local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair due to, at a minimum, the unavailability of the public record." Pet. at 3 (¶12). Movants characterize these allegations as "conclusory" and argue that ADS has failed "to include any specific basis for its challenge to the local siting authority's decision. . . ." Mot. at 7. Movants conclude that ADS has failed to satisfy pleading requirements and argue that the petition "should be stricken as inadequate and conclusory and dismissed." *Id*. at 8.

Decision as a Matter of Law

Participation

Alternatively, movants argue that the Board has a basis to determine that, as a matter of law, ADS "actually failed to participate in the local siting hearing." Mot. at 8. Movants claim that the record of the local hearing reflects only a statement by ADS that it was "in attendance" and "participating." *Id*., citing Exh. A (pages 48-49 of transcript of Pollution Control Site Hearing Committee). Movants argue that ADS "failed to raise any issues, present any evidence, ask any questions, or otherwise participate in the hearing in any meaningful respect other than merely listening to the public hearing." *Id*.

Movants argue that, in order to establish standing to file a third-party petition for review, ADS must have "actually participated" in the local hearing. Mot. at 8. Movants claim that the Board "has found participation to exist when the interested party has orally or in writing objected at the public meetings and has made their opposition clear. . . ." *Id*., citing Stop The Mega-Dump v. County Bd. of DeKalb County, Ill. and Waste Mgmt. of Ill., Inc., PCB 10-103; Amer. Bottom Conservancy and Sierra Club v. City of Madison, Ill. and Waste Mgmt. of Ill., Inc., PCB 7-184. Movants characterize ADS' involvement in the local hearing as mere attendance. Mot. at 8. Movants argue that the record reflects no "actual participation" by ADS that would entitle it to file a third-party petition for review. *Id*. Movants conclude that ADS as a matter of law "will be unable to prove actual participation in the local sting hearing." *Id*. at 9. Movants claim that ADS lacks standing to file its petition and that the Board lacks jurisdiction to hear it. *Id*.

"So Located As Not To Be Affected"

Movants cite Ogle County Bd. v. PCB, 272 Ill. App. 3d 184 (2nd Dist. 1995), and Section 40.1(b) of the Act to suggest that ADS cannot demonstrate that it is so located as to be affected by the proposed facility. *See* Mot. at 9-10, citing 415 ILCS 5/40.1(b) (2008). Movants state that ADS' only allegation on this issue is that it "does business in McLean County." Mot. at 9; *see* Pet. at 2 (¶5). Movants argue that, if standing to file a third-party appeal requires only residing or doing business within a particular county, "then the requirements that a third party actually be affected by the proposed facility is fundamentally meaningless." Mot. at 10. Movants further argue that this statutory requirement bars "appeals by persons or entities that are not actually affected by the facility." *Id*. Movants claim that "[t]he appeal process should not be a tool used by a competitor to suppress free competition." *Id*.

Movants conclude that, because ADS alleges only that it conducts business in McLean County, it has failed "to establish the appropriate standing as required in the statute to assert this claim." Mot. at 10. Movants argue that the Board should dismiss the petition with prejudice on this basis as a matter of law. *Id*.

RESPONSES TO MOTION TO STRIKE AND DISMISS

County Board Response

Approval of Application

The County Board cites Section 39.2 of the Act, which provides in pertinent part that, "[i]f there is no final action by the county board . . . within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved." County Resp. at 1, citing 415 ILCS 5/39.2 (e) (2010). The County Board states that courts interpreting this provision "have found that applicants who continue to participate in the approval process after the 180 days have expired are considered to have waived their right to approval within that time frame." County Resp. at 1, citing McLean County Disposal v. County of McLean, 207 Ill. App. 3d 477, 488, 566 N.E.2d 26, 33 (4th Dist 1991); City of Rockford v. County of Winnebago, 186 Ill. App. 3d 303, 311, 542 N.E.2d 423, 428-29 (2nd Dist. 1989); Citizens Against the Randolph Landfill v. PCB, 178 Ill. App. 3d 686, 695-96, 533 N.E.2d 401, 407-09 (4th Dist. 1988). The County Board argues that these cases "clearly establish that applicants must affirmatively assert their right to a decision within 180 days by objecting and refusing to participate and any proceedings after the deadline has passed." County Resp. at 2.

