ILLINOIS POLLUTION CONTROL BOARD
August 7, 2014

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.	)	

OPINION AND ORDER OF THE BOARD (by J.D. O'Leary):

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) (2012); 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 to recycle construction and demolition materials at 2148 Tri Lakes Road, 510 East Hamilton Road, and 2014 Bunn Street in Bloomington, McLean County.

On April 4, 2014, ADS filed a motion for summary judgment based on jurisdiction. The Board has received responses from both McLean County and from Henson and TKNTK and has also received ADS's reply in support of its motion. In addition, Henson and TKNTK have moved the Board to stay this proceeding until either McLean County acts on a subsequent application for site approval or the enactment of House Bill 4606, which would amend the definition of "pollution control facility." ADS has responded and opposes the motion to stay. For the reasons stated below, the Board today denies the motion for a stay. After reviewing the factual background and the parties' filings, the Board grants ADS's motion for summary judgment on jurisdiction.

Below, the Board first provides the procedural history before addressing the motion to stay filed by Henson and TKNTK. The Board then summarizes the factual background and states the parties' stipulated facts. Next, the Board summarizes ADS's petition for review, ADS's motion for summary judgment, the responses filed by the County of McLean and by Henson and TKNTK, and ADS's reply. After discussing the issues presented, 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 Henson's application 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, LLC (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 Board's Pollution Control Site Hearing Committee, and its second certificate of the record on appeal.

On April 20, 2011, Henson and TKNTK filed a motion to strike and dismiss. On May 6, 2011, the County Board filed its response. Also on May 6, 2011, ADS filed a response 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's 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. 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 requirement exceed 400 feet, including public streets, alleys and other public ways. (415 ILCS 5/39.2(b) (2012))

The Board also directed Henson to list 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. On June 23, 2011, the Board received ADS's response. On August 24, 2011, ADS filed a motion for leave to file a supplement to its response, accompanied by the supplemental response. In an order dated October 18, 2011, the hearing officer noted that respondents did not object to ADS's motion 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), which made 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 (PC 91) requesting that the Board "deny the permit to operate Henson Disposal's new C&D Recycling facility." On June 1, 2012, the Board received a public comment from David Pittman, Conservation Chair of the Heart of Illinois Group of the Sierra Club (PC 92), which urged the Board to allow operation of Henson's facility.

In an order dated February 16, 2012, the Board denied Henson's and TKNTK's motion to strike and dismiss.

On April 4, 2014, ADS filed a motion for summary judgment (Mot.) based on jurisdiction. Attached to ADS's motion was Exhibit A entitled "Stipulated Facts" (Stip.). On May 13, 2014, the County of McLean filed a response to ADS's motion. (Co. Resp.). On May 27, 2014, Henson and TKNTK filed a response to ADS's motion (Henson Resp.). On June 16, 2014, ADS filed a reply in support of its motion (Reply).

On June 18, 2014, Henson and TKNTK filed a motion to stay proceedings (Mot. Stay). On June 30, 2014, ADS filed its response to the motion (Resp. Stay).

MOTION TO STAY

Summary of Motion

Respondents Henson and TKNTK state that Henson filed an application for siting approval with the McLean County Board on April 3, 2014. Mot. Stay at 2. Henson and TKNTK add that the application seeks approval for operation of a facility at "the same location as involved in the present appeal." *Id.* Henson and TKNTK request that the Board "stay these proceedings pending the McLean County Board's decision" on the April 3, 2014 application. *Id.*, citing 35 Ill. Adm. Code 101.514. Henson and TKNTK argue that approval of the April 3, 2014, application will resolve the issues in the present appeal, although they acknowledge that the County Board's decision may lead one or more of the parties to appeal. Mot. Stay at 3.

Henson and TKNTK list "[t]he traditional standards considered for staying a matter." Mot. Stay at 3. They state that those include

a) Whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits;
b) Whether the applicant will be irreparably injured absent a stay;
c) Whether issuance of the stay will substantially injure the other parties interested in the proceeding; [and]
d) Where the public interest lies. *Id.*

Henson and TKNTK first stated that, based on the nature of the April 3, 2014 application, "the posture of the parties will change following the decision of the County Board." *Id.* at 4. Henson and TKNTK argue that ADS would not suffer injury from granting a stay. They claim that, even if ADS prevails in this matter on the issue of jurisdiction, Henson has already filed the April 3, 2014 application. *Id.* Henson and TKNTK also claim that a stay would "prevent all parties from undertaking unnecessary and costly matters, including additional discovery [and] a full hearing on this matter." *Id.*

Henson and TKNTK state that pending House Bill 4606 would amend the Act to provide that a facility that accepts exclusively general construction or demolition debris and that is operated and located in accordance with Section 22.38 of the Act is not considered a pollution control facility. Mot. Stay at 4; *see* 415 ILCS 5/22.38 (2012) (Facilities accepting exclusively general construction or demolition debris for transfer, storage, or treatment). Henson and TKNTK report that House Bill 4606 has passed both the House of Representatives and the Senate and awaits action by the Governor. *Id.* at 4-5. Henson and TKNTK claim that, if House Bill 4606 is enacted, their facility will no longer need siting under the Act. *Id.* at 5.

Henson and TKNTK conclude by requesting that the Board stay this matter until either the McLean County Board rules on the April 3, 2014 application or, alternatively, the enactment of House Bill 4606. Mot. Stay at 5.

