

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)

RECEIVED
CLERK'S OFFICE

JUN 23 2011

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

TO: See Attached Proof of Service

PLEASE TAKE NOTICE that on June 23, 2011, we filed with the Illinois Pollution Control Board, the attached Petitioner's Response to the Board's June 2, 2011, Order.

Dated: June 23, 2011

Respectfully submitted,

AMERICAN DISPOSAL SERVICES, INC.

By:


One of its attorneys

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ORIGINAL


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CLERK'S OFFICE

JUN 23 2011

STATE OF ILLINOIS
Pollution Control Board

PROOF OF SERVICE

I Ryan Spitzig, a non-attorney, swear or affirm that I served the foregoing **Notice of Filing and Petitioner's Response to the Board's June 2, 2011 Order** on the following parties by facsimile, hand delivery, e-mail, and/or depositing same in the U.S. mail, as indicated below, from 150 N. Michigan Avenue, Suite 2700, Chicago, Illinois 60602, before 5:00 p.m. on this 23rd day of June 2011.

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|---|--|
| Illinois Pollution Control Board James R. Thompson Center 100 W. Randolph Suite 11-500 Chicago, Illinois 60601 Original & 9 Copies (10 total) via hand delivery | Hearing Officer Carol Webb Illinois Pollution Control Board 1021 North Grand Avenue East P.O. Box 19274 Springfield, Illinois 62794-9274 Via E-mail (webbc@ipcb.state.il.us) |
| Richard T. Marvel Attorney at Law 202 N. Center Street, Suite 2 Bloomington, IL 61701 Via Fax 309.827-8139 & E-mail (marvelr@me.com) Attorney for Respondents Henson Disposal, Inc. and TKNTK, LLC | Amy Jackson Rammelkamp Bradney, P.C. 232 West State Street Jacksonville, Illinois 62650 Via Fax 217. 243-7322 & E-mail (ajackson@rblawyers.net) Co-Counsel for Respondents Henson Disposal, Inc. and TKNTK, LLC |
| Hanna Eisner McLean County State's Attorney's Office 104 W. Front Street, Rm. 605 Bloomington, IL 61702 Via Fax 309.888-5429 E-mail (hannah.eisner@mcleancountyil.gov) |  |

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


Ryan Spitzig

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PETITIONER'S RESPONSE TO THE BOARD'S JUNE 2, 2011 ORDER

Petitioner American Disposal Services of Illinois, Inc. ("ADS"), by and through its attorney, Jennifer J. Sackett Pohlenz at Clark Hill, PLC, responds in support of the reversal of the McLean County Board's siting decision on the basis of defective jurisdiction as follows:

INTRODUCTION

On March 22, 2011, American Disposal Services, Inc. (ADS) filed a petition asking the Illinois Pollution Control Board ("Board") to review a February 15, 2011, decision of County Board of McLean County ("County Board") granting Henson Disposal, Inc.'s request for a recycling and construction and demolition material transfer station. One of the issues raised in ADS' petition is the County Board's lack of jurisdiction due to Henson's improper notice under 415 ILCS 5/39.2(b).

On April 20, 2011, Henson and the property owner for the site location, TKNTK, LLC, filed a motion to strike and dismiss ADS' petition.

On June 2, 2011, the Board entered an Order requesting Henson submit to it proof of compliance with the pre-filing notice requirements of 415 ILCS 5/39.2(b). Henson responds to the Board's Order by arguing the Board can't do that, alleging that the Board's view of this

matter is restricted to the pleadings. Henson is incorrect: jurisdiction can be considered by the Board at any time, even *sua sponte*. Indeed, Henson relies on this faulty procedural argument as its initial response as it “does not have any additional information other than what was submitted by the County in the Record.” Given this admission and the contents of the Record before the Board, it is clear that Henson failed to comply, at a minimum, with the timing and form components of 415 ILCS 5/39.2(b).

ARGUMENT

A. THE BOARD CAN CONSIDER JURISDICTION AT ANY TIME

Henson’s argument that the Board is “prohibited” from considering jurisdiction in this case as it is outside the “pleadings” is an incorrect statement of law. Indeed, none of the cases relied on by Henson support such a rule. For example, *Mattis v. State Univ. Ret. Sys.*, has absolutely nothing to do with jurisdiction. 296 Ill.App.3d 675, 695 N.E.2d 566 (4th Dist. 1998). In *Mattis*, a professor had a dispute with how the university’s retirement system applied the Pension Code and a Court’s 735 ILCS 5/2-615 motion to dismiss was ultimately reversed as a result of the court’s misinterpretation of the Code. This case is inapplicable, as there is no argument in this case concerning the application or interpretation of the Illinois Environmental Protection Act (“Act”).

