

ILLINOIS POLLUTION CONTROL BOARD  
December 19, 1991

ENVIRITE CORPORATION, )  
a Pennsylvania Corporation, )  
 )  
Complainant, )  
 )  
v. ) PCB 91-152  
 ) (Enforcement)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY and )  
PEORIA DISPOSAL COMPANY, )  
 )  
Respondents. )

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the September 10, 1991 filing of Peoria Disposal Company's (Peoria) motion to dismiss and alternative motion for summary judgment, the September 24, 1991 filing of the Illinois Environmental Protection Agency's (Agency) motion to dismiss and alternative motion for summary judgment, the October 7, 1991 filing of Envirite Corporation's (Envirite) consolidated response and cross motion for summary judgment, the respondents' November 12, 1991 joint response to Envirite's cross motions, Envirite's November 27, 1991 motion to strike respondents' joint response or, in the alternative, motion for leave to file reply instanter and Peoria's December 9, 1991 response to the motion to strike.

Initially, the Board addresses Envirite's motion to strike respondents' joint response or, in the alternative, file a reply. The Board denies the motion to strike because we find nothing improper about the scope of the joint response. Having found the joint response proper, the Board finds no reason to deviate from its rule that the filing of a reply is not generally allowed except to prevent material prejudice. (35 Ill. Adm. Code 101.241(c).)

On August 23, 1991, Envirite filed a complaint pursuant to Section 31(b) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1033(b)) against respondents alleging violations of Sections 21(e) and 39(h) of the Act (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1021(e) and 1039(h)). Section 39(h) of the Act provides:

Commencing January 1, 1987, a hazardous waste stream may not be deposited in a permitted hazardous waste site unless specific authorization is obtained from the Agency by the generator and the disposal site owner and operator for the deposit of that specific hazardous waste stream. The Agency may grant specific authorization for disposal of hazardous

waste streams only after the generator has reasonably demonstrated that, considering technical feasibility and economic reasonableness, the hazardous waste cannot be reasonably recycled for reuse, nor incinerated or chemically, physically or biologically treated so as to neutralize the hazardous waste and render it nonhazardous. \* \* \*

Denial of 39(h) authorization is treated as a permit denial under Section 40(a) of the Act. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(h).)<sup>1</sup>

Section 21(e) of the Act provides that no person shall "[d]ispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and regulations and standards thereunder."

Envirite owns and operates a hazardous waste treatment facility in Cook County, Illinois. Envirite states in its complaint that, since 1981, it has had the capability to treat various hazardous wastes (USEPA Hazardous Waste Nos. F006 and F019) so as to neutralize them and render the wastes nonhazardous within the meaning of Section 39(h) of the Act. Envirite alleges that respondents have knowledge of Envirite's treatment capabilities.

Peoria operates a multiple hazardous waste treatment facility in Peoria County, Illinois. Peoria's RCRA Part B permit (Supp. Permit No. 1988-239-SP) allows Peoria to accept, inter alia, waste from electroplating operations ("F006 waste"). (Peoria Ex. A.) Peoria has also obtained Section 39(h) authorization from the Agency for continued land disposal of hazardous waste. (Peoria Ex. B.) Peoria receives hazardous wastes and treats the wastes using a proprietary stabilization process. This process inhibits the ability of the hazardous constituents to leach, but the stabilized residue which results from this process is still listed as a hazardous waste. Hence, the residue/waste is disposed of in

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<sup>1</sup> The instant proceeding requires the Board's interpretation of Section 39(h) which prohibits the disposal of hazardous wastes under certain circumstances. It is important to note that Section 39(h) was enacted and is implemented independent of Illinois' adoption of Resource, Conservation and Recovery Act (RCRA) and the Hazardous and Solid Waste Amendments of 1984 (HSWA) pursuant to Section 22.4 of the Act. The instant order in no way interprets or passes upon the interrelationship between Section 39(h) and RCRA/HSWA.

