

BEFORE THE ILLINOIS POLLUTON CONTROL BOARD

AMERICAN DISPOSAL SERVICES OF ILLINOIS, INC.,
Petitioner,
vs.
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 15 2011
STATE OF ILLINOIS
Pollution Control Board

ORIGINAL

NOTICE OF FILING

TO: See Attached Proof of Service

PLEASE TAKE NOTICE that on June 14, 2011, we filed with the Illinois Pollution Control Board, that attached Henson Disposal, Inc. and TKNTK, LLC's Response to the Illinois Department of Pollution Control Board June 2, 2011 Order.

Dated: June 14, 2011

Respectfully submitted,

HENSON DISPOSAL, INC. and TKNTK, LLC

By: [Signature]
Thier attorney

RICHARD T. MARVEL
Attorney at Law
202 N. Center Street, Suite 2
Bloomington, IL 61701
(309) 829-9486

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STATE OF ILLINOIS
Pollution Control Board

CERTIFICATE OF SERVICE

Richard T. Marvel, certifies that he served the following **HENSON DISPOSAL, INC. and TKNTK, LLC'S RESPONSE TO THE ILLINOIS DEPARTMENT OF POLLUTION CONTROL BOARD JUNE 2, 2011 ORDER** on the following parties by facsimile, hand delivery, e-mail, overnight delivery and/or depositing same in the U.S. mail at 202 N. Center Street, Bloomington, Illinois 61701, as indicated below, before 5:00 p.m. on this 14th day of June, 2011:

Illinois Pollution control Board
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, IL 60601
**Original and 9 copies (10 total) via
Federal Express overnight delivery**

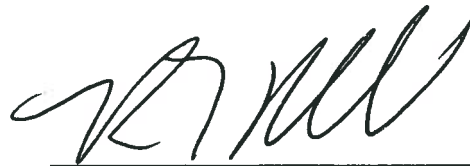
Jennifer J. Sackett Pohlenz
Clark Hill PLC
150 N. Michigan Avenue, Suite 2700
Chicago, IL 60601
Via Federal Express overnight mail

Amy Jackson
Rammelkamp Bradney, P.C.
232 West State Street
Jacksonville, IL 62650
Via U.S. Mail

Hearing Officer Carol Webb
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
**Via Federal Express
overnight delivery**

Hannah Eisner
McLean county State's Attorney's
Office
104 W. Front Street, Room 605
Bloomington, IL 61702
Via U.S. Mail

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

AMERICAN DISPOSAL SERVICES OF)
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 Petitioner,)
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 vs.)
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 COUNTY BOARD OF McLEAN COUNTY,)
 ILLINOIS, HENSON DISPOSAL, INC., and)
 TKNTK, LLC,)
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 Respondents.)

No. PCB 11-60

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Henson Disposal, Inc. and TKNTK, LLC Response to Illinois Pollution Control Board

June 2, 2011 Order

Now comes the Respondent, HENSON DISPOSAL, INC. and TKNTK, LLC, by their attorneys, Richard T. Marvel and Amy Jackson and in response to the Illinois Pollution Control Board Order of June 2, 2011 states as follows:

I. Overview

Henson Disposal Inc., filed an Application for Siting Approval on August 9, 2010 with the County of McLean. In its Application, Henson Disposal, Inc., requested local siting approval for a construction debris and landscape waste treatment facility. At the proposed facility, Henson Disposal, Inc. intends to accept construction debris and then separate out those items that can be recycled from those items that must be treated as waste and sent to a local landfill.

On December 9, 2010, the Pollution Control Site Hearing Committee of McLean County ("the Committee") conducted a public hearing on the siting application at which time Henson Disposal, Inc. presented evidence to the Committee. The Committee recommended siting

approval to the McLean County Board. The McLean County Board approved the Application for Siting on February 15, 2010.

On March 22, 2011, American Disposal Service of Illinois, Inc., filed a Petition for Review of the McLean County Board's decision to grant local siting approval. Said Petition for Review was filed pursuant to Section 39.2 and 40.1 of the Illinois Environmental Protection Act.

On April 20, 2011 Henson Disposal, Inc. and TKNTK, LLC filed a Motion to Strike and Dismiss The American Disposal Services of Illinois, Inc. Petition for Review of Decision Concern Siting of a New Pollution Control Facility, Pursuant to Sections 39.2 and 40.1 of the Illinois Environmental Protection Act. On May 9, 2011 the parties conducted a status conference wherein "the parties requested an expedited ruling" on the pending motion to strike and dismiss so that a discovery schedule may be established. See *Hearing Officer Order, May 9, 2011*. Henson agreed not to revoke the open waiver in a manner that would prejudice ADS. *Id.* On June 2, 2011 the PCB issued an order wherein they reserve ruling on the pending Motion to Dismiss and Motion to Strike the Petition of ADS and further orders Henson to provide additional information regarding the record and the statutory Notice.

II. ARGUMENT

I. The Pollution Control Board looks to Illinois Civil Practice Law for Guidance on Motions to Strike and Dismiss, which precludes the Board from considering evidence outside of the Pleadings.