The County Board states that, in this case, Henson did not affirmatively assert the 180-day decision deadline and participated in the site approval process after it had passed. County Resp. at 2. The County Board notes that the county's staff asked Henson to address issues raised in the public hearing of the Pollution Control Site Hearing Committee on December 9. 2010. *Id.* The County Board claims that "Henson was asked to clarify which corporate entity would be responsible for the operations of the pollution control facility and provide evidence of financial means to clean up the site following closure for review at the next meeting of the committee scheduled for February 3, 2011." *Id.*, citing C-107 - C-109, C-124 - C-126. The County Board argues that the record does not include any objection by Henson to a request to provide information "that would be considered one day before the 180 [day] deadline." County Resp. at 2. The County Board adds that "Henson also subsequently executed a Performance Agreement to guarantee funds for clean up of the site on February 15, 2010 (sic)." *Id.*, citing C-155 - C-161.

The County Board states that "[t]he Pollution Control Site Hearing Committee meeting scheduled for February 3, 2011 was cancelled due to inclement weather and was rescheduled for February 15, 2011 immediately before the County Board meeting at which the application was to be considered." County Resp. at 2. The County Board argues that "Henson attended the committee meeting on February 15, 2011 and confirmed that certain conditions regarding emergency response and fire protection were acceptable." *Id.*, citing C-168 - C-170 (minutes). The County Board concludes that "Henson's actions clearly indicate that it did not intend to assert its right to a decision within 180 days and by failing to assert that right Henson waived it." County Resp. at 2.

The County Board "respectfully requests that the Motion to Strike and Dismiss be denied as to the claim that the application was approved automatically on February 4, 2011. . . ." County Resp. at 3.

Standing

The County Board states that it "concurs with the arguments raised by Henson Disposal, Inc. and TKNTK, INC. with respect to ADS' standing to file this appeal and joins in that portion of the Motion to Strike and Dismiss." County Resp. at 2. The County thus requests that Henson's motion to strike and dismiss "be granted as to the claim that ADS lacks standing." *Id.* at 3.

ADS Response

Notification and Jurisdiction

As an initial matter, ADS states that the process followed by Henson in seeking approval of its proposed site is "confusing." ADS Resp. at 2. ADS argues that the County's Index of the Record includes a "Site Location Application" dated and file-stamped April 19, 2010. *Id.* n.3, citing C-2 - C-55. ADS also argues that the record includes "insufficient and defective notice" of that application. ADS Resp. at 2 n.3, citing 415 ILCS 5/39.2(b) (2010); C-1.

In addition, ADS claims that the Index of the Record includes an "Amendment to Site Application; 8/9/10." ADS Resp. at 2 n.3. ADS also claims that the document referred to as the amended application is dated July 20, 2010, but appears to be file-stamped August 9, 2010. *Id.*, citing C-64 - C-76. ADS further claims that the document does not identify itself as an amended application. ADS Resp. at 2 n.3. Again, ADS argues that the record includes "insufficient and defective notice" of what the index refers to as an amended application. *Id.*, citing C-63.

ADS argues that, if Henson filed its application for site approval on August 9, 2010, then the Board should determine based on Henson's pleading and the absence of required pre-filing notification to property owners that McLean County lacked jurisdiction. ADS Resp. at 1. ADS further argues that, in the absence of this jurisdiction, "Henson Disposal, Inc.'s siting was never even filed with or approved by the County." *Id.*, citing Mot. at 1.

"Notwithstanding and without waiving this argument," ADS argues that, "should the Board address the substance of Henson's Motion, it must fail." ADS Resp. at 1. ADS adds that the motion should be denied because ADS

> (A) timely filed its Petition; (B) participated in the siting hearing in this matter in accordance with how 'participated' is defined under Board opinions; (C) meets the pleading sufficiency requirements for standing and the basis for the Petition; and (D) [Henson] improperly seeks a judgment as a matter of law in a motion that attacks the sufficiency of the Petition. *Id.* at 2.

The Board summarizes ADS' arguments on these issues in the following subsection.