Moreover, it has long been established that jurisdiction is an issue that may be raised at *anytime* and *sua sponte* by the Board. *Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc.*, 144 Ill.App.3d 334, 339, 494 N.E. 2d 180 (2nd Dist. 1986). To find otherwise, would be contrary to the policy of judicial and administrative efficiency. Thus, the Board has the authority to rule on the jurisdictional issue at this time.

B. MCLEAN COUNTY BOARD'S SITING APPROVAL MUST BE REVERSED AS IT DID NOT HAVE JURISDICTION TO MAKE A DETERMINATION ON HENSON'S SITING APPLICATION

The notice requirements contained in section 39.2 of the Environmental Protection Act are jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal. *Kane County Defenders, Inc. v. The Pollution Control Board*, 139 Ill.App.3d 588, 487 N.E.2d 743 (1985); *Concerned Boone Citizens, Inc.*, 144 Ill.App.3d 334, 494 N.E.2d 180. Substantial compliance with notice provisions is insufficient where the statutory provisions are not merely technical requirements, but are jurisdictional. *Prairie Vista, Inc. v. Central Illinois Light Co.* 37 Ill.App.3d 909, 346 N.E.2d 72 N (1976); *M.L. Ensminger Co., Inc. v. Chicago Title and Trust Co.*, 74 Ill.App.3d 677, 393 N.E.2d 663 (1979).

Section 39.2(b) of the Illinois Environmental Protection Act provides, in relevant parts:

No later than 14 days before the date on which the county board or governing body of the municipality receives a request for site approval, the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property . . .within 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; . .

* * *

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

Two parts of Section 39.2(b) are particularly relevant to this case: (1) served on property owners within a specified distance from the proposed site whose name appear from the authentic tax records of the County no later than 14 days prior to the County Board receives the siting request; and (2) the minimum content requirements of the notice.

(1) Service on Property Owners Is Insufficient to Perfect Jurisdiction

Henson admits it did not perform the review necessary to determine who is a property owner entitled to receive notice: "Henson Disposal Inc. received the addresses of the parties entitled to notice from the County ofMcLean." (Henson Resp. p. 4). No copy of the notice that was allegedly sent to the persons identified on the copies of certified mail receipts are in the siting Record. Additionally, there is nothing in the siting Record that connects those certified mail receipts to property owners entitled to notice.

Moreover, even if the Board were to assume, *in arguendo*, that all persons entitled to notice under Section 39.2 of the Act were properly identified by the County to Henson (even though nowhere is that shown in the siting Record), the siting Record is clear that notice was not perfected as to those persons. If August 9, 2010, is the date the Board uses based on Henson's assertion that was the date it filed its Application, then notice should have been served no later than July 26, 2010. The siting Record shows the following persons received their certified mailing after July 26, 2010: HO1615CP Partnership (C-70), Bradford Supply Company (C-71), Representative Sommer (C-70), and Representative Cultra (C-70). Additionally, the siting Record reflects no proof of service on the following person: Raymond Fairchild , Kipp Connour, Norel Enterprises, and Senator Rutherford (receipt is for different article number).

If April 19, 2010 is the date used as the date the County Board received the Henson siting application, then there is simply no proof of any notice, other than newspaper publication (C-1).

Under Section 39.2(b), the applicant must serve property owners entitled to notice "either in person or by registered mail, return receipt requested." 415 ILCS 5/39.2(b) "Served" does not mean "mailed." If mere mailing of the 14-day advance notices were sufficient service, then proof of mailing would be all that was required to show service, and there would be little reason

to require a returned receipt. *Ogle County Board v. Pollution Control Board*, 272 Ill. App. 3d 184, 196, 649 N.E.2d 545, 554 (2nd Dist. 1995) (quoting *Avdich v. Kleinert*, 69 Ill. 2d 1, 9, 370 N.E.2d 504, 508 (1977)). Instead, the appellate court has held: The "return receipt requested" provision of section 39.2(b) of the Act reflects the intent of the legislature to require actual receipt of the notice, as evidenced by the signing of the return receipt. *Ogle County Board*, 272 Ill. App. 3d at 196, 649 N.E.2d at 554.