Summary of Response

ADS cites Section 101.514 of the Board's procedural rules, which provides for motions to stay and requires that those motions "must be accompanied by sufficient information detailing why a stay is needed." Resp. Stay at 1, citing 35 Ill. Adm. Code 101.514. ADS argues that, although Henson and TKNTK listed factors considered in determining whether to grant a motion to stay, they failed to discuss how their motion met those factors. Resp. Stay at 1. ADS argues that the Board should deny the motion "as there is no legal or other basis to excuse Henson from necessary compliance with the Illinois Environmental Protection Act." *Id.*

ADS claims that, when deciding a motion for a stay, "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." Resp. Stay at 2 (citations omitted). ADS adds that "[t]he Board may also weigh the prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation." Resp. Stay at 2 (citations omitted).

ADS argues that Henson and TKNTK seek a stay because they do "not want to have to stop operating a facility that should never have received a permit from Illinois EPA." Resp. Stay at 2. ADS claims that Henson testified before the McLean County Pollution Control Site Hearing Committee that "it has illegally operated this facility for many years." *Id.*, citing C-94 (testimony of Thomas Kirk). ADS states that it has found no case in which the Board granted a stay "to allow a Respondent to operate a permit that would otherwise be void if the Board were to make a final decision in the matter." Resp. Stay at 3. ADS cited IEPA v. Pielet Bros Trading,

Inc., PCB 80-185 (Feb. 4, 1982), *aff'd. sub nom* Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982), in which the Board granted a stay of a provision requiring payment of a penalty but denied a stay of a provision requiring the respondent to cease and desist from violations.

Below, the Board addresses ADS's arguments on factors considered in deciding a motion to stay.

Comity. ADS defines comity as "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." Resp. Stay at 3. ADS argues that there is no other matter pending in another court to which Henson and TKNTK ask the Board to defer. *Id*. ADS further argues that neither the April 3, 2014 application nor House Bill 4606 provide "sufficient reasons to outweigh the public harm by delaying a decision." *Id*.

ADS claims that Henson and TKNTK mislead the Board by claiming that the April 3, 2014 application seeks approval of the same facility at the same site as the August 9, 2010 application with only an expansion of its size. Resp. Stay at 3. ADS contends that the April 3, 2014 application seeks to change the facility to a municipal solid waste processing and transfer station. *Id*.; *see* Exh. A at 6. In addition, ADS claims that Henson has waived the decision deadline on the April 3, 2014 application and that the County has not set a hearing date on that application. *Id*.; *see* Exhs. B, C.

ADS argues that Henson and TKNTK proceeded with permitting and operation of the facility "knowing that this appeal was pending on jurisdictional and other grounds." Resp. Stay at 4. ADS further argues that Henson and TKNTK agreed to stipulated facts on which this matter could be decided through summary judgment. *Id*. ADS claims that "Henson knows the outcome of the case, if no jurisdiction is found, would be to void its permit with Illinois EPA." *Id*. ADS argues that Henson and TKNTK opted to file their application on April 3, 2014, rather than an earlier date and now ask "the Board to shield it from the consequences of its own actions." *Id*.

Prevention of multiplicity, vexation, and harassment. ADS first argues that staying this matter will create multiplicity by allowing this proceeding to continue while the April 3, 2014 application is pending. Resp. Stay at 4. ADS further argues that, even if it is enacted, House Bill 4606 would not generate multiplicity with this action. *Id*. at 5. ADS claims that, if Henson and TKNTK choose to operate their facility under House Bill 4606, they would still need to apply for a permit from the Agency. *Id*. ADS further claims that House Bill 4606 is not retroactive. *Id*. at 5. ADS claims that Henson and TKNTK are asking the Board to shield its facility until House Bill 4606 becomes law and the facility can then attempt to obtain a new permit under that law. *Id*. ADS argues that Henson and TKNTK ask "the Board to stay this proceeding pending contingency upon contingency, when a clear decision on the facts is waiting for decision by this Board." *Id*.

ADS cites C & S Recycling Inc. v. IEPA, PCB 95-100 (July 18, 1996) (C & S Recycling), in which the Board denied a motion to stay while a motion for summary judgment

was pending. Resp. Stay at 5. In that case, the Agency denied C & S's application to develop and operate a solid waste management site because the application failed to meet statutory setback requirements. Resp. Stay at 5; *see* C & S Recycling at 2. The Board initially granted two stays to allow C & S Recycling to pursue legislation amending the setback requirement. Addressing a subsequent motion for a stay, the Agency argued that, even if the pending legislation was adopted, C & S "would be required to file a new permit application." Resp. Stay at 5, *see* C & S Recycling at 1. The Board declined to extend the stay "since the pending appeal does not affect petitioner's attempts to pursue a change in the legislature." Resp. Stay at 5; *see* C & S Recycling at 1. The Board then proceeded to grant the Agency's motion for summary judgment and affirm denial of the permit. C & S Recycling at 2-3.

ADS argues that, like C & S Recycling, "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." Resp. Stay at 5. ADS also argues that, unlike C & S Recycling, "Henson is operating the facility, so a stay would shield Henson from a violation of the Act." *Id*. at 5-6. ADS stresses that, because C & S's permit application had been denied, it was not operating when it sought an additional stay. *Id*. at 6. ADS argues that granting the stay requested by Henson and TKNTK "would be contrary to the precedent established to date by the Board." *Id*.

Likelihood respondents will obtain complete relief. ADS argues that, even if McLean County approves the April 3, 2014 application, Henson and TKNTK would not obtain complete relief. Resp. Stay at 6. ADS contends that Henson and TKNTK would still need to complete permitting with the Agency before it could operate. *Id*. ADS also contends that siting approval based on the April 3, 2014 application is subject to appeal. *Id*.

