

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 I1-60

(Pollution Control Facility Siting Application)

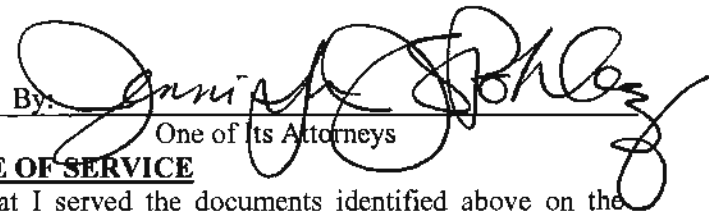
NOTICE OF FILING

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

PLEASE TAKE NOTICE that on June 30, 2014, we electronically filed with the Illinois Pollution Control Board: **(1)** this *Notice of Filing*; **(2)** the attached *PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENTS HENSON DISPOSAL, INC. & TKNTK, LLC'S MOTION TO STAY*.

Dated: June 30, 2014
Jennifer J. Sackett Pohlenz
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Respectfully submitted,
AMERICAN DISPOSAL SERVICES OF ILLINOIS, INC.

By: 
One of Its Attorneys

CERTIFICATE OF SERVICE

I, Rita Burman, a non-attorney, certify¹ that I served the documents identified above on the parties identified above *via* U.S. Mail and e-mail, as indicated above, from 150 N. Michigan Avenue, Suite 2700, Chicago, Illinois 60601, on June 30, 2014, before 5:00 p.m.


Rita Burman

¹ Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the above signed certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the above signed certifies as aforesaid that he verily believes the same to be true.

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 RESPONSE IN OPPOSITION TO
RESPONDENTS HENSON DISPOSAL, INC. & TKNTK, LLC'S MOTION TO STAY**

NOW COMES Plaintiff American Disposal Services of Illinois, Inc. ("ADS"), by and through its attorneys at Clark Hill PLC, and as its Response In Opposition to Respondents Henson Disposal, Inc. and TKNTK, LLC's Motion to Stay, states as follows:

INTRODUCTION

Respondents Henson Disposal, Inc. and TKNTK, LLC (collectively "Henson") argue that a decision on the Petitioner's Motion for Summary Judgment should be stayed by the Pollution Control Board ("Board"), because Henson has filed an "Amended Siting Application" with the County of McLean to expand the size of the site and if HB4606 is signed by the Governor of Illinois and becomes law, siting will not be needed for the facility. Although Henson references factors considered in a motion to stay (Henson Motion ¶ 13), Henson fails to discuss how its motion meets any of those factors. Henson's Motion to Stay should be denied as there is no legal or other basis to excuse Henson from necessary compliance with the Illinois Environmental Protection Act.

ARGUMENT:
THERE IS NO BASIS TO EXCUSE HENSON FROM COMPLIANCE WITH THE ACT

Motions to stay are provided for by Board Rule 101.514 and must contain sufficient information detailing why a stay is needed and a status report detailing the progress of the proceeding. The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." *Sierra Club, et al, v. Midwest Generation*, PCB 13-15, Slip Op. at 31 (April 17, 2014), citing *People v. State Oil Co.*, PCB 97-103 (May 15, 2003), *aff'd sub nom State Oil Co. v. PCB*, 352 Ill. App. 3d 813, 822 N.E.2d 876 (2d Dist. 2004).

When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding. *Id.*, citing *A.E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980); *Environmental Site Developers v. White & Brewer Trucking, Inc.*; *People v. White & Brewer Trucking, Inc.*, PCB 96-180, PCB 97-11, slip op. at 4 (July 10, 1997). The Board may also weigh the prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation. *Id.*, citing *Village of Mapleton v. Cathy's Tap, Inc.*, 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000).

Henson's true reason for the Motion to Stay is that it does not want to have to stop operating a facility that should never have received a permit from Illinois EPA. Of the little evidence Henson actually provided at its local siting hearing in this matter, it testified that it has illegally operated this facility for many years. (Record on Appeal, C-94). It desires to continue

to do so, under the shield of the Board through a Motion to Stay. Petitioners have not found a single case where the Board grants a stay to allow a Respondent to operate under a permit that would otherwise be void if the Board were to make its final decision in the matter – where the Board expressly condones and protects a violation of the Act.

