BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

PEORIA DISPOSAL COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB No. 08-25 (Permit Appeal - Land)

BRIEF OF
PETITIONER PEORIA DISPOSAL COMPANY

THIS FILING IS ON RECYCLED PAPER AS REQUIRED BY 35 ILL ADM. CODE 101.202 AND 101.302(g).

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB No. 08-25
v.	)	
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

BRIEF OF
PETITIONER PEORIA DISPOSAL COMPANY

NOW COMES the Petitioner, PEORIA DISPOSAL COMPANY ("PDC"), through its undersigned attorneys, and as and for its Brief, states as follows:

INTRODUCTION

The Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (the "IEPA"), by permit denial letter dated August 30, 2007, improperly denied PDC's request for modification of its RCRA Part B Permit No. ILD000805812/1438120003, Log No. 24 (the "Application"), on the sole basis that siting pursuant to Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS §5/1 *et seq.* (the "Act") was a necessary pre-condition to the issuance of the requested permit. PDC disagrees and, accordingly, has appealed this IEPA determination to the Illinois Pollution Control Board (the "Board"), pursuant to Sections 39 and 40 of the Act (415 ILCS §5/39 *et seq.* and §5/40 *et seq.*), and Parts 101 and 105 of the Board's procedural rules (35 Ill. Adm. Code Parts 101 and 105).

PDC requests that the Board reverse this IEPA determination and order the Application remanded to the IEPA for the purpose of evaluating the technical merits of the Application, and

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that the Board make a determination as to whether the Application is otherwise in compliance with the comprehensive and strict statutory and regulatory scheme set forth in the Resource Conservation and Recovery Act of 1976 ("RCRA"), Subtitle C, 42 U.S.C. §6921 *et seq.* (2007), and the regulations attendant thereto.

PDC has operated a hazardous waste landfill (the "Existing Landfill") and a Waste Stabilization Facility (the "WSF") in Peoria County, Illinois, for over twenty years, pursuant to its first RCRA permit which was issued on November 4, 1987. The Existing Landfill is one of the first authorized RCRA facilities in the state, and has operated without any environmental violations for over fifteen years. (*See* R01409-10). The requested permit would allow PDC to continue to operate into the future, by allowing necessary vertical and horizontal expansions, but limiting that expanded area (the "residual waste landfill" or "RWL") to disposal of only that residual waste that is generated by PDC in its WSF facility.[1]

PDC maintains that, pursuant to Section 3.330(a)(3) of the Act, the expansion sought pursuant to this permit does not constitute a new pollution control facility as the term is defined in the Act. Accordingly, siting is not a necessary pre-condition to review or issuance of the requested permit.

ISSUES PRESENTED FOR REVIEW

The IEPA permit application determination frames the issue for review by the Board. Here, the IEPA's denial was based upon its conclusion that siting was a necessary pre-condition to issuance of the requested permit. Thus, the issue before the Board is straightforward:

[1] In contrast, in the siting application presently on appeal before the Appellate Court for the Third District of Illinois, concerning a proposed expansion of the Existing Landfill, PDC sought siting approval for a permit that would expand PDC's existing operations at the site, including continuing direct disposal of hazardous wastes. (*See* Ex. 1, ¶¶81-85; Tr. 20/23-21/22).

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Whether the RWL, which is designed pursuant to this Application to accept only that waste which PDC has generated in its WSF, constitutes a new pollution control facility under the Act.

Illinois courts have held that the Board does not review the IEPA's decision using a deferential manifest-weight of the evidence standard. IEPA v. Illinois Pollution Control Board, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986)." Saline County Landfill, Inc. v. IEPA, County of Saline, Intervenor, PCB 04-117, 2004 WL 1090244, *14 (Illinois Pollution Control Board, May 6, 2004). *See also*, Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club v. IEPA and Village of New Lenox, PCB 04-88, 2007 WL 2106914, *2 (Illinois Pollution Control Board, July 12, 2007).

Furthermore, given that the IEPA's denial letter frames the issue on appeal, the Board's review is based solely on the record before the IEPA, upon which the IEPA based its determination. While the Board held a public hearing at which public comment was allowed, it is clear that such public comment is not relevant to the decision in this case.[2] The record before the IEPA forms the sole basis on which the Board should review the IEPA's denial of the Application. For this reason, the IEPA and PDC jointly filed a Stipulated Statement of Facts with the Board, summarizing the facts in the record considered by the IEPA.

