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)

NOTICE OF FILING

TO: Richard T. Marvel Attorney at Law 202 N. Center Street, Suite 2 Bloomington, IL 61701 ***Via U.S. Mail & E-mail (marvelr@me.com)*** *Attorney for Respondents Henson Disposal, Inc. and TKNTK, LLC*	Amy Jackson Rammelkamp Bradney, P.C. 232 West State Street Jacksonville, Illinois 62650 ***Via U.S. Mail & E-mail (ajackson@rblawyers.net)*** *Co-Counsel for Respondents Henson Disposal, Inc. and TKNTK, LLC*
Hannah Eisner McLean County State's Attorney's Office 104 W. Front Street, Rm. 605 Bloomington, IL 61702 ***Via U.S. Mail & E-mail (hannah.eisner@mcleancountyil.gov)***	Hearing Officer Carol Webb Illinois Pollution Control Board 1021 North Grand Avenue East P.O. Box 19274 Springfield, Illinois 62794-9274 ***Via E-mail ONLY (webbc@ipcb.state.il.us)***

PLEASE TAKE NOTICE that on June 13, 2014, we electronically filed with the Illinois Pollution Control Board: **(1)** this *Notice of Filing*; **(2)** the attached *Petitioner American Disposal Services of Illinois, Inc.'s Reply in Support of Its Motion for Summary Judgment Based on Jurisdiction.*

Dated: June 13, 2014

Respectfully submitted,

AMERICAN DISPOSAL SERVICES OF ILLINOIS, INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Rita Burman, a non-attorney, swear or affirm that I served the foregoing ***Petitioner American Disposal Services of Illinois, Inc.'s Reply in Support of Its Motion for Summary Judgment Based on Jurisdiction*** on the parties identified on the first page *via* U.S. Mail and e-mail, as indicated above, from 150 N. Michigan Avenue, Suite 2700, Chicago, Illinois 60601, before 5:30 p.m. on this June 13, 2014.

Under penalties as provided by law pursuant to Illinois Rev. Stat. Chap. 110-, Sec. 1-109, I do certify that the statements set forth herein are true and correct.

Rita Burman

Rita Burman

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 REPLY IN SUPPORT OF ITS 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 as its Reply In Support of Its Motion for Summary Judgment Based On Jurisdiction, states as follows:

INTRODUCTION

The County responds to all three categories of jurisdictional failure raised in the Motion. Respondents TKNTK, Inc. and Henson Disposal, Inc. (collectively referenced as "Respondent Henson" for convenience) respond only to the second, and adopt the County's arguments as respects the remainder. The three failures are:

> **(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

There are no contested facts. Indeed, the Respondents entire argument rests on a request that the Illinois Pollution Control Board change the precedent on pre-filing notice. However, there is no basis for such a change and, certainly, no policy to *lessen* the requirements to notify the public of this type of proceeding. Petitioner's Motion should prevail.

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

Amazingly, the County's response to the Respondent Henson's admitted failure to serve the owner (as determined through authentic tax records) of PIN 21-16-226-004 is that neither the Illinois Pollution Control Board (PCB) nor a court has interpreted the statutory language "within 250 feet." In other words, the County (and by joinder, Respondent Henson) asks the PCB to require an entire footprint of a property to fall within the 250 foot minimum statutory notice area. This is absurd and tortures the plan and ordinary reading of the statute. The statute reads that notice must be given "and on the owners of all property within 250 feet in each direction of the lot line of the subject property. . ." If the legislature wanted to limit notice in such a convoluted manner than an entire parcel of property must be within the 250 foot minimum statutory notice area, the legislature would have specified that constricting language (making notice meaningless in the statute).

Adopting a constrained meaning to the notice provision of Section 39.2 of the Act, as is suggested by Respondents, is contrary to every rule of statutory construction. *See Cassens Transp. Co. v. Indus. Comm'n (Ade), 218 Ill. 2d 519, 524* (Ill. S.Ct. 2006)(in interpreting a statute, the primary goal is to ascertain and give effect to the intent of the legislature; and we must construe the statute so that each word, clause, and sentence is given a reasonable meaning

and not rendered superfluous, avoiding an interpretation that would render any portion of the statute meaningless or void), citations omitted.