In ruling on a motion to dismiss, the Board looks to Illinois civil practice law for guidance. *See, e.g.,* United City of Yorkville, PCB 08-96, slip. op. at 14-15 (Oct.16, 2008); People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, PCB 98-43, slip op. at 2 (Nov. 6, 1997); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997). In

ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, *Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989).

The pending Motion to Strike and Dismiss claims that the ADS Petition is deficient and as such should be dismissed. The Motion to dismiss challenges the standing of ADS to even assert the Petition for Review in addition to alleging the pleading is factually insufficient. The PCB order of June 2, 2011 essentially forces Henson to address the merits of a Petition that is alleged to be deficient. The alleged deficiencies are apparent on the face of the pleading, which Petition is the only pleading that can be considered by the Court. *See Elson v. State Farm Fire and Cas. Co.*, 295 Ill.App. 3d 1 (1st Dist. 1998). The Pending Motion to Strike and Dismiss assert deficiencies in the pleading itself, i.e. the pleading fails to meet the requisite pleading requirements under Illinois law.

Illinois Civil Practice law prohibits a Court from reviewing evidence outside of the pleadings. In *Mattis v. State University Retirement System*, the Fourth District Appellate Court ruled that the “trial court committed reversible error in considering matters beyond complaint in dismissing, for failure to state a claim...” 296 Ill.App.3d 675 (4th Dist. 1998). The PCB is requiring Henson to address the allegations of ADS and is requesting Henson to provide evidence, even before a discovery schedule can be established so the PCB can then decide the pending Motion to Strike and Dismiss.

The parties agreed and the hearing officer order that a discovery scheduling order would be entered following a ruling on the Motion to Strike and Dismiss. During the status conference on May 9, 2011 Henson agreed and the Hearing Officer memorialized the agreement wherein Henson would not revoke the open waiver in a manner that would prejudice ADS. Instead of a

ruling on a pending motion the PCB has undertaken the work of ADS in not only initiating discovery, for which no scheduling order exists, but also cloaks the petitioners discovery with the veil of an Illinois Pollution Control Board order.

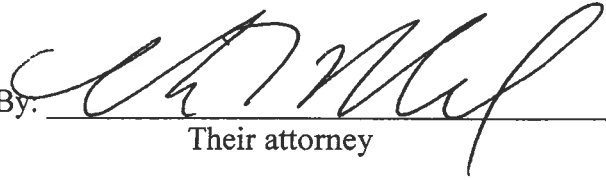
III. Response to Illinois Pollution Control Order.

The Illinois Pollution Control Board has requested Henson Disposal provide additional information regarding the notice that was sent with respect to the Siting application. Henson Disposal, Inc., does not have any additional information regarding the notice other than what the County of McLean has submitted in the Record. Henson Disposal, Inc. has the original certificates of mailing, as proof of delivery and the party to whom delivery was made. Other than the original mailing receipts Henson Disposal, Inc. does not have any additional information to add to the Record.

The Notice requirements of the Illinois Environmental Act, Section 39.2, do not require personal service on the parties entitled to Notice. Henson Disposal Inc. received the addresses of the parties entitled to notice from the County of Mclean. Henson Disposal Inc. served the parties with notice via registered mail, return receipt requested, as evidenced by the record submitted by the County. The Act does not require personal service on the parties, however personal service is a service option. Henson Disposal Inc., does not have any additional information other than what was submitted by the County in the Record.

The requested material, while relevant if this matter is well plead and factual sufficient under Illinois law, is not relevant to pending motion in front of the PCB. In addition to not being relevant Henson Disposal Inc., does not have any other information regarding the notice. Notwithstanding the notice issues Henson has a pending Motion to Strike and Dismiss, Henson Disposal, Inc. and TKNTK, LLC respectfully request the PCB to issue an order on the merits of the pending Motion to Strike and Dismiss.

HENSON DISPOSAL, INC. and TKNTK, LLC

By: 
Their attorney

RICHARD T. MARVEL
Attorney at Law
202 N. Center Street, Suite 2
Bloomington, IL 61701
(309) 829-9486

RICHARD T. MARVEL
ATTORNEY AT LAW
202 NORTH CENTER STREET, SUITE 2
BLOOMINGTON, ILLINOIS 61701
(309) 829-9486
FAX (309) 827-8139
E-MAIL: Marvelr@me.com

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John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, IL 60601

1 ORIGINAL

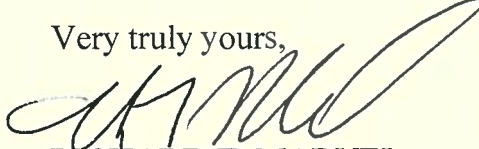
RE: American Disposal v. County Board of McLean County, et al
PCB 11-60

Dear Sir:

Enclosed please find a Notice of Filing in regard to the above. I have enclosed and original and nine copies and a copy to be file-stamped and returned in the enclosed stamped envelope.

Thank you for your assistance in regard to this matter.

Very truly yours,



RICHARD T. MARVEL

RTM:ka
Enclosures