

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN DISPOSAL SERVICES OF
ILLINOIS, INC.,

Petitioner,

v.

COUNTY BOARD OF MCLEAN COUNTY,
ILLINOIS, HENSON DISPOSAL, INC., and
TKNTK, LLC

Respondents.

No. PCB 11-60

(Pollution Control Facility Siting
Application)

**PETITIONER'S MOTION FOR SUMMARY JUDGMENT
BASED ON JURISDICTION**

NOW COMES Plaintiff American Disposal Services of Illinois, Inc. ("ADS"), by and through its attorneys at Clark Hill PLC, and moves the Illinois Pollution Control Board to find that the Defendant County Board of McLean County, Illinois ("County"), had no jurisdiction to decide the siting application of Henson Disposal, Inc. (hereinafter "Applicant" or "Henson Disposal") for a pollution control facility. In addition, since there was no jurisdiction, the siting decision of the County is null and void and should be vacated by the Illinois Pollution Control Board.

INTRODUCTION

There are three (3) categories of failures to obtaining jurisdiction before the County, any one of which is sufficient to vacate the County's decision. All three (3) categories of failures are admitted by the Respondents in the attached Stipulation of Facts. (**Exhibit A**) In addition, all parties admit that there are no other material facts concerning jurisdiction that any party believes will be identified or otherwise disclosed at a hearing. (**Exhibit A, ¶16**).

(1) The Applicant never attempted to serve or send pre-filing notice pursuant to Section 39.2(b) of the Illinois Environmental Protection Act ("Act") to the taxpayer of PIN 21-16-226-004, who is, undisputedly within 250', excluding roadways, of the pollution control facility property (**Exhibit A, ¶¶13-14**);

(2) The pre-filing notice contained an incorrect and misleading description of the rights of persons to comment on the application (**Exhibit A, ¶15**); and

(3) The certified mailings of pre-filing notice to Raymond Fairchild, Kipp Connour, and Nord Enterprises were not attempted to be sent until July 23, 2010, a mere three (3) days prior to the 14th day before filing, and there is no proof of service of the pre-filing notice on Raymond Fairchild, Kipp Connour, Nord Enterprises, all of whom were required by the Act to receive notice (**Exhibit A, ¶¶4-8**); and

Section 39.2(b) of the Illinois Environmental Protection Act sets forth the jurisdictional notice requirements for pre-filing notice of a siting application. (415 ILCS 5/39.2). Section 39.2(b) provides:

(b) No later than 14 days before the date on which the county board or governing body of the municipality receives a request for site approval, the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.

Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located.

Such notice shall state the name and address of the applicant, the location of the proposed site, the nature and size of the development, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted, and a description of the right of persons to comment on such request as hereafter provided.

The notice requirements are jurisdictional prerequisites to the municipal government's power to hear a siting proposal. *Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc.*, 144 Ill. App. 3d 334, 494 N.E.2d 180 (2d Dist. 1986); *Kane County Defenders, Inc. v. PCB*, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2nd Dist. 1985). In this case, the notice requirement is the jurisdictional prerequisite to the County's power to hear the Applicant's siting proposal. The notice requirements of Section 39.2 are to be strictly construed as to timing, and even a one day deviation in the notice requirement renders the county without jurisdiction. *Browning-Ferris Industries of Illinois, Inc. v. IPCB*, 162 Ill. App. 3d 801, 516 N.E.2d 804, 807 (5th Dist. 1987).

Pursuant to 35 IAC §101.500(a), the Illinois Pollution Control Board "may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure." Summary judgment in a case is appropriate "when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no issue as to any material facts and that the moving party is entitled to judgment as a matter of law. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998), *citing*, 735 ILCS 5/2-2005(c). In this case, the parties agree on the relevant, material facts as shown on the attached Stipulated Facts (**Exhibit A**).

(1) The Applicant Failed to Serve a Person Required to be Served with Section 39.2 Notice

The issue of whether or not proper notice to landowners was provided under Section 39.2(b) of the Act is a threshold issue in a pollution control siting appeal to the Board. If proper notice procedures were not followed, then the County lacked jurisdiction to hear the siting appeal. The plain and clear language of Section 39.29(b) requires that all owners as shown on the tax records within 250' of the lot line of the property that is the subject of the siting

application be served either in person or by registered mail, return receipt requested, with pre-filing notice.