The standard of review relevant in any permit appeal, including this one, is whether the Applicant has demonstrated that the Act will not be violated if the permit were issued. I.E.P.A. v. Pollution Control Bd., 115 Ill.2d 65, 70, 503 N.E.2d 343, 345, 104 Ill.Dec. 786, 788 (1986); ESG

[2] The Board has a long history of holding public hearings on matters pending before it, and in such hearings the Board historically allows public comment, as it did here. While public comment is relevant in many Board contexts, it is not relevant here. In this case, the Board's review is limited to the permit record before the IEPA, the necessary facts concerning which are the subject of a stipulation between the IEPA and PDC. (Ex. 1). Moreover, none of the persons who offered public comment were subject to cross examination and, accordingly, these comments cannot be construed as facts.

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Watts, Inc. vs. Illinois Environmental Protection Agency, PCB 01-63, 2002 WL 560956, *6 (Illinois Pollution Control Board, April 4, 2002). In this case, the issue before the Board is a question of law, and thus, review is *de novo*.

APPLICABLE LAW

Section 39(c) of the Act requires local siting approval prior to issuance of a permit for the development or construction of any new "pollution control facility":

> Except for those facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act, no permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of this Act. For purposes of this subsection (c), and for purposes of Section 39.2 of this Act, the appropriate county board or governing body of the municipality shall be the county board of the county or the governing body of the municipality in which the facility is to be located as of the date when the application for siting approval is filed. * * *.

(415 ILCS §5/39(c)).

Section 3.330(a)(3) of the Act defines "pollution control facility" in relevant part as follows:

> (a) "Pollution control facility" is any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act.
>
> The following are not pollution control facilities: * * *
>
> (3) sites or facilities used by any person conducting a waste storage, waste treatment, waste disposal, waste transfer or waste incineration operation, or a combination thereof, for wastes generated by such person's own activities, when such wastes are

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> stored, treated, disposed of, transferred or incinerated within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person; * * *.

(415 ILCS §5/3.330(a)(3)).

The term "generator" is defined at Section 3.205 as "any person whose act or process produces waste." (415 ILCS §5/3.205). Section 3 is the definitional section of the Act. That section provides that this definition of "generator" is controlling for the purposes of the Act unless otherwise noted: "For the purposes of this Act, the words and terms defined in the Sections which follow this Section and precede Section 4 shall have the meaning therein given, unless the context otherwise clearly requires." (415 ILCS §5/3(a)). The term "generator" is further defined in Section 39(h) of the Act, which concerns RCRA facilities, as follows:

> For purposes of this subsection (h), the term "generator" has the meaning given in Section 3.205 of this Act, unless: (1) the hazardous waste is treated, incinerated, or partially recycled for reuse prior to disposal, in which case the last person who treats, incinerates, or partially recycles the hazardous waste prior to disposal is the generator; or (2) the hazardous waste is from a response action, in which case the person performing the response action is the generator.

(415 ILCS §5/39(h)).

FACTUAL BACKGROUND

The essential facts are undisputed. See Joint Exhibit 1, Stipulated Statement of Facts, attached herewith as Exhibit 1 for the Board's reference. The following factual summary is provided for the Board's convenience.

The Application

On or about January 5, 2007, PDC submitted the Application (R00001-01363) to the IEPA, seeking modification of PDC's RCRA Part B Permit No. ILD000805812/1438120003,

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Log No. 24. (Ex. 1, ¶1). This original permit was issued to PDC by the IEPA's Bureau of Land on November 4, 1987. (Id.)

The modification sought in the Application is "to allow the development and operation of a landfill unit known as the PDC No. 1 Residual Waste Landfill ... for acceptance of residual waste from PDC's RCRA-permitted Waste Stabilization Facility...." (Ex. 1, ¶2; R00012). The Application specifically seeks authorization to vertically raise the currently permitted 32.4 acre landfill ("Area C") by 44 feet (R00046) and to construct an approximately 8.2 acre horizontal expansion adjacent to the southwestern portion of Area C. (Ex. 1, ¶3; R01119). The expansion is necessary in order for PDC to continue on-site disposal of the waste from the WSF. The area sought to be developed pursuant to the Application is referred to as the PDC No. 1 Residual Waste Landfill (the "Residual Waste Landfill" or "RWL"), and is designed to provide approximately 2.4 million tons of disposal space to be used solely for PDC's on-site generated residual waste from PDC's on-site WSF. (Ex. 1, ¶4-5; R00012). That waste is variously referred to as "residual waste" or "treatment waste" or "treated residue."

By letter dated August 30, 2007, the IEPA denied PDC's Application. (Ex. 1, ¶6; R01369-01370). The IEPA's stated rationale for the denial was that the Application did not demonstrate proof of local siting pursuant to Section 39.2 of the Illinois Environmental Protection Act ("Act"). (Id.) A true and accurate copy of such letter is attached herewith as Exhibit 2.