Statutory Decision Deadline

ADS disputes Henson's suggestion that, if its application is not deemed to have been granted automatically on February 4, 2011, Henson becomes "a victim of circumstances, which lie outside of their control." ADS Resp. at 3, citing Mot. at 3. ADS claims that only Henson and the County had control of the site approval process. ADS Resp. at 3. ADS argues that "Henson failed to raise any objection during the course of the siting proceedings to the timeliness of the County's hearing and decision." *Id*. ADS claims that Henson failed to object to the hearing date of December 9, 2011, and participated without objection in it. *Id*. ADS argues that this hearing date failed to meet the statutory deadline, whether the application date is consider to be August 2010 or April 2010 with an August amendment. *Id*., citing 415 ILCS 5/39.2(d), (e) (2010). ADS adds that on February 15, 2011, Henson signed and filed a Performance Agreement, no previous version of which appears in the county's record. ADS Resp. at 3, citing C-155 - C-161. ADS concludes that, because Henson participated in the hearing and performed a filing after the deadlines for the County Board's hearing and decision, "it waived that argument in response to this Petition." ADS Resp. at 3, citing Citizens Against the Randolph Landfill v. PCB, 178 Ill. App. 3d 686, 696, 533 N.E.2d 408 (4th Dist. 1988).

In addition, ADS claims that the timing of when to file a petition with the Board hinges on the date of the County Board's approval of a proposed site and not on the statutory deadline. ADS Resp. at 4, citing 415 ICLS 5/40.1 (2010). ADS suggests that the deadline to file its petition in this case does not depend on a timely County Board decision. ADS Resp. at 4. ADS also suggests that to conclude otherwise would allow Henson to make objections on appeal to the Board that it had concealed from the County Board. *Id*. (citations omitted). ADS further suggests that to conclude otherwise would prevent adjudication on the merits of Henson's application. *Id*.

ADS concludes that the Board should accepts its petition as timely filed within 35 days of the McLean County Board's "February 15, 2010 (sic) decision." ADS Resp. at 4. ADS argues that, if the Board bases that 35-day period on the county board's statutory decision deadline rather than the date of its actual decision, "then the Board should find that Henson's failure to object and active participation after the statutory decision deadline expire resulted in its waiver of this argument." *Id*. at 4-5.

Participation

ADS disputes Henson's claim that ADS failed to establish its participation in the McLean County Board's hearing. ADS Resp. at 5, citing 415 ILCS 5/40.1(b) (2010); 35 Ill. Adm. Code 107.200(b). ADS argues that the Board in at least five other cases has "made it clear that 'mere attendance' at the public hearing is sufficient" to constitute participation. ADS Resp. at 5 (citations omitted). ADS claims that Henson has admitted "that ADS was in attendance at the hearing." ADS Resp. at 5, citing Mot. at 5. ADS further claims that this attendance is evident in the County Board's record. ADS Resp. at 5; *see* C-126 - C-127.

ADS concludes that the Board must follow its precedent on the issue of participation and deny Henson's motion on this ground. ADS Resp. at 5 (citation omitted). In the event that the

Board wishes to modify that precedent, ADS argues that Henson's motion "should be denied because ADS relied on that precedent in effectuating its participant status at the public hearing." *Id*.

Petition Content Requirements

ADS disputes Henson's claim that ADS has not sufficiently specified how it is affected by the proposed facility. ADS Resp. at 5-6; *see* Mot. at 5-6. ADS also disputes Henson's claim that ADS has insufficiently pled grounds for appeal. ADS Resp. at 5-6; *see* Mot. at 7-8.

ADS argues that its petition includes factual allegations sufficient to satisfy the Board's procedural rules. ADS Resp. at 6, citing 35 Ill. Adm. Code 107.208(b), (c). ADS claims that it has met the requirements of fact pleading and that the Board has found similar petitions sufficiently pled. ADS Resp. at 6-8 (citations omitted). ADS adds that the Board has accepted its petition for hearing. *Id*. at 7, 8. In addition, ADS argues that Henson has relied upon a case that "is not applicable." *Id*. at 6, citing Campbell v. Haiges, 152 Ill. App. 3d 246, 251, 504 N.E.2d 200, 204 (2nd Dist. 1987); *see* Mot. at 6, 7.

ADS concludes that the Board should deny Henson's motion on these grounds. ADS Resp. at 8. In the alternative, ADS argues that, if the Board finds that its pleading is insufficient, "ADS should be allowed, and herein so moves, to amend its petition." *Id*., citing Landfill 33, ltd. v. Effingham Co. Bd., *et al*., PCB 3-43 (Oct. 17, 2003).