Res judicata**.** ADS argues that *res judicata* does not apply. Resp. Stay at 6. ADS claims that, since the April 3, 2014 application differs from the earlier application, its approval would not have *res judicata* effect on the Board's decision in this matter. *Id*. at 7. In addition, ADS claims that, even if the Governor signs House Bill 4606, it would not become effective until January 2015 and it would not be retroactive. *Id*. ADS adds that, even if the April 3, 2014 application is approved or House Bill 4606 becomes law, Henson and TKNTK would still need to obtain permits from the Agency and address other legal proceedings that may ensue. *Id*.

Summary

ADS argues that Henson and TKNTK recognized jurisdictional issues in this appeal and agreed to stipulated facts. Resp. Stay at 6. ADS further argues that they decided when and how to file the April 3, 2014 application. *Id*. ADS also argues that "Henson decided to permit and operate its facility before this appeal was concluded." *Id*. ADS states that any prejudice claimed by Henson "was self-inflicted and should not be considered a motivating factor by the Board." *Id*. ADS argues that it would be prejudiced by a stay, which would "protect Henson from the law." *Id*.

ADS argues that the four factors considered in determining whether to grant a motion to stay "cannot be weighed in favor of Henson and Henson's Motion for Stay should be denied." Resp. Stay at 7.

Board Discussion

Under Section 101.514(a) of the Board's procedural rules, a motion to stay a proceeding "must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion." 35 Ill. Adm. Code 101.514(a).

The decision whether to grant a motion for stay is "vested in the sound discretion of the Board." *See* 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 granting a stay of 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. *See* A.E. Staley Mfg. Co. v. Swift & Co., 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980); *see also* 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) (applying the Illinois Supreme Court's Staley factors). The Board may also weigh the prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation. *See* Village of Mapleton v. Cathy's Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000).

Comity

Comity is the principle that courts give effect to the decisions of another jurisdiction not as a matter of obligation but as a matter of deference and respect. *See* Environmental Site Developers v. White & Brewer Trucking; People v. White & Brewer Trucking, PCB 96-180, 97-11, slip op. at 4 (July 10, 1997), citing *Black's Law Dictionary*, 6th Ed. (1990). "Where another court has taken jurisdiction over a controversy, a court with jurisdiction over the same controversy as a result of a later-filed suit will generally, as a matter of comity, defer to the first court in ruling on the matter before both courts." White & Brewer Trucking, PCB 96-180, 97-11, slip op. at 4 (July 10, 1997).

As noted above, Henson and TKNTK request that the Board stay this matter until either the McLean County Board rules on the April 3, 2014 application for site approval or, alternatively, the enactment of House Bill 4606. Mot. Stay at 5. ADS suggests that neither justifies deference by the Board. *See* Resp. Stay at 3.

Henson and TKNTK acknowledge that their 2014 application for site approval proposes to expand the size of the facility proposed in their original August 9, 2010 application. Mot. Stay at 3, 4. ADS argues that Henson and TKNTK also propose in their amended application "to change the facility into a municipal solid waste processing and transfer station." Resp. Stay at 2, citing Exhibit A (Amended Site Location Application). In either case, the McLean County Board's decision on the 2014 application will not determine the jurisdictional issues that are the subject of the pending motion for summary judgment in this appeal.

In addition, the Board notes that House Bill 4606 was filed on February 4, 2014, has since passed both houses of the General Assembly, and was sent to the Governor on June 19, 2014. As of this date, however, the Governor has not signed it into law. HB 4606, 98th General Assembly (Ill. 2014), *available at* http://www/ilga.gov/legislation. While the Board recognizes the General Assembly's authority to amend the Environmental Protection Act, enactment of House Bill 4606 also will not determine the jurisdictional issues that are the subject of the pending motion for summary judgment in this appeal.

The Board finds that neither the April 3, 2014 application for site approval nor House Bill 4606 filed on February 4, 2014, addresses the same matter as that before the Board in this appeal. The Board declines to weigh this factor in favor of staying this case.

Prevention of Multiplicity, Vexation, and Harassment

Henson and TKNTK argue that, whether the McLean County Board approves its April 3, 2014 application or not, "staying this proceeding would increase the judicial economy of this matter as well as save the parties the time and expense in pursuing matters which may be moot." Mot. Stay at 3. ADS responds that granting a stay while the April 3, 2014 application is pending before the McLean County Board could generate a multiplicity of actions. Resp. Stay at 4. ADS also argues the enactment of House Bill 4606 would not generate multiplicity with this case, as that legislation would require Henson to obtain a separate Agency permit to operate under Section 22.38 of the Act. *Id.*

The Board is not persuaded that granting a stay would prevent multiple actions, vexation, or harassment. The Board notes Henson's claim that approval of the April 3, 2014 application by the McLean County Board "will resolve the issues present with this particular siting." Mot. Stay at 3. However, the Board does not now know when the County Board will act on that application or whether it will be approved. In addition, Henson recognizes that approval may generate an appeal to the Board. Granting a stay in this case would effectively keep it open indefinitely while the April 3, 2013 application remains pending before the McLean County Board and while any appeal is decided. ADS's motion for summary judgment is ripe for decision by the Board. The Board concludes that this factor does not weigh in favor of granting a stay.

Likelihood of Complete Relief in Foreign Jurisdiction

Again, the Board notes Henson's claim that a decision on its April 3, 2014 application "resolves the pending matter with either decision. *i.e*. this siting is allowed wherein the Petitioner has the right to initiate a new proceeding or the siting is not allowed in which Henson Disposal, Inc. and TKNTK, LLC could appeal that decision or rely upon the present siting." Mot. Stay at 3. While Henson recognizes that the McLean County Board has not decided the April 3, 2014 application and that a decision may very well generate an appeal to the Board, those uncertainties cast doubt on the likelihood of Henson obtaining complete relief from the County Board. In addition, the Board notes ADS's argument that, even if site approval is granted and upheld,

Henson would need to obtain an Agency permit before being able to operate. Resp. Stay at 6. The Board concludes that this factor does not weigh in favor of granting a stay.