Brief Description of the WSF and the RWL

PDC owns and operates the WSF in which PDC mixes metal-bearing hazardous wastes from various sources with chemical compounds ("reagents") to create a chemically stable new end-product with dramatically reduced leachable concentrations. (Ex. 1, ¶7; R01120). PDC then

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disposes of the treated residue in the Existing Landfill. (Ex. 1, ¶8; R01120). A picture of the WSF is attached with the Application (Ex. 1, ¶10; R01131), as was a Site Plan depicting the WSF and the proposed RWL, which are adjacent to and contiguous with each other (Ex. 1, ¶12; R01219-20; Tr. 18/19-19/18[3]). PDC is the owner of both the WSF and the RWL. (Ex. 1, ¶¶9 & 13).

The WSF

The Application does not concern or seek a change to the WSF. (Tr. 20/15-17). Nonetheless, the operations of the WSF provide context to this Application. The WSF was approved in PDC's RCRA Part B Permit issued by the IEPA for operation in 1989 and has been in continuous operation since then. (Ex. 1, ¶14; R00012-13, R01120). In 1995, PDC submitted a Class 2 permit modification request to the U.S. Environmental Protection Agency (the "USEPA") to change the WSF from a waste pile to a containment building unit. (Ex. 1, ¶15; R01120). This request was approved in a letter from the USEPA dated May 3, 1996. (Ex. 1, ¶16; R01120). Siting was not required for permitting of the WSF. PDC receives waste at the WSF in accordance with PDC's issued RCRA Part B Permit (the "Existing Permit"). (Tr. 20/4-14; R01120). The WSF is permitted and authorized for storage and treatment of hazardous and non-hazardous wastes. (Ex. 1, ¶21; R01120).

Mr. Ron L. Edwards, Vice President of Development and Operation of Landfills for PDC, provided testimony at the hearing before the Board concerning the Existing Permit, the Existing Landfill, the WSF, the proposed RWL and the Application. (Tr. 15/10-28/5). Mr. Edwards is the signatory of the Application. (Tr. 17/11-18/10). He has more than 24 years of experience in the management of hazardous and solid waste. (Tr. 15/19-20). He is a member of

[3] References to "Tr." throughout this Brief refer to the transcript of the public hearing in this case before the Board, on November 9, 2007, which transcript is part of the Board's record in this case. Citations will be in the following format: "[Page]/[Line]-[Line]" or "[Page]/[Line]-[Page]/[Line]."

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the National Solid Waste Management Association, and has served as Past Chairman of the Landfill Technical Committee of that Association. (Tr. 16/3-5). The Landfill Technical Committee participated in the State's adoption of the Federal RCRA requirements. (Tr. 16/5-15).

As Mr. Edwards testified and as the Application demonstrates, the Existing Permit authorizes PDC to accept hazardous wastes for treatment at the WSF. (Ex. 1, ¶18; Tr. 22/1-7; R01120). Pursuant to the Existing Permit, the wastes received by the WSF cannot lawfully be disposed of directly, and must be treated prior to disposal. (Tr. 24/17-25/3; *see also* Ex. 1, ¶19).

Current Operations at the Existing Landfill

PDC is currently permitted to accept hazardous waste for direct disposal only in the Existing Landfill, and is not proposing to accept such waste for direct disposal in the RWL. (Tr. 20/23-21/6). The hazardous waste that is directly deposited in the Existing Landfill is sent to PDC's Existing Landfill by the original producer with a manifest designating the waste as destined for disposal. This waste, as received, is not prohibited from placement directly into the landfill as authorized by law, regulation and PDC's permit.

As the WSF is a treatment facility, PDC accepts waste in the facility only for treatment, and not for disposal. (*See* R01132-38). PDC's WSF provides a valuable service for PDC's customers, as it transforms hazardous waste into a product (namely, treatment residue) which is capable of being safely land disposed. (*See* R01132-38). Those companies that send their waste for treatment to the WSF do so pursuant to a hazardous waste manifest. The manifest identifies the product and indicates it is being sent to PDC for treatment. At the point of receipt and acceptance of the product, PDC is legally responsible for its treatment, storage and eventual disposal in accordance with RCRA.