"So Located As To Not Be Affected"

ADS notes that Henson argues in the alternative that ADS has failed as a matter of law to participate in the County Board hearing and cannot as a matter of law establish that they are affected by the proposed facility. ADS Resp. at 8; *see* Mot. at 8-10. ADS characterizes this alternative argument as a challenge to the sufficiency of the petition under Section 101.506 of the Board's procedural rules couched as a motion for summary judgment. *See* ADS Resp. at 8-9; citing 35 Ill. Adm. Code 101.506 (Motion Attacking the Sufficiency of the Petition, Complaint, or Other Pleading). ADS argues that, because Section 101.506 conflicts with Part 107, Part 107 applies "and Henson cannot raise this issue through a Section 101.506 motion." ADS Resp. at 8-9, citing 35 Ill Adm. Code 107.100(b) (Applicability). ADS further argues that "summary judgment is not proper when there is no responsive pleading on file and there has been no discovery (or even discovery schedule) set in the case." ADS Resp. at 9. ADS moves to strike Section VI of Henson's motion. *Id*. at 9, 10.

ADS argues that, if the Board does not strike this argument, it should deny Henson's motion. ADS claims that "[i]t is a matter of public record that ADS is the owner and operator of the McLean County Landfill," the only landfill in the county. ADS Resp. at 9, citing *id*., Exh A (landfill capacity report). ADS further claims that Henson's hearing testimony demonstrates that ADS is "affected" by the proposed facility. *Id*., citing C-95 - C-96. ADS also likens itself to the petitioner in Ogle Co. Bd. V. PCB, 272 Ill. App. 3d 184, 649 N.E. 2d 545 (2nd Dist. 1995), dismissing Henson's reliance on that case. ADS Resp. at 10. ADS concludes that, if the Board

does not strike Henson's argument, it should deny the motion because, "at the very least, Henson's own testimony raises an issue of material fact as to whether ADS is 'affected.'" *Id.*

BOARD ORDER OF JUNE 2, 2011

Summary of Order

In its June 2, 2011 order, the Board reviewed "the County Board's record in the issue of certified mail service of notice of the request for siting approval." Board Order at 3-6. The Board indicated that "[t]he record does not plainly indicate that the applicant attempted personal service" on any of the 18 listed entities. *Id.*, *see supra* at __-__.

The Board noted that the parties had raised "the threshold question of whether Henson's notice of its request for site approval complied with the requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2008)) and thus whether the County Board acquired jurisdiction to consider that request." Board Order at 6, citing Pet. at 2, Mot. at 7, ADS Resp. at 1. On the basis of its review of the record and the Act, the Board concluded that "it does not now have an adequate record on which to determine that Henson complied with the notice requirements and, in turn, whether the McLean County Board acquired jurisdiction to consider Henson's application." *Id.*

The Board directed Henson as the applicant for site approval to submit to the Board a filing addressing adequacy of service listing, at a minimum

> the owners of all property within the subject area not solely owned by the applicant, and [] 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 requirement; provided further, that in no event shall this requirements exceed 400 feet, including public streets, alleys and other public ways; (415 ILCS 5/39.2(b) (2008)). Board Order at 7.

The Board also directed Henson to list "members of the General Assembly from the legislative district in which the proposed facility is located. . . ." *Id.*; *see* 415 ILCS 5/39.2(b) (2010). The Board also set a deadline for the other parties to respond to Henson's filing. Board Order at 7. The order reserved ruling on the pending motion to strike and dismiss. *Id.*

Henson's and TKNTK's Response

The movants state that their motion challenges ADS' standing to file its petition for review and claims that the petition is factually deficient and should be dismissed. Movants' Resp. at 3. Movants argue that the Board's order "essentially forces Henson to address the merits of the Petition that is alleged to be deficient." *Id.* Movants further argue that the Board can consider only the petition in deciding the motion to strike and dismiss and that Illinois Civil

Practice law bars the Board from considering evidence outside of the pleadings. *Id*. (citations omitted). Movants add that "[t]he parties agreed and the hearing officer order that a discovery scheduling order would be entered following a ruling on the Motion to Strike and Dismiss." *Id*.