Res Judicata Effect of Foreign Judgment

Res judicata is the legal doctrine which states that "once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in a new proceeding." White & Brewer Trucking, PCB 96-180, PCB 97-11, slip op. at 6, citing Burke v. Village of Glenview, 257 Ill.App.3d 63, 69, 628 N.E.2d 465, 469 (1st Dist. 1993). The elements of *res judicata* are "(1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties, or privity between subsequent parties and the original parties." *Id.* at 6, citing People *ex rel.* Burris v. Progressive Land Developers, Inc., 151 Ill.2d 285, 294, 602 N.E.2d 820, 825 (1992). Where the Board finds these elements present, "a judgment in a suit between the parties will be conclusive of all questions" and will "bar relitigation of any such issues." *Id.* at 6, citing Progressive Land Developers, 151 Ill. 2d 285, 294, 602 N.E.2d 820, 825.

The Board cannot conclude that a decision by the County Board on the April 3, 2014 application or action by the Governor on House Bill 4606 could have a *res judicata* effect on the issue raised in the pending motion for summary judgment. The Board found above that neither of these actions addresses the same matter as that before the Board in this appeal. Henson and TKNTK have acknowledged that their 2010 and 2014 applications for site approval differ from one another. In addition, even if the Governor signs House Bill 4606 into law, this enactment is not the equivalent of a court's judgment on the merits. The Board concludes that this factor does not support granting a stay.

Prejudice to the Non-Movant

As noted above, the Board may also weigh the prejudice a stay would cause ADS as the non-moving party against the policy of avoiding duplicative litigation. *See* Village of Mapleton v. Cathy's Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000). ADS claims that it has suffered unspecified prejudice and will be prejudiced if the Board grants a stay. Mot. Stay at 6. ADS has not persuasively argued that it would suffer actual prejudice such as a loss of evidence or potential witnesses if the Board grants a stay.

ADS also appears to dismiss any claim that denying the requested stay would prejudice Henson. ADS argues that any hardship to Henson "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 the Board." *Id*. The Board does not find these arguments persuasive in establishing that ADS would suffer prejudice if a stay is granted.

The Board finds that this factor weighs neither in favor of nor against granting a stay. However, the Board has found that none of the four factors discussed above weighs in favor of granting a stay. Accordingly, the Board finds that a stay is not warranted and denies the motion

for a stay. The Board proceeds below to review the factual background and the parties' filings before deciding ADS's motion for summary judgment.

ABBREVIATED FACTUAL BACKGROUND

Ownership of Applicant for Site Approval

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 Recycling 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) (2012). 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 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) (2012).

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) (2012).

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.

Notice of 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) (2012); *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.

Hearing Testimony

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 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's 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 (2012)); and a third proposing 22 conditions for the county board to consider if it approves Henson's application (C-139 - C-142).

Decision

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 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 McLean County Pollution Control Site Hearing Committee recommended approval of Henson's application for site approval, provided compliance with a number of stipulations. 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, the Pollution Control Site Hearing Committee presented an Agency form 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

[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.

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).

PARTIES' JOINT STIPULATION OF FACTS

Attached to ADS's motion for summary judgment was Exhibit A, stipulated facts, which "are agreed to by all parties in this case." Exhibit A at 2. The parties have stipulated as follows:

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, 2014:

   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; 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 . . . 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 . . . 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. Exhibit A.

SUMMARY OF 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 contested 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 described itself as "a company that does business in McLean." Pet. at 2. ADS stated that it "attended the public hearing and decision in the subject local siting review." *Id*. ADS further stated 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 added that, through its attorney, it "timely filed written comments concerning or relating to the subject application with McLean." Pet. at 1.

ADS appealed on various grounds. First, ADS claimed 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) (2012). ADS argued 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) (2012) (listing criteria (i) - (ix)). ADS claimed 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 claimed 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 claimed 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's petition requested 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.

SUMMARY OF MOTION FOR SUMMARY JUDGMENT

ADS moves that the Board find the County Board lacked jurisdiction to decide Henson's request for site approval. Mot. at 1. ADS claims that, because there was no jurisdiction, the County Board's approval of the site "is null and void and should be vacated by the Illinois Pollution Control Board." *Id.*

ADS states that Section 39.2(b) of the Act establishes requirements for filing notice of a siting application. Mot. at 2, citing 415 ILCS 5/39.2(b) (2012). ADS argues that meeting these notice requirements is the jurisdictional prerequisite for the County Board's authority to consider the Applicant's siting proposal." Mot. at 3 (citations omitted). ADS claims that these requirements "are to be strictly construed as to timing, and even a one day deviation on the notice requirements renders the county without jurisdiction." *Id.*, citing Browning-Ferris Indus. V. PCB, 162 Ill. App. 3d 801, 516 N.E.2d 804, 807 (5th Dist. 1987).

ADS claims that this application presents three distinct ways in which the County Board failed to acquire jurisdiction over Henson's application. Mot. at 1. ADS further claims that each of these failures "is sufficient to vacate the County's decision." *Id.* ADS emphasizes that the parties have agreed upon and stipulated to the relevant facts. Mot. at 3, citing Stip. ADS argues that the respondents have admitted each of these failures to obtain jurisdiction in the stipulated facts. Mot. at 1. ADS adds that all parties agree that "[t]here are no other material facts concerning jurisdiction that any party believes will be identified or otherwise disclosed at a hearing in this matter." Stip. at 2 (¶16).