The following facts are stipulated by all parties and confirm that jurisdiction did not vest with the County due to the failure to serve the taxpayer of PIN 21-16-226-004.

(a) All parties agree that the taxpayer of PIN 21-16-22-004 was entitled to notice pursuant to Section 39.2(b)(**Exhibit A, ¶5**);

(b) PIN 21-16-226-004 is within 250' of the lot line of the property that is the subject of the subject siting application (**Exhibit A, ¶¶12-13**);

(c) The taxpayer of PIN 21-16-22-004 was not sent or served, in any form, pre-filing notice by Henson Disposal (**Exhibit A, ¶14**).

The failure to attempt service on even one person who is required to be served under Section 39.2 of the Act is fatal and jurisdiction does not vest. For example, in *City of Kankakee v. County of Kankakee, et al.*, PCB 03-125 (August 7, 2003), 2003 Ill. ENV LEXIS 462, *38, a the siting applicant did not send certified mail, registered mail, or attempt to personally serve a single person, Brenda Keller, required to be notice until Section 39.2(b). That failure was fatal to jurisdiction and required that the siting decision of the county be vacated. The Pollution Control Board's decision in *City of Kankakee* was upheld on appeal in *Waste Mgmt. of Ill., Inc. v. Ill. Pollution Control Bd.*, 336 Ill.App. 229, 826 N.E.2d 586 (3rd Dist 2005).

Therefore, due to no notice being sent registered or certified mail, or served by the Applicant to the taxpayer of PIN 21-16-226-004, who all parties agree was required to be notified pursuant to Section 39.2(b), there was no jurisdiction for the County's decision, and the Pollution Control Board should not hesitate to vacate the County's decision.

(2) The 39.2(b) Notice Contained an Incorrect and Misleading Description of Rights or Persons to Comment on the Siting Application

In addition to the failure to serve identified in section (1), above, Henson's Section 39.2(b) notice was also fatally flawed in its wording. The Section 39.2(b) notice is required, among other things, to provide "a description of the right of persons to comment." The Act provides that public comments are to be received by the local government for 30-days following the last date of the public hearing. 415 ILCS 5/39.2(c).

The Henson notice fails to accurately state that public comment period. Indeed, Henson's notice cuts the notice period over 90-days short, providing only that "[p]ersons may submit comments on this application after that date to the County Clerk and should be delivered or post marked no later than 30 days after August 9, 2010." (**Exhibit A, ¶15 & C-63, also attached to Exhibit A**). The application filing date was August 9, 2010 (**Exhibit A, ¶3**) – thus, the notice inaccurately described the public comment period and mislead the public into thinking the time period for commenting expired more than 90-days before it actually did.

In *Kane County Defenders, Inc. v. Pollution Control Bd.*, 139 Ill.App.3d 588, 591, 487 N.E.2d 743 (2nd Dist 1985), the siting applicant filed its site location request with the local government entity on August 11, 1983, but, it was not until August 10, 1983, that it caused a notice to be published in the Daily Courier-News in Elgin. The newspaper notice stated that the site approval request would be submitted to the local government entity "within 14 days," rather than announcing the exact date it would be filed, as is required by the statute. Although the application in the *Kane County Defenders, Inc.* case went through a full public hearing and appeal before the Pollution Control Board, the Illinois Appellate Court did not hesitate to vacate all decisions on the basis that the local government had no jurisdiction due to the applicant's

failure to strictly follow the pre-filing, jurisdictional, notice requirements of Section 39.2(b) and (c).

Moreover, in *Everett Allen, Inc. v. City of Mount Vernon*, PCB 86-34, the siting applicant misstated the time period for public comment both the notices to nearby properties and in the newspaper publication nearly identically to how it was misstated in this case. In *Everett Allen*, the notice read, in relevant part:

The City Council of the City of Mount Vernon shall consider any comment received or postmarked not later than 30 days from the date of receipt of the request in making its final determination. . .