Movants respond to the Board's order by stating that

> Henson Disposal, Inc., does not have any additional information regarding the notice other than what the County of McLean has submitted in the Record. Henson Disposal, Inc. has the original certificates of mailing, as proof of delivery and the party to whom delivery was made. Other than the original mailing receipts Henson Disposal, Inc. does not have any additional information to add to the Record. Movants' Resp. at 4.

Henson adds that

> Henson Disposal received the addresses of the parties entitled to notice from the County of McLean. Henson Disposal Inc. served the parties with notice via registered mail, return receipt requested, as evidenced by the record submitted by the County. The Act does not require personal service on the parties, however personal service is a service option. Henson Disposal, Inc., does not have any additional information other than what was submitted by the County in the Record. *Id*.

Henson concludes that the requested material is not relevant to the pending motion and requests that the Board issue an order on the merits of that motion. *Id*.

ADS' Response

ADS first disputes Henson's position that the Board's consideration of the motion to strike and dismiss is limited to the pleadings. ADS Reply at 1-2; *see* Movants' Info. at 2-3. ADS argues that "it has long been established that jurisdiction is an issue that may be raised at *anytime* and *sua sponte* by the Board. ADS Reply at 2 (emphasis in original), citing Concerned Boone Citizens, Inc. v. M.I.G Investments, 144 Ill. App. 3d 334, 339, 494 N.E.2d 180 (2nd Dist. 1986). ADS further argues that finding otherwise "would be contrary to the policy of judicial and administrative efficiency." ADS Reply at 2. ADS discounts the case cited by movants as "inapplicable." *Id*. ADS concludes that "the Board has the authority to rule on the jurisdictional issue at this time." *Id*.

ADS characterizes Section 39.2 notice requirements as "jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal." ADS Reply at 3 (citations omitted). ADS argues that the County Board's record does not include a "copy of the notice that was allegedly sent to the persons identified on the copies of certified mail receipts" or anything "that connects those certified mail receipts to property owners entitled to notice." *Id*. ADS further argues that, even if the Board assumes for the sake of argument that the county correctly identified all persons entitled to service, notice was not perfected on each of those persons. *Id*., citing Ogle Co. Bd. v. PCB, 272 Ill. App. 3d 184, 196,

649 N.E.2d 545, 554 (2nd Dist. 1995), Browning-Ferris Industries of Illinois, Inc. v. PCB, 162 Ill. App. 3d 801, 805, 516 N.E.2d 804, 807 (5th Dist. 1987).

ADS also argues that the form of Henson's published notice also deprived the County Board of jurisdiction. ADS Reply at 6, citing 415 ILCS 5/39.2(b), (c) (2010). ADS claims that the notice did not correctly state the deadline to file public comments on the application for site approval. ADS Reply at 6-7, citing Kane County Defenders v. PCB, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2nd Dist. 1985); Everett Allen, Inc. v. City of Mt. Vernon, PCB 86-34, slip op. at 5-7 (July 11, 1986). ADS concludes that this error constitutes an additional jurisdictional defect warranting reversal of the County Board's approval of the site of Henson's proposed facility. ADS Reply at 7.

ADS' Supplemental Response

ADS noted above under "Procedural History," the hearing officer on October 18, 2011, granted ADS' unopposed motion for leave to file a supplemental response. In that response, ADS states that on July 20, 2011, the Agency issued Henson a development and operation permit for the facility at issue in this appeal. Supp. at 1. ADS further states that, "[s]ince the date of permit issuance was subsequent to the date by which ADS had to respond the Board's June 2, 2011 Order, ADS was not able to raise the issue of the permit issuance." *Id*. ADS indicated that it had requested, but had not obtained, a copy of that permit. *Id*. ADS stated, however, that it sought leave to file a supplemental response to notify the Board that, if it reverses the County Board, "it should also find that the permit is void." *Id*. at 1-2.

BOARD DISCUSSION

Standard of Review

When ruling on a motion to dismiss, the Board must take all well-pled facts contained in the pleadings as true, and must draw all inferences from those facts in the light most favorable to the non-movant. Veolia ES Zion Landfill, Inc. v. City Council of the City of Zion, PCB 11-10, slip op. at 2 (Nov. 4, 2010) (citations omitted). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

County Board Decision Deadline

Section 39.2(e) of the Act provides in pertinent part that, "[i]f there is no final action by the county board . . .within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved." 415 ILCS 5/39.2(e) (2010). Henson's motion argues that, because the County Board failed to take action on its application for site approval within 180 days of August 9, 2010, the application was granted automatically on February 4, 2011. Mot. at 2-3. Having so argued, Henson claims that ADS' petition for review is untimely and should be dismissed on that basis. *Id*. at 3.