Service Upon Required Person

ADS alleges that whether an applicant served notice upon nearby landowners as required by Section 39.2(b) of the Act is a threshold issue. Mot. at 3. ADS claims that "Section 39.2(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. *Id.* at 3-4, citing 415 ILCS 5/39.2(b) (2012).

ADS states that the parties have all stipulated that the taxpayer of PIN 21-16-22-004 was "entitled to pre-filing, jurisdictional notice for the Henson Disposal Inc. siting application." Mot. at 4; citing Stip. at 1 (¶5). ADS further states that the parties have all stipulated that "PIN 21-16-226-004 is within 250' of the lot line of the property that is subject of the subject siting application." Mot. at 4, citing Stip. at 2 (¶¶12, 13). ADS adds that the parties have all stipulated that "[t]he taxpayer of PIN 21-16-22-004 was not sent or served, in any form, pre-filing notice by Henson Disposal." Mot. at 4, citing Stip. at 2 (¶14). On the basis of these stipulated facts, ADS concludes that "jurisdiction did not vest with the County due to the failure to serve the taxpayer of PIN 21-16-226-004." Mot. at 4.

Petitioner claims that "[t]he 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." Mot. at 4, citing City of Kankakee v. County of Kankakee, *et al.*, PCB 03-125 (Aug. 7, 2003). ADS states that, in that case, the siting applicant failed to provide notice to a single person who was required to be notified under Section 39.2(b). Mot. at 4. The Board determined that this "failure was fatal to jurisdiction and required that the siting decision of the county be vacated." *Id.* ADS notes that this determination was upheld on appeal. *Id.*, citing Waste Mgmt. of Ill. Inc. v. PCB, 336 Ill.App. 229, 826 N.E. 2d 586 (3rd Dist. 2005).

ADS argues that all parties agree that the taxpayer of PIN 21-16-22-004 was required to be notified and that no notice was sent to that taxpayer through registered or certified mail or by personal service. Mot. at 4. ADS claims that "there was no jurisdiction for the County's decision, and the Pollution Control Board should not hesitate to vacate the County's decision." *Id.*

Notice of Right to Comment

ADS states that Section 39.2(b) requires notice must provide "a description of the right of persons to comment." Mot. at 5, citing 415 ILCS 5/39.2(b) (2012). ADS adds that "[t]he Act provides that public comments are to be received by the local government for 30 days following the last date of the public hearing." Mot. at 5, citing 415 ILCS 5/39.2(c) (2012).

ADS claims that the notice provided by Henson inaccurately describes the comment period. Mot. at 5. ADS cites the notice, which states that comments on the application "should be delivered or postmarked no later than 30 days after August 9, 2010." *Id.*, citing R-63; Stip. at 2 (¶15). ADS argues that this notice "mislead the public into thinking the time period for commenting expired more than 90 days before it actually did." Mot. at 5

Petitioners cite to Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588, 591, 487 N.E.2d 743 (2nd Dist. 1985), in which notice stated that an application would be filed "within 14 days" instead of providing a precise filing date as required by the Act. Mot. at 5; *see* 415 ILCS 5/39.2(b) (2012). ADS states that, on appeal from the Board, the 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." Mot. at 5-6 , citing 415 ILCS 5.39.2(b), (c) (2012).

ADS also cites Everett Allen, Inc. v. City of Mount Vernon, PCB 86-34, slip. op. at 6 (July 11, 1986), in which the applicant misstated the time for public comment in both notices to nearby property owners and in newspaper publication. Mot. at 6. ADS states that the notice in that case provided in pertinent part that the city council "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. . . ." *Id.* ADS claims that the Board found that notice "to be a jurisdictional defect, requiring that the local government's decision be vacated on the basis of lack of jurisdiction." *Id.* ADS argues that misstatement of the comment period in Henson's published notice also is "a substantial and material failure to comply with jurisdictional prerequisites, and requires the decision of the County to be vacated." *Id.*

Timely Service

ADS claims that Henson attempted service on Raymond Fairchild, Kipp Connour, and Nord Enterprises, three persons required to be served with notice of the application, only three days prior to the 14th day before the filing date of August 9, 2010. Mot. at 6, citing 415 ILCS 5.39.2(b) (2012). ADS argues that initiating service on those three persons at that time "without otherwise showing that service was received prior to that 14th date prior to filing, is insufficient service and fatal to jurisdiction." Mot. at 7. ADS further argues that Henson failed to account for timely receipt of notices by those persons and has no proof of service upon them. *Id.*

ADS cites City of Columbia, *et al.* v. County of St. Clair and Browning-Ferris Indus., PCB 85-177 (Apr. 3, 1986), stating that the Board 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." Mot. at 7. ADS also cites Leonard Carmichael v. Browning-Ferris Indus., *et al*., PCB 93-114, slip op. at 6 (Oct. 7, 1993), in which the Board determined that notices sent three-days prior to the 14-day deadline were insufficient to meet the jurisdictional prerequisite of Section 39.2(b). Mot. at 7. ADS argues that "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. *Id.* ADS concludes that the Board "should vacate the decision of the County as the County lacked jurisdiction." *Id.*

SUMMARY OF COUNTY'S RESPONSE

The County argues that the parties' stipulated facts concerning jurisdiction do not require the Board to find as a matter of law that the County Board lacked jurisdiction to consider Henson's application.