The Pollution Control Board found the *Everett Allen* notice to be a jurisdictional defect, requiring that the local government's decision be vacated on the basis of lack of jurisdiction. Specifically, the Pollution Control Board stated: "the incorrect description published by Everett Allen constitutes a substantial and material failure to state. . . 'a description of the right of persons to comment . . .'" Like the mistake in the notice published by *Everett Allen*, the misstatement of the public comment period in Henson's notice is a substantial and material failure to comply with jurisdictional prerequisites, and requires the decision of the County to be vacated.

(3) The certified mailings of pre-filing notice to Raymond Fairchild, Kipp Connour, and Nord Enterprises were not reasonably attempted to be timely served by Henson

Henson did not attempt any type of service on three persons required to be served pursuant to Section 39.2(b), until Friday, July 23, 2010, a mere three (3) days prior to the 14th day before the filing date of August 9, 2010. First initiating notice three-days prior to the 14-day deadline prior to filing the siting application, without otherwise showing that service was

received prior to that 14th date prior to filing, is insufficient service and fatal to jurisdiction. Henson, by initiating certified mailings a mere 3-days (over a weekend) prior to the 14th day before filing to Raymond Fairchild, Kipp Connour, and Nord Enterprises, failed to reasonably calculate the timely receipt of the notices to those persons. Further, Henson has no proof (or return of the "green cards") for Raymond Fairchild, Kipp Connour, and Nord Enterprises.

The Pollution Control Board has held that Section 39.2(b) notice if sent *via* certified or registered mail, must be sent in a manner reasonably calculated to result in timely receipt. *City of Columbia*, PCB 85-177 (April 3, 1986). Indeed, specifically applicable to the facts in this case, the Pollution Control Board has determined that notices sent three-days prior to the 14-day deadline, as was done in this case, were insufficient to meet the jurisdictional prerequisite of Section 39.2(b). *Leonard Carmichael v. Browning-Ferris Industries of Illinois, Inc., et al*, PCB 93-114 (October 7, 1993), Slip Op. at 6. Therefore, the failure of Henson to initiate sending the certified mail notice to Raymond Fairchild, Kipp Connour, and Nord Enterprises until three-days before the 14-day deadline was unreasonable and defective, and failed to confer jurisdiction on the County. Thus, the Pollution Control Board should vacate the decision of the County as the County lacked jurisdiction.

Dated: April 4, 2014

Respectfully submitted,

AMERICAN DISPOSAL SERVICES, INC.

By: 

One of Its Attorneys

Jennifer J. Sackett Pohlenz
CLARK HILL PLC
150 N Michigan Ave | Suite 2700 | Chicago,
Illinois 60601
312.985.5912 (direct) | 312.985.5971 (fax) |
312.802.7810 (cell)
jpohlenz@clarkhill.com | www.clarkhill.com
Attorney No. 43345

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN DISPOSAL SERVICES OF
ILLINOIS, INC.,

Petitioner,

v.

COUNTY BOARD OF MCLEAN COUNTY,
ILLINOIS, HENSON DISPOSAL, INC., and
TKNTK, LLC,

Respondents.

No. PCB 11-60

(Pollution Control Facility Siting
Application)

STIPULATED FACTS

1. Henson Disposal Inc. received the addresses of the parties entitled to notice from the County of McLean.
2. Henson Disposal Inc. filed an application on April 19, 2010, with the County of McLean, but withdrew that application.
3. Henson Disposal Inc. again filed a siting application on August 9, 2010, with the County of McLean.
4. The fourteenth day prior to August 9, 2010, is July 26, 2010.
5. The following persons were entitled to pre-filing, jurisdictional notice for the Henson Disposal Inc. siting application and either did not receive it or received it after July 26, 2010:
 - a. H01615CP Partnership;
 - b. Bradford Supply Company;
 - c. Representative Sommer;
 - d. Representative Cultra;
 - e. Raymond Fairchild;
 - f. Kipp Connour;
 - g. Nord Enterprises;
 - h. Taxpayer of PIN 21-16-226-004
6. The following persons received the pre-filing, jurisdictional notice to property owners of the siting application after July 26, 2010: H01615CP Partnership; Bradford Supply Company; Representative Sommer; and Representative Cultra.
7. There is no proof of service of the pre-filing, jurisdictional notice to the following taxpayers or elected officials (as applicable) of the siting application: Raymond Fairchild; Kipp Connour; and Nord Enterprises; and Taxpayer of PIN 21-16-226-004.