While the Board has granted stays of its orders with respect to the payment of penalties, it has denied motions to stay that would allow respondents to act in non-compliance with the Act. *See, e.g., IEPA v. Pielet Bros. Trading, Inc.*, PCB 80-185 (Feb. 4, 1982) (granting motion for stay of order's provision requiring penalty payment, but denying motion for stay of order's provision requiring respondent to cease and desist from violations), *aff'd sub nom Pielet Bros. Trading, Inc. v. PCB*, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982). Consistent with its precedent, the Board should deny Henson's Motion to Stay.

Reviewing the four factors considered with a motion to stay is likewise consistent with the Board's precedent to deny such a motion in this type of case. First, comity, is the principle that courts give effect to the decisions of a court of another jurisdiction, not as a matter of obligation but as a matter of deference and respect. There is no matter pending in another court which Henson seeks the Board to show deference. The other "pending" matters to which Henson refers are an "Amended Siting Application" that Henson states it filed in April 2014 (Henson Mot. ¶6) in McLean County and HB4606 which has not been signed by the Governor. Neither are sufficient reasons to outweigh the public harm by delaying a decision.

Henson misleads this Board by stating that the only change to this siting application from the current site, is an expansion in the size of the site. Indeed, Henson seeks much more than simply a change in physical boundaries – the new siting application is seeking to change the facility into a municipal solid waste processing and transfer station. (**Exhibit A**). In addition,

Henson misleads this Board into thinking the application is currently pending, when, in fact, the unusual step of “staying” the decision on the application and, apparently with it the public hearing.¹ (**Exhibit B**). As of today, nearly 90-days into the process, no public hearing date has been set. (**Exhibit C**).

Henson made the decision, knowing that this appeal was pending on jurisdictional and other grounds, to proceed with its permitting and operate its facility. Henson then agreed to the set of facts on which this matter will be decided by summary judgment. Henson knows the outcome of the case, if no jurisdiction is found, would be to void its permit with Illinois EPA. But, rather than re-file for siting approval a year or more ago, it decided to do so now and asks the Board to shield it from the consequences of its own actions. The Board should decline to create precedent that shields facilities from compliance with the Act.

The second factor the Board considers with a motion to stay is the prevention of multiplicity, vexation, and harassment. The proposed stay fails to prevent any of those things. Indeed, allowing the stay creates multiplicity by allowing this action to continue and, thus, create confusion as to the true purpose of Henson’s “amended” siting application now pending with McLean County. Public participants came out in large numbers following the siting under review in this matter and during this appeal and the permitting process with Illinois EPA. The same public participants have a right to be involved with a re-siting of the facility and a right to

¹ ADS objects to the “stay” of the local pollution control siting proceedings as (a) neither allowed by nor consistent with the Act; (b) fundamentally unfair; and (c) a violation of all notice requirements that are intended to allow for and notify the public of its opportunity to participate.

clearly know the scope of what is included in that siting – is it a re-siting with a larger scope or is it an “amendment?”²

Likewise, HB4606, even if signed by the Governor, does not create a multiplicity with this action, as Henson, *if* he decides to operate a facility under 415 ILCS 5/22.38 (which HB4606 addresses by removing that type of facility from the definition of a pollution control facility), he would still need to apply for a permit from Illinois EPA. HB4606 is not retroactive and, thus, again Henson is asking this Board to shield him until and if HB4606 becomes law and if he can obtain a new permit under that law. In both circumstances raised by Henson, the “Amended” siting that has been filed and HB4606, Henson is asking the Board to stay this proceeding pending contingency upon contingency, when a clear decision with facts agreed to is waiting for decision by this Board. The Board previously denied a motion to stay while a motion for summary judgment was pending (on which there were no issues of fact, much like in this case) in *C & S Recycling, Inc. v. Illinois EPA*, PCB 91-100 (July 18, 1996).

In *C & S Recycling, Inc.*, the movant transfer station operator was denied an Illinois EPA permit based on failure to meet the Section 22.14 setback and appealed to the Board. The movant-operator then tried to have the setback legislation changed. While the PCB granted the operator’s motion to stay initially, the PCB denied a subsequent motion to stay, because even if the legislation were enacted, the operator would be required to file a new permit application with Illinois EPA. Like in this case, in *C & S Recycling, Inc.*, a decision on the pending motion for summary judgment will not impact the operator’s ability to seek a new permit from Illinois EPA, under any new legislation. Further, unlike *C & S Recycling, Inc.*, the Henson is operating the

² ADS objects to the use of the term “amended” or “amendment” in any of its forms, in the pending siting application by Henson in McLean County as it, among other things, misrepresents the scope and purpose of that siting proceeding.

facility, so a stay would shield Henson from a violation of the Act. In *C & S Recycling, Inc.*, the operator was not operating a municipal solid waste transfer station when he sought the stay – the operator’s permit had been denied by Illinois EPA. Thus, granting Henson’s requested stay would be contrary to the precedent established to-date by the Board.