Moreover, the Respondents fail to show any findings or analysis in **any** siting decision where notice was ONLY given to properties whose footprint fall completely within the 250 foot minimum statutory notice area. This is **not** an "open question" as argued by the County and Summary Judgment should be granted for Petitioner and 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

The County and Respondent both make arguments in response to this portion of the Motion. However, if the PCB rules in favor of the Petitioner on the first issue in the Motion (failure to serve pre-filing notice on an owner within 250 feet of the facility boundary), the County's decision is vacated. In other words, ruling in favor of any one of the three issues in Petitioner's Motion is sufficient to vacate the County's siting decision.

Indeed, even if the PCB were to rest its decision on this second issue, Respondent Henson again failed to follow the law and the County was without jurisdiction to make its decision. The County's argument in response is that the cases cited by Petitioner are distinguishable. Respondent Henson argues that the McLean County Ordinance (which neither the County nor Respondent Henson followed during any part of the siting proceeding) should be able to "correct" the jurisdictional failure through pre-hearing notice. Both the County and Respondent Henson are wrong.

First the County argues that a "previous version of Sec. 39.2" limited public comment to 30-days after the filing of the application. This is not true. The written comment period in Section 39.2(c) of the Act has never been amended.

Second, the County argues that *Kane County Defenders, Inc. v. Pollution Control Bd.*, 139 Ill.App.3d 588, 591, 487 N.E.2d 743 (2nd Dist 1985), is distinguishable, as it was the "timing, not the content" at issue. This, again, is not correct. In *Kane County Defenders, Inc.*, the issue was the siting applicants incorrect publication of when it filed its siting application with the local government as well as the failure of that applicant to abide by the timing requirement of the Act. In *Kane County Defenders, Inc.*, the deficient 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. The Illinois Appellate Court vacated all decisions in *Kane County Defenders, Inc.* 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).

Third, the County contends that *Everett Allen, Inc. v. City of Mount Vernon*, PCB 86-34, is distinguishable, as both the right to comment and the public hearing dates were misstated in that siting applicant's pre-filing notice. Again, the County is incorrect and surprisingly is arguing, as it has throughout its Response, to limit public participation in the siting process. The PCB clearly held in *Everett Allen, Inc.* that the siting applicant's failure to correctly state the comment period was a jurisdictional flaw. It's simple – the Act states the notice requirement, if a siting applicant materially deviates, there is no jurisdiction. The Act states, among other things, a siting applicant must include in its pre-filing notice "a description of the right of persons to comment on such request as hereafter provided." (415 ILCS 5/39.2(b)). Later in the Act, *i.e.*, "as hereafter provided," the right of persons to comment is defined as:

> Any person may file written comment with the county board or governing body of the municipality concerning the appropriateness of the proposed site for its intended purpose. The county board or

> governing body of the municipality shall consider any comment received or postmarked not later than 30 days after the date of the last public hearing.
>
> 415 ILCS 5/39.2(c)

Thus, just as it was in *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.

Finally, the County and Respondent Henson both call attention to the County's siting ordinance (something neither of them followed during the siting process). The siting ordinance is not an issue here, as the jurisdictional requirements raised in the Motion derive from the Act and cannot be modified by a local government by ordinance. Moreover, the County and Respondent Henson's argument that the publication of notice of the public hearing somehow corrects the jurisdictional flaw and properly notifies people of their write to comment is false. Page C-77 of the record filed and certified by the County contains the notice of public hearing, simply states: "Persons have the right to comment on the request at the public hearing." Indeed, rather than correcting the deficient and public participant-unfriendly notice, (even if that were possible, which it is not), the public hearing notice also misstates the right of the public to comment on the siting application, compounding the failure. Thus, Summary Judgment should be granted in favor of Petitioner and the County's decision 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

In response to the Motion and in support of Respondent Henson's failure to attempt any type of service on three persons (Raymond Fairchild, Kipp Connour, and Nord Enterprises)

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, the County argues that "reasonably attempted" should no longer be the law after *Maggio v Pollution Control Board,* 2014 IL App 130260 (2nd Dist 2014). However, while the Second District Appellate Court disagreed with part of the PCB's reasoning that the purpose of the pre-filing notice was to give surrounding landowners adequate time to comment, the Appellate Court supported and did not overrule or distinguish the prior holdings of the PCB in *Leonard Carmichael v. Browning-Ferris Industries of Illinois, Inc., et al,* PCB 93-114 (October 7, 1993) or *Waste Management, Ill. Pollution Control Bd.,* PCB 89-28.

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) and that ruling remains undisturbed by *Maggio.* 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: June 13, 2014

Respectfully submitted,

AMERICAN DISPOSAL SERVICES OF ILLINOIS, INC.

By:

One of Its Attorneys

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