Peoria's permitted hazardous waste landfill.<sup>2</sup>

Envirite further alleges that Production Plated Plastics (PPP), a Michigan facility, and other generators of "F006 waste", have deposited hazardous waste at Peoria's facility without 39(h) authorization. In its response and cross motion, Envirite agrees with Peoria's statement that this enforcement action was precipitated by PPP's decision to award its hazardous waste disposal contract to Peoria rather than Envirite. (Envirite Consol. Resp. at 2.) According to Envirite, on or about June 15, 1991 to the present, it requested that the Agency exercise its enforcement powers against Peoria, but the Agency has refused to take any action. Envirite alleges that Peoria and the Agency have, therefore, violated Sections 21(e) and 39(h) of the Act because the wastes are being disposed of in a hazardous waste landfill when there is a technically feasible and economically reasonable method of treatment which renders the hazardous waste nonhazardous so that it could be disposed of in a nonhazardous waste landfill. Envirite requests that the Board enter an order:

"A. Revoking any and all approvals or authorizations ... issued by the Agency to [Peoria] purporting to authorize [Peoria] to deposit the subject hazardous wastes in its Peoria County, Illinois landfill in [sic] which (1) [Peoria] is not the generator or (2) the subject hazardous wastes can be rendered nonhazardous; B. Requiring ... [Peoria] and the Agency to cease and desist from further violating Sections 39(h) and 21(e) of the Act; and [o]rdering such other relief as may be just."

Both respondents contend that Envirite's complaint should be dismissed because the Board does not have jurisdiction to review the Agency's grant of 39(h) authorization to Peoria. The Agency also contends that the Board lacks jurisdiction over the Agency because the Agency is not a "person" within the meaning of Section 31(b) of the Act. Alternatively, respondents contend that summary judgment should be granted in their favor because there are no genuine issues of material fact and, as a matter of law, respondents have not violated the Act.

The Agency filed a motion to dismiss contending that it is not a "person" within the meaning of Section 31(b) of the Act which governs citizen enforcement actions and, therefore, an enforcement action cannot be brought against the Agency. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1031(b).) Section 31(b) of the Act

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<sup>2</sup> Envirite successfully petitioned USEPA for delisting of its treatment residue. (R87-30, June 30, 1988; 12 Ill. Reg. 12070, eff. July 12, 1988.) Peoria's adjusted standard petition seeking delistment of its stabilized residue is currently pending before the Board (AS 91-3).

provides that "[a]ny person may file with the Board a complaint ... against any person allegedly violating the Act ... ." (Ill. rev. Stat. 1989, ch. 111 1/2, par. 1031(b).) Section 3.26 of the Act defines "person" as including a "state agency". (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.26.) Envirite alleges that Peoria is violating Section 21(e) and 39(h) of the Act by accepting hazardous wastes from "generators" who have not obtained 39(h) authorization from the Agency. Envirite also alleges that the Agency is violating Section 21(e) and 39(h) of the Act by failing to exercise its enforcement powers against peoria. According to Envirite, "[w]hat is at issue is whether ... the Agency is abdicating its responsibilities by not requiring those authorizations." (Mem. Support of Cross Motion at 8-9.)

The Agency relies upon Landfill, Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978) in support of its motion to dismiss. In Landfill, Inc., the court declared invalid a Board regulation allowing third parties to file complaints seeking revocation of permits on the basis that they were issued by the Agency in violation of its statutory duty to grant permits only upon proof that the permit would not cause a violation of the Act and regulations. (387 N.E.2d at 261-65.) The court rejected the Board's reliance upon Section 31(b) as a statutory basis for the regulation stating that the focus of a citizen enforcement action must be upon polluters who are in violation of substantive provisions of the Act and not upon the Agency's compliance with its permit-granting procedures. (Id. at 263.) "Prosecution under the Act ... is against polluters, not the Agency." (Id. at 264.)