Service Upon Required Persons

The County acknowledges that the Board and courts "have strictly construed the notice requirements of Section 39.2." Co. Resp. at 2. However, the County emphasizes the location of PIN 21-16-2-004, the parcel at issue, and suggests that this strict construction is not appropriate in this case. *Id.* The County argues that only "a very small part of that parcel lies within the 250 [feet] of the proposed facility." *Id.* at 3. The County states that it has found no cases in which the Board or the courts have construed the meaning of the phrase "within 250 feet." *Id.* The County adds that the Act "is silent as to whether the entire parcel or just a portion of the property must lie within the 250 feet boundary to be entitled to preapplication notice. *Id.* The County states that the Board "is charged with adjudicating the Act in accordance with Appellate and Supreme Court decisions construing the statute." *Id.*, citing Maggio v. County of Winnebago, *et al.*, PCB 13-10. Arguing that the question remains open, the County does not believe the Board should rule without a more definitive interpretation that the County lacked jurisdiction as a matter of law. *Id.*

Notice of Right to Comment

The County notes that ADS cited two cases in support of its argument that Henson's notice of the right to comment on the application was so deficient as to divest the County of jurisdiction. Co. Resp. at 3. The County seeks to distinguish those cases from the present appeal. *Id*. The County first asserts that Kane County Defenders was decided under an earlier version of the Act and addressed the timing rather than the content of the preapplication notice. *Id*. at 3-4. The County asserts that "[t]here is no question being raised with respect to the timing of the publication in this case." *Id*.

While the County acknowledges that Everett Allen addresses the content of the notice, it claims that it is significantly different than the notice in this case. Co. Resp. at 4. The County claims the Board found that the notices in that case made misstatements regarding both the comment period and the hearing date. *Id*. The County asserts that the Board did not hold that any defect in notice would defeat jurisdiction. *Id*. The County claims that only a "substantial and material failure" to describe the right to comment would lead to that result. *Id*. Although the County acknowledges that it did not accurately state the right to comment, it claims that any inaccuracy or incompleteness was not substantial or material. *Id*. at 5.

The County challenges ADS's argument that Henson's notice eliminated 90 days from the comment period. Co. Resp. at 5. The County notes that the Act establishes the comment period. *Id*. The County argues that, while Henson's notice may have caused a misunderstanding of the right to comment, it could not limit the period or interfere with the right to comment. *Id*.

The County also argues that McLean County's Pollution Control Facilities ordinance "requires publication of the notice of hearing once per week for three successive weeks prior to the hearing and at least once during the week preceding the hearing." Co. Resp. at 5, citing Exhibit B at 4 (McLean County Revised Code Chapter 33.13(c) Public Hearing Procedures). The County argues that both pre-application notice and notice of hearing have the same purpose of reminding them that there is an application pending and allowing them to participate. *Id*. at 5-6. The County claims that the longer publication period required by the ordinance for the notice of hearing mitigated the importance of the mistake in the preapplication publication. *Id*. at 6. The County argues that "the Board should find that the notice was not so deficient as to deprive the County of jurisdiction." *Id*.

Timely Service

The County notes that, in the Maggio case, the Board had applied a "reasonable time to ensure delivery rule" to determine whether pre-application notice requirements had been met. Co. Resp. at 6-7, citing Maggio v. PCB, 2014 IL App (2d) 130260. The County states that the Board found that mailing notices seven days prior to the 14-day deadline was reasonably calculated to ensure delivery by the deadline. *Id*. at 7. However, the County claims that, because the Board had found jurisdiction on the basis of both the plain meaning of the Act and the "reasonable time" rule, the Appellate Court did not rule on which was the proper interpretation. *Id*.

The County argues that the statutory notice requirements are now open to two different interpretations. Co. Resp. at 7. The County claims that one relies on the plain language and looks only to delivery, without regard to receipt. *Id*. The County then claims that the other still reads some requirement for receipt into the statute. *Id*. The County asserts that, under the first interpretation, the mailing of the preapplication notices satisfied the jurisdictional requirement because they were mailed by certified mail, return receipt requested, before the 14-day deadline. *Id*. at 7-8. The County does not agree that the mailing was not done within a time to reasonably insure delivery. *Id*. at 8. However, the County "believes that the Board can properly interpret the statute [] considering only the delivery without regard to receipt and in so doing find that McLean County properly obtained jurisdiction as a matter of law." *Id*. The County concludes that the availability of two interpretations "precludes the Board from ruling that the notices did not meet jurisdictional requirements as a matter of law." *Id*.

SUMMARY OF HENSON'S AND TKNTK'S RESPONSE

In their response, Henson and TKNTK move "to adopt the Response to Petitioner's Motion for Summary Judgment based on jurisdiction filed by the County of McLean." Henson Resp. at 1.

In addition, Henson and TKNTK claim that the description of the public's right to comment in the pre-filing notice was not fatally flawed and did not cause the notice to be ineffective. Henson Resp. at 1. Henson and TKNTK state that "the Board can take the County local rules into consideration." *Id*., citing Waste Mgmt. of Ill. V. PCB, 175 Ill. App. 3d 1023 (2nd Dist. 1988). Henson and TKNTK argue that the McLean County ordinance requires additional notice fourteen days prior to the public hearing, provides directions for written comments, and also addresses procedures for public hearing. Henson Resp. at 1-2; *see* Co. Resp. Exhibit B at 4-6 (McLean County Revised Code Chapter 33.13 Public Hearing Procedures). Henson and TKNTK argue that the McLean County ordinance expands upon the statutory notice requirements. Henson Resp. at 2. Henson and TKNTK argue that their notices properly complied with the statute's purpose of informing parties of their rights. *Id*. Henson and TKNTK argue that, since their pre-filing notice reflected this intent, "jurisdiction vested to the County to make the Siting decision." *Id*.

SUMMARY OF REPLY

ADS claims that respondents' entire argument effectively requests that the Board "change the precedent on pre-filing notice." Reply at 2. ADS argues that "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." *Id*.