Moreover, ADS will be prejudiced by the Board staying to protect Henson from the law. ADS has been prejudiced by the unfair and unequal treatment McLean County has given Henson, by irregularities that are and have been allowed at this facility and are not consistent with the law, and will be prejudiced by the Board, if it shields Henson from the law. This is not a situation that ADS created – Henson knew about the jurisdictional issues and agreed to the facts; Henson decided when and how to file an “Amended siting application”; and Henson decided to permit and operate its facility before this appeal was concluded. Any “prejudice” on Henson, was self-inflicted and should not be considered a motivating factor by this Board.

The third factor the Board reviews is the likelihood that Henson obtains complete relief in the foreign jurisdiction. It would be inappropriate for the Board to pre-judge the likelihood of success of an adjudicative siting proceeding, prior to a decision by the County Board. However, even if Henson were successful with its “Amended” siting application pending but allegedly “stayed” in McLean County, it would not obtain “complete relief.” Henson, even with siting approval, would need to complete permitting with Illinois EPA before it would be able to operate. Further, the likelihood is that the “Amended” siting for Henson would also be defeated on appeal due to the numerous issues being created by the County and Henson, at a minimum, as respects fundamental fairness.

Finally, the fourth factor for consideration, is the *res judicata* effect of a foreign judgment in the Board proceeding – and *res judicata* does not apply to these circumstances. Even if the

siting proceeding that Henson initiated was not stayed (to which ADS objects), since it is an “amended” filing, there is legally a question as to whether it seeks siting of the facility currently on appeal to the Board. In addition, even if the siting were granted (which there is no date for doing currently), it would not have *res judicata* effect on the Board’s decision on this matter and Likewise, even if HB4606 were signed by the Governor, by its own terms it would not become effective until January 2015, and is not retroactive. Thus, if any of the contingent circumstances were resolved, such as another siting or HB4606 becoming law, Henson would still need to obtain its permits from the Illinois EPA and address any other legal proceedings resulting from such approval (particularly in the fundamentally unfair manner the County and Henson are proceeding on this application).

Therefore, the four factors cannot be weighed in favor of Henson and Henson’s Motion for Stay should be denied. Further, the Board should maintain its precedent and not stay a matter to shield an operator from a violation of the Act.

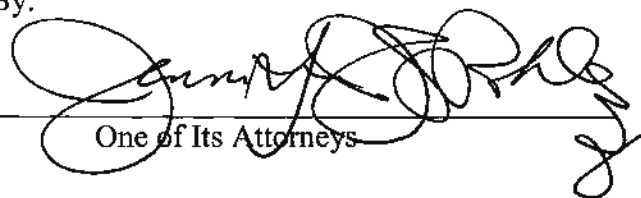
Dated: June 30, 2014

Jennifer J. Sackett Pohlenz
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Respectfully submitted,

**AMERICAN DISPOSAL SERVICES OF
ILLINOIS, INC.**

By:



One of Its Attorneys



Henson Disposal

PO Box 1058
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(309) 275-5021
(309) 829-5021
(309) 829-5741 fax

AMENDED SITE LOCATION APPLICATION

Henson Disposal Recycling Center
McLean County, Illinois

Submitted to:
McLean County Board

Submitted by:
Henson Disposal, Inc.
Owners: Thomas and Timothy Kirk

April 2014

FILED
McLEAN COUNTY, ILLINOIS
APR 03 2014

Kath... Michael
CLERK

EXHIBIT A

The Henson Disposal Recycling Center is a recycle facility for municipal solid waste. The facility is a proposed recycling center for all municipal waste except perishable garbage or food scraps. The types of materials that are currently being recycled and will be recycled include, but are not limited to wood, drywall, cardboard, concrete, brick, block, aggregate materials, shingles, plastic, vinyl siding and bulk waste; construction and demolition debris and landscape wastes. Bulk waste consists of furniture, equipment, machinery, and miscellaneous parts thereof; including auto parts, tires, wheels, mechanical equipment, appliances, furniture and furniture pieces, individual items of construction and demolition wastes, appliances, trash compactors, water heaters, furnaces, carpeting, mattresses, box springs, lawn mowers, conduit pipe, wire, glass and miscellaneous rubble.