Landfill, Inc. establishes that a citizen cannot bring an enforcement action against the Agency in an attempt to challenge the Agency's issuance of a permit, nor can the Board provide for third-party review of such decisions beyond that allowed by the Act. While Envirite contends that it is not seeking review of the Agency's grant of 39(h) authorization to Peoria, the basis of the instant enforcement action against the Agency is the Agency's alleged failure to require those bringing their waste to Peoria to obtain 39(h) authorization. This allegation is tantamount to challenging the Agency's performance of its statutory duties in the issuance of permits which the Illinois Supreme Court held is not a proper action before the Board. (Id. at 263-65.)

Moreover, the Board finds that Envirite is in essence asking that the Board direct the Agency to file an enforcement action against Peoria for accepting waste from unauthorized "generators" and to direct the Agency to bring an enforcement action against those who should, but do not, have permits. Irrespective of Landfill, Inc., the Board is not empowered to direct the Agency's course of conduct in this regard. The decision to bring an enforcement action lies with the Agency, not the Board. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1004.) For these reasons, the Board grants the Agency's motion to dismiss.

The Board next addresses respondent's contention that Envirite's complaint should be dismissed for lack of jurisdiction to review the Agency's grant of 39(h) authority to Peoria because Envirite did not file for review in a timely manner pursuant to the permit provisions of the Act. Section 40(b) provides that "[i]f the Agency grants a RCRA permit for a hazardous waste disposal site, a third party other than the permit applicant or the Agency, may petition the Board within 35 days for a hearing to contest the issuance of the permit." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040(b).)

The parties appear to agree that Section 40(b) applies to Section 39(h) authorizations. However, the parties disagree over what Agency action triggers the 35-day time period. While the Board agrees with respondents that a third-party petition for review pursuant to Section 40(b) must be filed within 35 days from the date the Agency issues the permit, the Board disagrees that this provision governing third-party appeals of RCRA permits for hazardous waste disposal sites is applicable to Section 39(h). Section 39(h) authorization is not a RCRA permit as defined by the Act. (See, Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.29.) Moreover, Section 39(h) specifically provides that "[i]f the Agency refuses to grant authorization under this Section, the applicant may appeal as if the Agency refused to grant a permit pursuant to the provisions of subsection (a) of Section 40 of this Act." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(h).) Section 40(a) of the Act provides for an applicant's appeal of the Agency's denial of a permit or the imposition of permit conditions. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040(a).) Consequently, the Act does not provide for third-party appeals of Agency grants of Section 39(h) authorization and the Board cannot expand those appeal rights (Landfill, Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978)).

However, this does not lead the Board to conclude that Envirite's complaint should be dismissed for lack of jurisdiction. While the Board agrees that an enforcement action against the Agency is precluded by Landfill, Inc., this does not mean that the Board does not have authority pursuant to the enforcement provisions of the Act to determine whether Peoria is violating the act and regulations. Envirite asserts that it is not seeking review of the Agency's grant of 39(h) authorization to Peoria and that its allegations properly state an enforcement action. Envirite contends that, regardless of Peoria's 39(h) authorization, Peoria cannot accept for deposit hazardous wastes such as that generated by PPP and others who, as generators, have not obtained 39(h) authorization. By accepting such waste, Envirite alleges that Peoria is violating Sections 21(e) and 39(h) of the Act. Similarly, Envirite also seeks a ruling that the Agency has abdicated its responsibilities by not requiring that these

generators obtain 39(h) authorization.<sup>3</sup> The Board finds that Envirite has properly alleged a cause of action and that respondents' motion to dismiss for lack of jurisdiction on the basis that the instant action is in actuality an improper permit appeal is, therefore, denied. The Board now addresses whether summary judgment is proper.

Respondents contend that Peoria is both the generator and the disposal site owner and operator for purposes of 39(h) because it is Peoria that disposes of the waste residue after chemical stabilization. Accordingly, respondents contend that PPP and other facilities that bring their "F006 waste" to Peoria for treatment are not required to obtain 39(h) authorization. Therefore, respondents contend that, as a matter of law, Peoria is not violating the Act by accepting waste from facilities which do not have 39(h) authorization and the Agency is not in violation of the Act by failing to require these facilities to obtain 39(h) authorization. Envirite and respondents both move for summary judgment based upon their respective interpretations of "generator."<sup>4</sup>

The pertinent portion of Section 39(h) of the Act provides that "a hazardous waste stream may not be deposited in a permitted hazardous waste site unless specific authorization is obtained from the Agency by the generator and the disposal site owner and operator for the deposit of that specific hazardous waste stream." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(h).) Section 39(h) also provides that it is the "generator" who must demonstrate that

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<sup>3</sup> Although Envirite asks in its request for relief for revocation of Peoria's permit, the enforcement provisions of the Act specifically provide that the Board may revoke a permit as a penalty upon finding that the permit holder is in violation of the Act. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1033(b).)