8. Certified mailings of the pre-filing notice were not attempted to be sent to or served on Raymond Fairchild, Kipp Connour, or Nord Enterprises until July 23, 2010.

9. Deposition Exhibit 6 (attached for convenience) was created on or about March 30, 2011, after the August 9, 2010 siting application filing.

10. No boundary of PINs changed between July 1, 2010 and March 30, 2011.

11. The distance from the Henson Disposal Inc. proposed site property boundaries, as depicted in Exhibit 6, was the same in July 2010.

12. Page 1 of Deposition Exhibit 6 reflects the 250' area from the property boundary of the proposed Henson Disposal Inc. site.

13. PIN 21-16-226-004 is within 250' from the property boundary of the proposed Henson Disposal Inc. site, with roadways excluded in the distance measured.

14. The taxpayer of PIN 21-16-226-004 was not sent or served, in any form, pre-filing notice by Henson Disposal Inc.

15. The pre-filing, jurisdictional notice of the siting application sent by Henson Disposal Inc. was the form shown in the Record on Appeal at C-63 (attached for convenience) and containing the language: "Persons may submit comments on this application after that date to the County Clerk and should be delivered or post marked no later than 30 days after August 9, 2010."


16. There are no other material facts concerning jurisdiction that any party believes will be identified or otherwise disclosed at a hearing in this matter.

17. All documents supporting Henson's pre-filing, jurisdictional notice, are contained in the Record on Appeal, and no party believes there are additional documents or proof to be identified at a later time.


18. The parties stipulate that, inclusive of this Stipulation, the entire record on the issue of pre-filing, jurisdictional notice is before the Pollution Control Board at this time and no material fact is disputed.

The above stated facts are agreed to by all parties in this case.

AMERICAN DISPOSAL SERVICE OF ILLINOIS, INC.

By: 
Jennifer J. Sackett Pohlenz
One of its attorneys
Dated: March 26, 2014

HENSON DISPOSAL, INC.

By: 
Richard Marvel
One of its attorneys
Dated: March 27, 2014

COUNTY BOARD OF MCLEAN
COUNTY, ILLINOIS

TKNTK, INC.

By: _____

Hanna Eisner

First Assistant State's Attorney

Dated: March 29, 2014

By:  _____

Richard Marvel

One of its attorneys

Dated: March 29, 2014

COUNTY BOARD OF MCLEAN
COUNTY, ILLINOIS

TKNTK, INC.

By: 