Service Upon Required Person

ADS expresses amazement at respondents' argument that neither the Board nor a court has interpreted the statutory language requiring service of notice "on all owners of all property within 250 feet in each direction of the lot line of the subject property." Reply at 2; *see* 415 ILCS 5/39.2(b) (2012). ADS stresses that Henson has acknwowledge failing to serve notice

upon the owner of PIN 21-16-226-004, which is within 250 feet from the property boundary of the proposed Henson site, with roadways excluded in the distance measured. Reply at 1; citing Stip. at 2 (¶¶13, 14). ADS notes the County's argument, joined by Henson and TKNTK, that notice is required by Section 39.2 only to owners of property falling entirely within the 250-foot distance. *See* Reply at 2; 415 ICLS 5/39.2(b) (2012). ADS argues that this argument "is absurd and tortures the plain and ordinary meaning of the statute." Reply at 2. ADS contends that, if the legislature had intended to limit notice as the respondents suggest, the legislature would have adopted that limiting language. *Id*., citing Cassens Transp. Co. v. Indus. Comm'n *et al*., 218 Ill. 2d 519, 524 (Ill. 2006). Finally, ADS argues that respondents fail "to show any findings or analysis in any siting decision where notice was ONLY given to properties whose footprint fall completely with the 250 foot minimum statutory notice area." Reply at 3 (emphasis in original). ADS argues that "[t]his is not an open question, as argued by the County." *Id*. (emphasis in original). ADS concludes that the Board should grant the motion for summary judgment and vacate the County's decision. *Id*.

Notice of Right to Comment

ADS first states that, if the Board rules in ADS's favor on the issue of service upon the owner of PIN 21-16-226-004, the effect will be to vacate the County's decision. Reply at 3. ADS argues that the respondents also failed to follow the requirements of the Act regarding notice of the right to comment and that this failure left the County Board without jurisdiction to make a decision on Henson's application. *Id*.

ADS notes the County's argument that cases cited by ADS are distinguishable from this case. Reply at 3. ADS also notes Henson's argument that the McLean County ordinance "should be able to 'correct' the jurisdictional failure through pre-hearing notice." *Id*. ADS discounts both arguments.

ADS first responds to the County's claim that a previous version of Section 39.2(c) "limited public comment to 30-days after the filing of the application." Reply at 3. ADS states that "[t]his is not true." *Id*. ADS elaborates that "[t]he written comment period in Section 39.2(c) of the Act has never been amended." *Id*.

Second, ADS responds to the County's argument that Kane County Defenders is distinguishable from the present case because the timing of the notice and not its content was the issue. Reply at 4. ADS states that, in Kane County Defenders, "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 the applicant to abide by the timing requirements of the Act." *Id*. (emphasis in original). ADS claims that the newspaper notice in that case was insufficient because it did not specify the exact filing date. *Id*. ADS notes that the Appellate Court vacated all decisions in that case because the applicant failed strictly to follow the pre-filing, jurisdictional notice requirements of the statute. *Id*.

Third, ADS replies to the County's argument that Everett Allen is also distinguishable. ADS claims that the Board clearly held in that case that the siting applicant's failure to correctly state the comment period was a jurisdictional flaw. Reply at 4. ADS states that the notice

requirement of the Act is clear and that there is no jurisdiction if the applicant materially deviates from it. *Id*. ADS claims that, as 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. *Id*. at 5.

Finally, ADS rejects the respondents' argument that the County's siting ordinance corrects any jurisdictional flaw. *Id*. ADS argues that notice requirements stem from the Act and cannot be modified by an ordinance. *Id*. Also, ADS states that Henson's notice, stating that "persons have the right to comment on the request at the public hearing", misstated the right of the public to comment on the siting application. *Id*., citing C-77 (County Notice). ADS concludes that its summary judgment should be granted and the County's decision vacated. Reply at 5.

Timely Service

ADS notes that three person entitled to service were not attempted to be served until three days before the 14th day before the filing date of August 9, 2010. ADS responds to respondents' argument that timely service is no longer required under Maggio. Reply at 6. ADS acknowledges that the Appellate Court disagreed with the Board's reasoning that the purpose of the pre-filing notice was to give surrounding landowners adequate time to comment. *Id*. However, ADS notes that the Appellate Court "supported and did not overrule or distinguish" prior Board holdings. *Id*. (citations omitted).

ADS emphasizes that the Board has determined that notices sent three days before the 14-day deadline were insufficient to meet jurisdictional prerequisites. Reply at 6. ADS argues that Maggio did not disturb this determination. *Id*. ADS claims that mailing notice to three property owners only three days before the 14-day deadline "was unreasonable and defective, and failed to confer jurisdiction on the County." *Id*.

LEGAL BACKGROUND

Statutory Authority

Section 39.2(b) of the Illinois Environmental Protection Act sets forth requirements for pre-filing notice of a siting application and provides in its entirety that,

> [n]o 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 all 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. 415 ILCS 5/39.2(b) (2012).

Standard of Review

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

DISCUSSION

The parties have stipulated that "[a]ll 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." Stip. at 2 (¶17). The parties have also stipulated that "[t]here are no other material facts concerning jurisdiction that any party believes will be identified or otherwise disclosed at a hearing in this matter." *Id.* (¶16). In addition, "[t]he parties stipulate that, inclusive of this Stipulation, the entire record on the issue of pre-filing, jurisdictional notice is before the Board at this time and no material fact is disputed." *Id.* (¶18). The Board has reviewed the administrative record and the parties' filings, particularly the stipulated facts regarding jurisdiction. The Board concludes that there are no issues of material fact and that summary judgment is appropriate.