In *Ogle County Board*, the return receipts were signed after the notice deadline had expired, and the court found that the notice did not comply with the requirements of Section 39.2(b). The court therefore upheld the Board's finding that the local government lacked jurisdiction to hear the siting application. *Ogle County Board*, 272 Ill. App. 3d at 196, 649 N.E.2d at 554. This is the same scenario. The siting Record is clear that return receipts were signed after the notice deadline. *See also, ESG Watts, Inc. v. Sangamon County Bd*, PCB 98-2 (June 17, 1999)(siting reversed when return receipts signed after 14-day prior to filing deadline, even though several attempts at personal service were made).

Additionally, Henson made no attempt to personally serve the notice on HO1615CP Partnership (Bradford Supply Company), Representative Sommer, and Representative Cultra, Raymond Fairchild, Kipp Connour, Norel Enterprises, and Senator Rutherford. Because Henson missed this deadline, the County Board lacked jurisdiction to hear the siting request. *See Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board*, 162 Ill. App. 3d 801, 805, 516 N.E.2d 804, 807 (5th Dist. 1987) (because the notice requirements of Section 39.2(b) are jurisdictional, even a one-day deviation renders a local government without jurisdiction to hear a siting request).

(2) ***The Form of Henson's Notice Was Insufficient to Perfect Jurisdiction***

Even if Henson's service of notice under Section 39.2(b) was timely (which it clearly was not), the form of Henson's notice, alone, prevented jurisdiction from perfecting in this case. The notice under Section 39.2 of the Act is required to provide "a description of the right of persons to comment. . .", among other things. 415 ILCS 5/39.2(b). In this case, Henson's newspaper notice provided: "Persons may submit comments on this application after that date to the county Clerk and showd be delivered or post marked no later than **30 days after August 9, 2010.** (C-63, *emphasis added*). This notice misinformed the public as to the timeframe in which they were able to comment on the Henson siting application.

The law actually provides for public comments to be received by the County Board up to thirty-days after the public hearing. 415 ILCS 5/39.2(c). The Henson notice cuts short the public's comment period in excess of 90-days.

In *Kane County Defenders v. Pollution Control Board*, 139 Ill.App.3d 588, 487 N.E.2d 743 (2nd Dist. 1985), the Court explained that the incorrectly referenced filing date in the notice effectively reduced the public comment period and, thus, was a jurisdictional defect.

Additionally, in *Everett Allen, Inc. v. City of Mount Vernon*, PCB 86-34, the siting applicant misstated the time period for public comment both in the notices it sent to nearby landowners and in the newspaper publication. In *Everett Allen*, the notice read, in relevant part:

The City Council of the City of Mount Vernon shall consider any comment received or postmarked not later than 30 days from the date of receipt of the request in making its final determination. Additionally, at least one public hearing is to be held by the City Council of the City of Mount Vernon within 60 days of receipt of the request for site approval...

The Pollution Control Board found that "the incorrect description published by Everett Allen constitutes a substantial and material failure to state ' . . . a description of the right of persons to comment on such request as hereafter provided' (Section 39. 2(b) of the Act). The

magnitude of that failure is apparent when viewed from the perspective of a member of the public or adjacent land-owner who relied on the notice to prepare for hearing or to prepare comments." Under *Everett Allen's* notice, the public would have had 134 days to prepare public comments under the terms of the statute, but were misinformed according the notice that they had 44 days.

Henson's error in the form of the notice, incorrectly stating the public comment period, as like in *Everett Allen* and *Kane County Defenders*, is an additional jurisdiction defect in this matter requiring the reversal of the McLean County Board's decision approving the Henson siting application.

WHEREFORE, American Disposal Services of Illinois, Inc. respectfully requests the Illinois Pollution Control Board to reverse the siting approval for Henson Disposal Inc. given by the McLean County Board on the basis that there was no jurisdiction for such a decision by the McLean County Board.

Dated: June 23, 2011

Respectfully submitted,

AMERICAN DISPOSAL SERVICES, INC.

By: 
One of its attorneys

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