Hannah Eisner

First Assistant State's Attorney

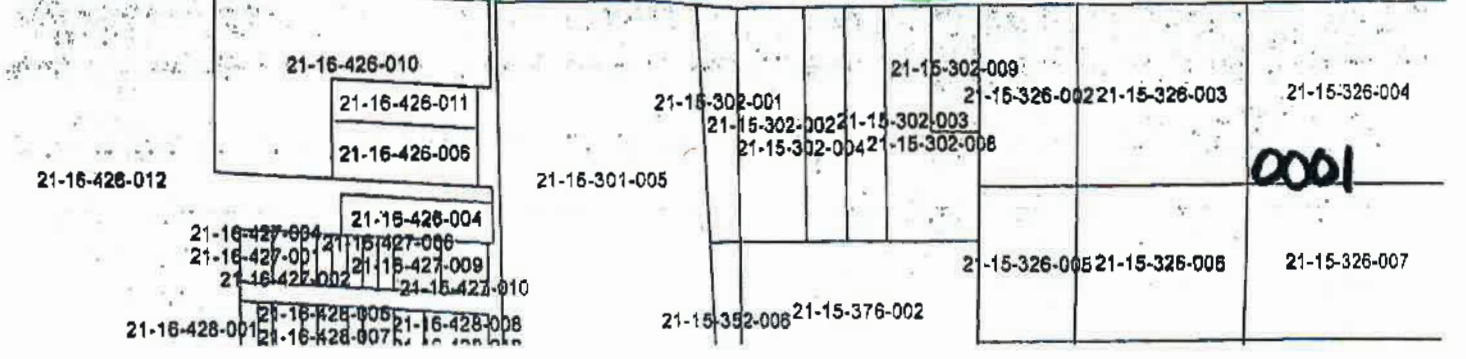
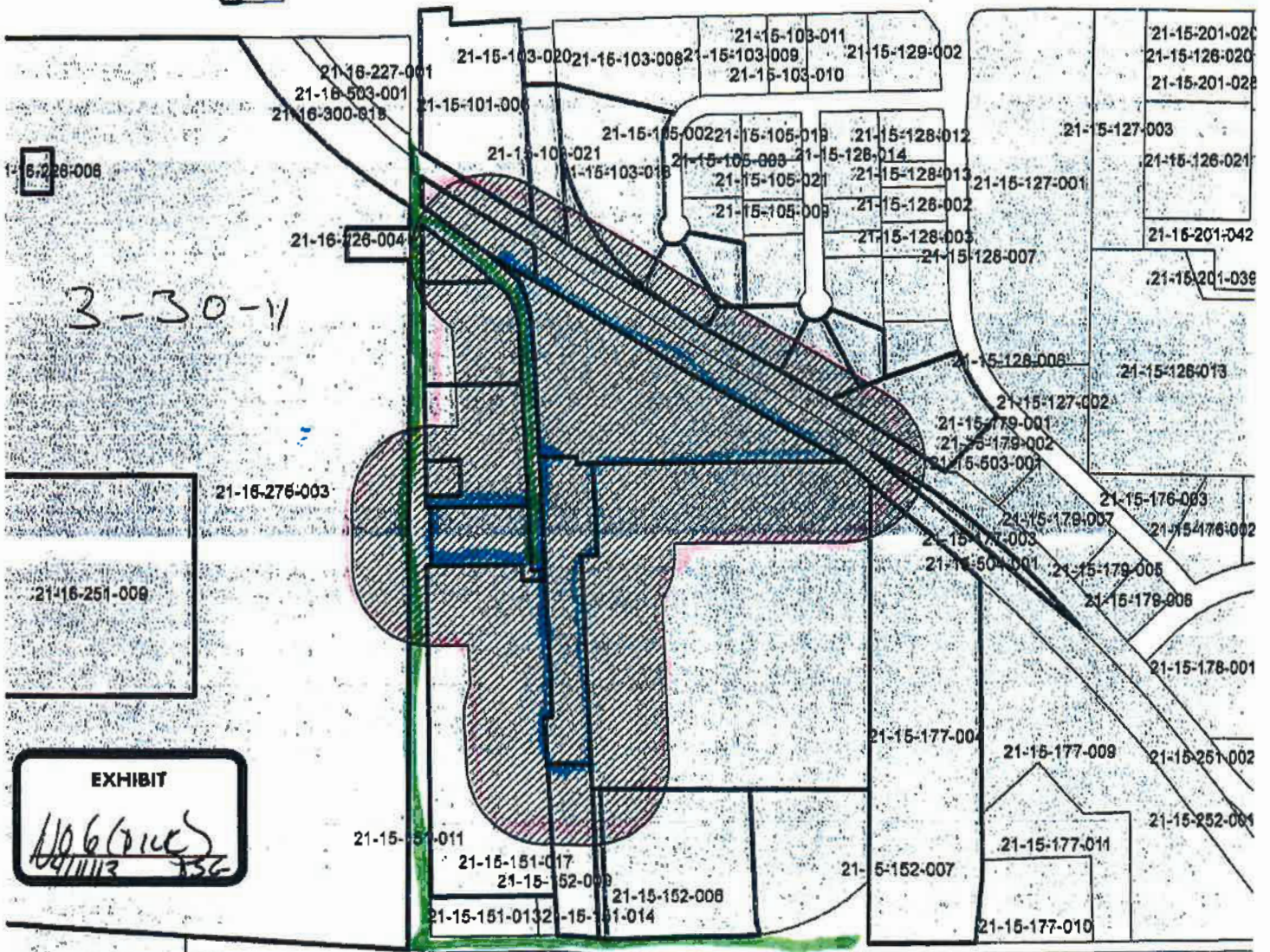
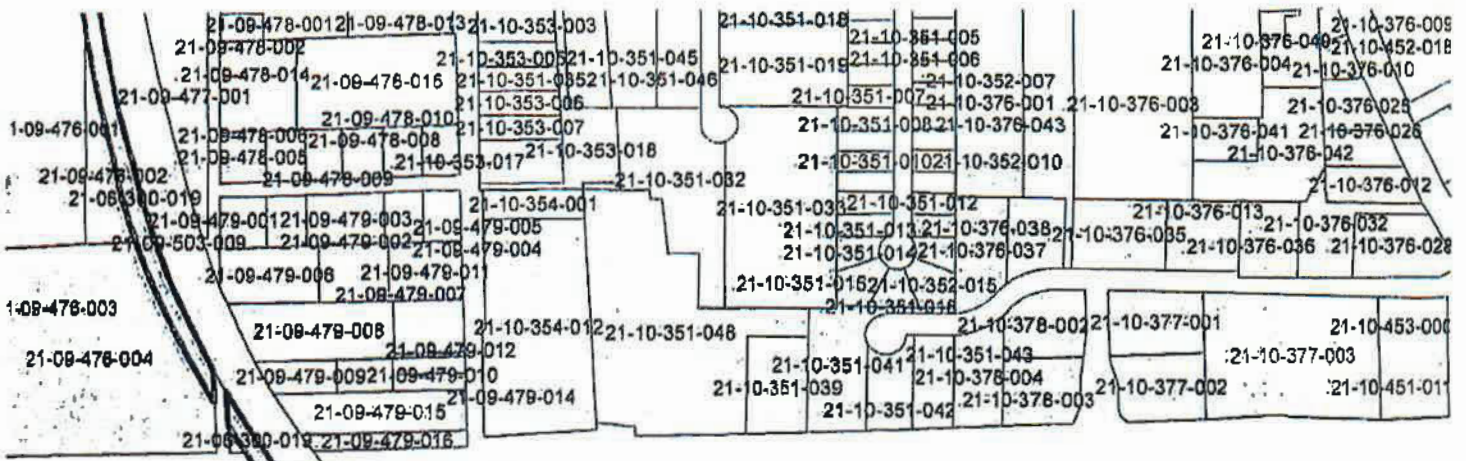
Dated: March 28, 2014