<sup>4</sup> The parties cite to the Board's emergency rules which were to guide the implementation of Section 39(h). However, these rules were vacated by the appellate court because the court found that no emergency existed allowing the Board to invoke its emergency rulemaking procedures. (Citizens For a Better Environment v. PCB, 152 Ill. App. 3d 105. 504 N.E.2d 166 (1st Dist. 1987).) Because the Board's adoption of these rules was found to be improper and the rules were invalidated by the court, the rules may not now be used to interpret Section 39(h). Moreover, while the Board has taken the position that a rulemaking is needed to implement Section 39(h) (see, R89-6(B) (August 30, 1990)), the Board has yet to complete its rulemaking reenacting the emergency rules.

no technically feasible and economically reasonable method of rendering the waste nonhazardous exists before the Agency may authorize "disposal." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(h).)

"Generator" is defined as "any person whose act or process produces hazardous waste." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.12.) However, Section 39(h) requires authorization only for those generators of the specific hazardous waste stream that is deposited by the disposal site owner and operator.<sup>5</sup> While the Act does not define "deposit", it defines "disposal" as including the "deposit ... of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment ... ." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.08.)

Here, it is undisputed that Peoria receives hazardous wastes from companies such as PPP, the waste is subject to a propriety chemical stabilization process by Peoria and that the stabilized residue which constitutes a hazardous waste is disposed of in Peoria's permitted hazardous waste landfill. Based upon these undisputed facts, the Board finds that companies such as PPP are not generators of the "specific hazardous waste stream" that is deposited into the land such that the waste may enter the environment. Rather, PPP and other such companies bring the wastes to Peoria for processing and Peoria subsequently deposits the treated residue in its permitted hazardous waste landfill. The Board concludes that, as a matter of law, Peoria is both the "generator" of the specific hazardous waste stream and the owner and operator of the disposal site for purposes of Section 39(h). Such an interpretation is consistent with the requirement in Section 39(h) that it is the "generator" that must make the demonstration to the Agency that there exists no technically feasible and economically reasonable method of rendering the waste nonhazardous. Where a company sends its hazardous waste to a treater, it makes sense that the treater who exercises control over the waste prior to disposal should be required to make the 39(h) demonstration rather than the initial company who has relinquished control over the waste.

Having concluded that PPP and other such companies need not obtain 39(h) authorization, the Board finds that, as a matter of law, Peoria is not violating the Act by accepting such wastes nor is the Agency abdicating its responsibilities by failing to require such authorization. Therefore, summary judgment is granted in

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<sup>5</sup> The Board emphasizes that PPP and other such companies may be "generators" for purposes of other hazardous waste provisions; however, the instant proceeding requires only that the Board construe the term "generator" for purposes of Section 39(h).

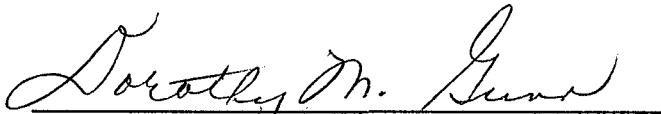
favor of Peoria. Envirite's cross-motion for summary judgment is denied.

In summary, the Agency's motion to dismiss is hereby granted. Peoria's motion to dismiss is denied, but its motion for summary judgment is hereby granted. Envirite's cross motion for summary judgment is denied.

IT IS SO ORDERED.

Section 41 of the Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041) provides for the appeal of final Board Orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 17<sup>th</sup> day of December, 1991 by a vote of 6-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board