The County Board states that "Henson did not affirmatively assert its right to a decision within 180 days and it willingly participated in the approval process after the 180 day deadline had passed." County Resp. at 2. The County Board argues that, by failing to assert this right, Henson has waived it. *Id*., citing McLean County Disposal v. County of McLean, 207 Ill. App. 3d 477, 488, 566 N.E.2d 26, 33 (4th Dist 1991); City of Rockford v. County of Winnebago, 186 Ill. App. 3d 303, 311, 542 N.E.2d 423, 428-29 (2nd Dist. 1989); Citizens Against the Randolph Landfill v. PCB, 178 Ill. App. 3d 686, 695-96, 533 N.E.2d 401, 407-09 (4th Dist. 1988). ADS adds that "Henson failed to raise any objection during the course of the siting proceedings to the timeliness of the County's hearing and decision." ADS Resp. at 3. ADS argues that Henson's active participation in the County Board's proceedings after the deadline constitutes waiver of the deadline. *Id*.

Taking these facts as true and viewing them in the light most favorable to ADS, the Board cannot conclude that ADS can prove no set of facts demonstrating that Henson had waived the 180-day decision deadline, that Henson's application was not granted automatically, and that ADS' petition was timely filed. The Board denies the motion to dismiss on this basis.

Petition Content Requirements

Factual Sufficiency

Henson argues generally that ADS' petition is factually insufficient and makes only conclusory allegations on matters of jurisdiction and notice, the statutory siting criteria, and fundamental fairness. Mot. at 7-8; *see* Pet. at 2-3 (¶¶9-12). While Henson acknowledges that ADS "may plead only ultimate facts rather than evidence upon which to rely," Henson claims that ADS "fails to allege any specific factual allegations which would give the Board or the Respondents sufficient information as to the character of the evidence to be introduced or the issues to be tried." Mot. at 7.

On the issue of notice and jurisdiction, ADS' petition alleges in pertinent part that "[t]he pre-filing notice was not accurate, was misleading, and was insufficient under the requirements of Section 39.2 of the Act." Pet. at 2 (¶9). On the issue of the statutory siting criteria, ADS' petition alleges that "Criteria 1, 2, 3, 4, 5, 6, 7, 8, and 9 were not met by Henson, and McLean's approval of Henson's siting Application on those Criteria is not supported by the record and against the manifest weight of the evidence. Further, McLean did not make a finding as to Criterion 4, and incorrectly determined that Criterion 4 was not applicable." Pet. at 3 (¶¶10, 11). On the issue of fundamental fairness, ADS' petition alleges that "the local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair due to, at a minimum, the unavailability of the public record." Pet. at 3 (¶12).

In assessing the adequacy of pleadings in a complaint, the Board has stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Loschen v. Grist Mill Confections, PCB 97-174, slip op. at 4 (June 5, 1997), citing LaSalle National Trust, N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (1993). Fact-pleading does not require a complainant to set out its evidence: "[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts

tending to prove such ultimate facts." People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (citations omitted). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People *ex rel*. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

In ruling on the motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of ADS. In light of these authorities, and based on its review of the pleadings, the Board finds that ADS sufficiently pleads these allegations against the respondents. The Board denies the motion to dismiss on this basis.

Participation

Henson's motion claims that ADS has insufficiently alleged facts demonstrating that it "participated in the public hearing conducted by the county board." Mot. at 4-5; *see* 415 ILCS 5/40.1(b) (2010).

The Board consistently "has held that mere attendance at a local hearing is sufficient to constitute participation under Section 40.1(b) of the Act." Janis Rosauer and Batavia , Illinois Residents Opposed to Siting of Waste Transfer Station v. Onyx Waste Services Midwest, Inc. and City of Batavia, Illinois, PCB 05-1, slip op. at 6 (Oct. 7, 2004); *see also* Citizens Against Landfill Expansion v. American Disposal Services of Illinois, Inc. and Livingston County Board, PCB 03-236, slip op. at 3 (July 24, 2003); Alice Zeman, *et al*. v. Village of Summit and West Suburban Recycling and Energy Center, Inc., PCB 92-174, 92-177 (consol.), slip op. at 4-6 (Dec. 17, 1992); Peter Valessares and Edward F. Heil v. County Board of Kane County, Illinois and Waste Management of Illinois, Inc., PCB 97-36, slip op. at 4 (July 16, 1987).