By: _____

Richard Marvel

One of its attorneys

Dated: March __, 2014



Kirk	THOMAS KIRK KIRK C&D RECYCLING INC PO BOX 1058 BLOOMINGTON, IL 61702	THOMAS KIRK KIRK C&D RECYCLING INC PO BOX 1058 BLOOMINGTON, IL 61702
THOMAS KIRK KIRK C&D RECYCLING INC PO BOX 1058 BLOOMINGTON, IL 61702	THOMAS KIRK KIRK C&D RECYCLING INC PO BOX 1058 BLOOMINGTON, IL 61702	THOMAS KIRK KIRK C&D RECYCLING INC PO BOX 1058 BLOOMINGTON, IL 61702
THOMAS KIRK KIRK C&D RECYCLING INC PO BOX 1058 BLOOMINGTON, IL 61702	ATTN: THOMAS E. KIRK TKNTK, LLC 1010 OLD FARM RD BLOOMINGTON, IL 61704	ATTN: THOMAS E. KIRK TKNTK, LLC 1010 OLD FARM RD BLOOMINGTON, IL 61704
ATTN: THOMAS E. KIRK TKNTK, LLC 1010 OLD FARM RD BLOOMINGTON, IL 61704	ATTN: THOMAS E. KIRK TKNTK, LLC 1010 OLD FARM RD BLOOMINGTON, IL 61704	ATTN: THOMAS E. KIRK TKNTK, LLC 1010 OLD FARM RD BLOOMINGTON, IL 61704
ATTN: THOMAS E. KIRK TKNTK, LLC 1010 OLD FARM RD BLOOMINGTON, IL 61704	NORD ENTERPRISES 512 E HAMILTON RD BLOOMINGTON, IL 61704	NORD ENTERPRISES 512 E HAMILTON RD BLOOMINGTON, IL 61704
NORD ENTERPRISES 512 E HAMILTON RD BLOOMINGTON, IL 61704	NORD ENTERPRISES 512 E HAMILTON RD BLOOMINGTON, IL 61704	NORD ENTERPRISES 512 E HAMILTON RD BLOOMINGTON, IL 61704
NORD ENTERPRISES 512 E HAMILTON RD BLOOMINGTON, IL 61704	DAVID CAPODICE 2820 CAPODICE RD BLOOMINGTON, IL 61704	MORGAN & GRIMSHAW ENTERPRISE 11 CURRENCY DR BLOOMINGTON, IL 61704
BRADFORD SUPPLY CO ATTN: JAN WAGY PO BOX 246 ROBINSON, IL 62454	KIPP CONNOUR 1902 BUNN ST BLOOMINGTON, IL 61704	MCLEAN COUNTY TRUSTEE PO BOX 96 EDWARDSVILLE, IL 62025
NORD ENTERPRISES 512 E HAMILTON RD BLOOMINGTON, IL 61704	FIRST NATIONAL BANK 1 TOWNE CTR DANVILLE, IL 61832	TRI LAKES CONS REC CLUB 2100 BUNN ST BLOOMINGTON, IL 61704
¼ MOORE ENTERPRISES JAMES & MARION MOORE TRUSTEES 4425 W Airport Pwy Ste 475 Irving, TX 75062	BCA LLC 14 TIMBER RIDGE DR LEXINGTON, IL 61753	RAYMOND FAIRCHILD 20 CURRENCY DR BLOOMINGTON, IL 61704