The proposed site is located at 2148 Tri Lakes Road in Bloomington, Illinois. This site is near the intersection of Hamilton Road and Bunn Street, accessible from Tri Lakes Road. The property is currently zoned M-2.

The IEPA requires that a *"facility is necessary to accommodate the waste needs of the area it is intended to serve."*¹

The Henson Disposal Recycling Center is necessary to help divert materials that can be reused from going to a landfill. Materials diverted from the landfill will help limit the demand for virgin materials. For example, recycled aggregate material can be used in place of mining new material from a gravel pit.

The more materials diverted from landfills, the longer the life of area landfills, therefore slowing the need for new landfills to open or existing ones to expand. According to the Illinois EPA, the McLean County Landfill will reach its full capacity by the year 2014.² At this time, Allied Waste has not yet applied for a landfill expansion. The Henson Disposal Recycling Center could help prolong the life of the McLean County Landfill by diverting recyclable materials that take up valuable landfill space.

The McLean County landfill accepted 120,460 tons of total waste in 2007, averaging 463 tons per day.³ The Henson Disposal Recycling Center will help improve these numbers by diverting recyclable construction, demolition waste and bulk waste from landfills. Based on the operations of similar recycling centers in Illinois, they recycle approximately 77% of construction and demolition materials processed at their facility.⁴ A 75% recycle rate is also a requirement of the Illinois EPA for pollution control facilities.

The Henson Disposal Recycling Center is a great resource for contractors seeking LEED compliance. The LEED program certifies a building was built "green" meeting energy standards and stewardship of resources.⁵ One way to meet LEED requirements is by recycling construction waste, such as wood, metal, and cardboard generated from the construction. The Henson Disposal Recycling Center makes it easier for contractors to meet LEED standards, which could lead to more green buildings in the County.

The Henson Disposal Recycling Center will continue to be a valuable employer and will continue to create new job positions as the facility grows. The current facility presently employs

MARVEL LAW P.C.

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E-MAIL: Marvelr@me.com

Deborah Moore, Of Counsel

June 9, 2014

Hannah Eisner
City of Bloomington
109 E. Olive Street
Bloomington, IL 61701

RE: *McLean County Site Application.
for Henson Disposal Recycling Center
dated 4/30/14*

FILED
McLEAN COUNTY, ILLINOIS

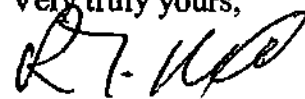
JUN 13 2014

Kathy Michael
COUNTY CLERK

Dear Ms. Eisner:

The applicant, Henson Disposal, Inc. waives the statutory requirement contained in 415 ILCS 5/39.2(e), for the County to decide the pending Siting Application within 180 days from the filing date. Henson also waives the McLean County Ordinance requirement, wherein the County Board is to decide the Siting Application within 180 days as contained in Chapter 33, Section 17.

Very truly yours,



RICHARD T. MARVEL

RTM:ka

EXHIBIT B

Pohlenz, Jennifer Sackett

From: Dick, Philip <Philip.Dick@mcleancountyil.gov>
Sent: Monday, June 30, 2014 12:44 PM
To: Pohlenz, Jennifer Sackett
Cc: Marvel, Richard T. (marvelr@me.com); Eisner, Hannah
Subject: RE: Henson Siting Hearing Date

Ms. Pohlenz:

There has not been a hearing date set.

Sincerely,

Philip Dick, AICP, Director
McLean County Department of Building and Zoning
115 East Washington Street, Room M102
Bloomington, IL 61702-2400
Phone 309-888-5160; cell 309-824-2551
Fax 309-888-5768
Email - philip.dick@mcleancountyil.gov

From: Pohlenz, Jennifer Sackett [<mailto:JPohlenz@ClarkHill.com>]
Sent: Monday, June 30, 2014 12:12 PM
To: Dick, Philip
Cc: Marvel, Richard T. (marvelr@me.com); Eisner, Hannah
Subject: RE: Henson Siting Hearing Date

Has a hearing date been set?

Regards,

Jennifer

Jennifer J. Sackett Pohlenz

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EXHIBIT C