ADS' petition alleges that, "[o]n December 9, 2010, ADS entered its appearance at the siting hearing on the subject Application. Additionally, ADS attended the public hearing and decision in the subject local siting review." Pet. at 2 (¶6). Taking these facts as true and viewing them in the light most favorable to ADS, the Board cannot conclude that ADS can prove no set of facts demonstrating that it participated in the County Board hearing. The Board denies the motion to dismiss on the basis of participation.

"So Located As To Not Be Affected"

Section 40.1(b) of the Act provides in pertinent part that, unless the Board determines "that the petitioner is so located as to not be affected by the proposed facility, the Board shall hear the petition. . . ." 415 ICLS 5/40.1(b) (2010); *see* 35 Ill. Adm. Code 107.200 ("Any person who . . . is so located as to be affected by the proposed facility may file a petition for review of the decision to grant siting.").

ADS' petition alleges that "ADS is a company that does business in McLean [County]." Pet. at 2 (¶5). In its comment filed with the County Board following the local hearing, ADS states that it "is a corporation in McLean County that is involved in the waste industry and is submitting its comment to encourage equal application of the state siting criteria to any person

who seeks site location approval. . . ." C-133. Taking these facts as true and viewing them in the light most favorable to ADS, the Board cannot conclude that ADS can prove no set of facts demonstrating that it is so located as to be affected by the proposed facility. The Board denies the motion to dismiss on this basis. *See* Ogle County Board and Browning-Ferris Industries, Inc. v. PCB and Leonard Carmichael, 272 Ill. App. 3d 184, 190-91, 649 N.E.2d 545, 550-51 (2nd Dist, 1995).

Decision as a Matter of Law

Henson has alternatively argued that, as a matter of law, ADS cannot establish that it participated in the local siting hearing or that it is so located as to be affected by the proposed facility. Mot. at 8-10. Above, the Board denied Henson's motion to dismiss on the basis of arguments relating to participation and location. In light of these determinations, the Board cannot conclude that Henson is entitled to dismissal of the petition on the grounds of participation and location as a matter of law.

Responses to Board Order of June 2, 2011

In its June 2, 2011 order the Board stated that,

> [b]ased on its review of the notice requirements of the Act and the record regarding service of notice of the application for site approval, the Board concludes that it does not now have an adequate record on which to determine that Henson complied with the notice requirements and, in turn, whether the McLean County Board acquired jurisdiction to consider Henson's application. In other words, the Board cannot determine from the record now before it whether Henson provided timely notice of its request for site approval to each entity required under Section 39.2(b) to receive it. Am. Disposal Serv. of Ill., Inc. v. County Bd. of McLean County, Ill., Henson Disposal, Inc. and TKNTK, LLC, PCB 11-60, slip op. at 6-7 (June 2, 2011), citing 415 ILCS 5/39.2(b) (2010).

The Board directed Henson as the applicant to submit a filing addressing the adequacy of service. *Id*. The Board cited the provisions of Section 39.2 of the Act in directing Henson to list entities required to be served notice of the request for site approval. *Id*.

Henson's response filed June 15, 2011 stated that it "does not have any additional information regarding the notice other than what the County of McLean has submitted in the Record." Movants' Resp. at 4. Henson emphasized that it "does not have any additional information to add to the Record." *Id*.

Since the Board stated on June 2, 2011, that it did not have an adequate record on which to determine whether Henson complied with the statutory notice requirements, the contents and substance of that record have not changed. Consequently, the Board reserves ruling on this issue. *See* Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 339, 494 N.E.2d 180, 182 (2nd Dist. 1986).

CONCLUSION

For the reasons described above, the Board denies the motion to strike and dismiss the petition for review. The Board directs the hearing officer to proceed to hearing.

ORDER

The Board denies in its entirety the motion to strike and dismiss filed by Henson Disposal, Inc. and TKNTK, LLC and directs the hearing officer to proceed to hearing.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 16, 2012, by a vote of 5-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board