CITY OF BLOOMINGTON
109 E OLIVE ST
BLOOMINGTON, IL 61701

ADELINE BERNER
34 HODGEHAVEN CIR
BLOOMINGTON, IL 61704

MCLEAN COMMERCIAL CORP
405 N HERSHEY RD
BLOOMINGTON, IL 61704

% Richard B. Owen Rock Rose Properties,
LLC
1700 Morrissey Dr
Bloomington, IL 61704

RICHARD OWEN
1700 MORRISSEY DR
BLOOMINGTON, IL 61704

WALTER MONTI, SUPERVISOR
BLOOMINGTON TOWNSHIP
3 TIMBERLAKE RD
BLOOMINGTON, IL 61704

CHARLES FITZGERALD, RD. COMM.
BLOOMINGTON TOWNSHIP
8764 N 1375 EAST RD
BLOOMINGTON, IL 61705

Pantagraph Publishing

The Pantagraph
301 WEST WASHINGTON ST. P.O. BOX 2807
BLOOMINGTON, ILLINOIS 61702-2807
PHONE 309-529-9000

MCLEAN CO DEPT OF BLDG &
ZONING
PO BOX 2400
BLOOMINGTON, IL 617022400

Certificate of Publication

ACCOUNT #	1029930	DESCRIPTION	Henson Disposal Recycling Center
AD #	0000980372	SIZE	33.00 li
INVOICE DATE	7/24/2010	TIMES	2
		DATES APPEARED	7/24/2010

Paste Tear Sheet Here

The Pantagraph Publishing Co. hereby certifies that it is now and has been for more than one year continuously, d/b/a The Pantagraph, a daily secular newspaper of general circulation in said County, printed and published in the City, County and State aforesaid, and further certifies that said newspaper has been continuously published at regular intervals of more than once each week with more than a minimum of fifty issues per year for more than one year prior to the first publication of the notice, and further certifies that The Pantagraph is a newspaper as defined by the Statutes of the State of Illinois in such cases made and provided, and further hereby certifies that a notice of which the annexed notice is a true copy, has been regularly published in said paper.

By _____



REC'D

AUG 02 2010

ZONING

NOTICE is given that Henson Disposal, Inc. is submitting a request to McLean County for approval of a new pollution control facility, named Henson Disposal Recycling Center, that will use water transfer station and waste treatment facility of land disposal waste and construction waste demolition materials including wood metal drywall cardboard roof shingles brick block aggregate materials and shingles on seven acres of their 70.4 acre property or parcels 21-16-104003 at 2348 Franklin St. Bloomington, Illinois 61702-2807 and 21-16-104015 at 2014 Bunt St. Bloomington, Illinois, which is part of the RNV-24 of Section 15, Township 23N, Range 2E of the 6th P.M. and is located in Bloomington Township of Bloomington, IL. The proposed life of the proposed facility is fifty years. The request for approval will be submitted to the McLean County Clerk, Room 102, 118 E Washington St., Bloomington, IL on August 3, 2010. Persons may submit comments on this application after that date to the County Clerk and should be delivered or post marked no later than 30 days after August 9, 2010.

C-63