Whether the applicant provided proper notice to all landowners required to receive it under Section 39.2(b) of the Act is a threshold question in the appeal of pollution control facility siting. *See* 415 ILCS 5/39.2(b) (2012). "Section 39.2(b)'s notice requirements are jurisdictional prerequisites that the applicant must follow in order to vest the county board with the power to hear a landfill proposal." Maggio v. PCB, 2014 IL App (2d) 130260 (¶15), 9 N.E.3d 80 (2nd Dist. 2014), citing Kane Co. Defenders v. PCB, 139 Ill. App. 3d 588, 593 (1985). "The failure of notice is a jurisdictional issue; the county board does not have jurisdiction if all landowners have not been given notice according to the statute." Waste Management of Illinois v. PCB, 356 Ill. App. 3d 229, 234, 826 N.E.2d 586, 591 (3rd Dist. 2005) (citations omitted).

The basic principle in construing Section 39.2(b) "is to ascertain and give effect to the legislature's intent. The language of the statute is the most reliable indicator of the legislature's objectives in enacting a particular law." Town & Country Utilities, Inc. v. PCB, 225 Ill.2d 103, 117, 866 N.E.2d 227, 235 (2007). The role assigned by the Act to the county board "clearly reflects a legislative understanding that the county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the landfill site approval process." Kane County Defenders v. PCB, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2nd Dist. 1985). Section 39.2(b) provides that, "[n]o later than 14 days before the date on which the county board . . . 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 all owners of all property within 250 feet in each direction of the lot line of the subject property*. 415 ILCS 39.2(b) (2012) (emphasis added). The Board views this requirement as a clear legislative determination that particular property owners have such a significant interest in the site approval process that the interest warrants individual notice of the application at the critically important stage.

The Board notes the parties' stipulation that the taxpayer of PIN 21-176-226-004 was "entitled to pre-filing, jurisdictional notice for the Henson Disposal Inc. siting application. . . ." Stip. at 1 (¶5). The parties' stipulation also states that "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." *Id*. at 2 (¶13). The parties have also stipulated that "[t]he taxpayer of PIN 21-16-226-004 was not sent or served, in any form, pre-filing notice by Henson Disposal, Inc." *Id*. (¶14).

The County argues that only "a very small part" of PIN 21-16-22-004 lies within the statutory 250-foot radius of Henson's proposed facility. Co. Resp. at 3. The County claims that this unique location warrants a more liberal construction of the notice requirements of Section 39.2(b). *Id*. at 2. The County argues that the Act "is silent as to whether the entire parcel or just a portion of the property must lie within 250 [feet] to be entitled to preapplication notice. *Id*. at 3. The County suggests that, in the absence of an appellate decision resolving this issue, the Board "should not rule that the County lacks jurisdiction as a matter of law." *Id*.

The Board is not persuaded by the County's argument. The plain language of Section 39.2(b) provides that an applicant shall provide notice of its application for site approval to all property owners within 250 feet in each direction of the boundary of the proposed facility. By

arguing that this requirement applies only to property entirely within this 250-foot radius, the County effectively asks the Board to "depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." Town & Country Utilities, Inc. v. PCB, 225 Ill.2d 103, 117, 866 N.E.2d 227, 235 (2007), citing Alternate Fuels, Inc. v. Director of IEPA, 215 Ill. 2d 219, 238, 830 N.E.2d 444 (2004). The Board cannot conclude that the General Assembly intended to restrict individual notice of the application for site approval as argued by the County. In addition, the County has cited no caselaw or other authority in support of its position that the requirement applies only to property entirely within the statutory 250-foot radius. *See* Co. Resp. at 2-3.

The parties have stipulated that the taxpayer of PIN 21-16-226-004 was entitled to prefiling notice of Henson's application for site approval and that Henson did not serve it with that notice in any form. Stip. at 1, 2 (¶¶5, 14). Henson's failure to serve notice of its application on the taxpayer of PIN 21-16-226-004 did not meet the clear requirements of Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (2012). Because Henson failed to meet this requirement, the Board finds that the County lacked jurisdiction to review Henson's application for site approval. The Board found above that there is no genuine issue of material fact and finds also that ADS is entitled to judgment as a matter of law. Accordingly, the Board grants ADS's motion for summary judgment on jurisdiction.

Having determined that the McLean County Board lacked jurisdiction to review Henson's application, the Board vacates the County Board's determination to approve that application. Having found on the basis of Henson's failure to provide pre-filing notice that the County Board lacked jurisdiction to consider Henson's application, the Board need not address the other issues raised in the motion for summary judgment.

CONCLUSION

The Board first denies the motion to stay filed by Henson and TKNTK. After examining the record and the arguments presented by the parties, the Board finds that Henson failed to provide required notice of its application for site approval to the taxpayer of PIN 21-16-226-004 as required by Section 39.2(b) of the Act. Accordingly, the Board finds that the McLean County Board lacked jurisdiction to consider that application. Accordingly, the Board grants ADS's motion for summary judgment on jurisdiction. The Board thus vacates the decision of the County Board to approve Henson's application. Having found that the County Board lacked jurisdiction on this basis, the Board need not address the remaining issues raised by the motion for summary judgment.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board denies the motion to stay filed by Henson and TKNTK.

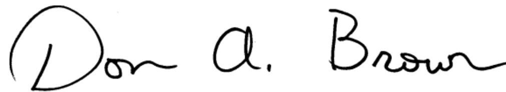
2. The Board grants ADS's motion for summary judgment on jurisdiction.

3. The Board vacates the McLean County Board's February 15, 2011 decision granting an application filed by Henson for approval of the site of a waste treatment and waste transfer operation.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 7, 2014, by a vote of 4-0.



Don A. Brown, Assistant Clerk
Illinois Pollution Control Board