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Approximately 60-65% of the waste currently deposited at the Existing Landfill is treated residue from the WSF, and the remainder is direct disposal waste. (Ex. 1, ¶84). The proposed RWL would not be allowed to accept any waste for direct disposal, as was testified to by Mr. Edwards:

> Q [by Ms. Nair] * * * [W]hat is currently disposed of at the site?
>
> A There is -- we have two types that we are disposing. One is waste that goes to the treatment plant for treatment. And then the other is what we call direct disposal. That's waste that already achieves the standards that can be directly deposited into the disposal unit.
>
> Q Under the application, will PDC be able to directly dispose of hazardous waste at the residual waste landfill?
>
> A No.
>
> Q How about MGP waste or coal tar?
>
> A No.
>
> Q PCB waste?
>
> A No.
>
> Q Nonhazardous special waste?
>
> A No.
>
> Q Only treatment residue will be deposited in the residual waste landfill under the application?
>
> A That's correct.
>
> Q Is that the only treatment residue generated by PDC's activities at the site?
>
> A Right.

(Tr. 20/23-21/22). Pursuant to the Application, 100% of the material that will be deposited in the proposed RWL will be the treatment residue from the WSF.

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At present, PDC is reported as the generator of all treatment residue deposited in the Existing Landfill for all regulatory and administrative purposes. (*See* Tr. 27/15-22). For example, PDC is listed as the generator of the treatment residue in locator logs (Ex. 1, ¶¶36-41), hazardous waste annual reports submitted to the IEPA (Ex. 1, ¶¶51-54), LDR notification and certification statements (Ex. 1, ¶¶55-58), and waste manifests (Ex. 1, ¶¶59-63). Mark Crites, the sole witness offered by the IEPA at the hearing before the Board, a hazardous waste permit reviewer for the IEPA's Bureau of Land Permit section, agreed that PDC is "a generator for purposes of RCRA." (Tr. 38/21-22). Furthermore, Mr. Crites agreed that the IEPA "would be holding [PDC] in violation were [PDC] not filing those generator statements...." (Tr. 39/3-8).

The Treatment Residue

As Mr. Edwards testified, the WSF utilizes "an industrial process, employs methods and techniques specified by the U.S.EPA and IEPA to treat -- to physically change the composition of hazardous waste." (Tr. 22/3-5). The purpose of treatment is for the resultant residue to achieve health based risk standards prior to disposal. (Tr. 22/6-7).

During the treatment process, the chemical and physical makeup of the material received into the WSF is altered. (Tr. 22/8-25/3; R01120). At the hearing, Mr. Edwards briefly described the treatment process as follows:

> Q [by Ms. Nair] What is the treatment process itself?
>
> A We have incoming materials to the building. They are dumped into receiving bays. They are commingled with other waste materials coming into the plant. They are moved to a mixing chamber. We add reagents to the mixing chamber. As part of that process, we are adding cement, ferrous sulfate, fly ash and water. There is a exothermic chain reaction occurring -- exothermic meaning it's producing heat. Reaction occurs in the chamber itself. It renders the material much greater mass than initially was placed into the mixer. It's also very stable. It has improved load-bearing capacity. And it's very cohesive material.

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* * *

Q Could you describe any other physical changes undergone by the waste as it becomes the treatment residue?

A Essentially, it's sludges and dust that are coming into the plant. Once processed, it becomes a clay-like consistency. It's very compactible.

* * *

Q Could you describe the chemical changes that are undergone during the treatment process?

A Yes. This is the best demonstrative available technology process that's designated by the EPA under the regulations. And what's occurring is three things, a pH adjustment. We also are changing metal ions to hydroxides. And that's limiting leachability of the metal itself. The third thing is it's a pozzolanic material being added. The cementetious materials are pozzolanic, and they have silicates present. Those silicates combine around the metal. There is positive charge and negative charge ions. So they tend to bind around that metal itself to limit leachability of the metal.

(Tr. 22/8-20, 23/15-20, 24/3-16). The treatment process is described in much greater detail in the Application, in the Existing Permit, and in the Stipulated Statement of Facts. (*See* R00013, R01133-38, and Ex. 1, ¶¶23-35, respectively).

The treatment residue is homogeneous, and cannot be separated into its constituent elements:

Q [by Ms. Nair] And that final product, the treatment residue, is that homogenous?

A Yes.

Q Is it possible to separate that homogenous mass into its constituent elements?

A No. Not after it's been homogeneously mixed.

(Tr. 23/21-24/2).

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The treatment residue is capable of disposal into a landfill, while the materials received by the WSF for treatment are not:

> Q [by Ms. Nair] Can the waste that's brought in by PDC's customers for treatment be directly disposed of in a landfill?
>
> A No. Those are what are called restricted wastes. They do not meet the health base risk standards to allow lawful land disposal.
>
> Q In comparison, can the treatment residues be landfilled?
>
> A Yes. After we've processed it, the residues do achieve the health base risk standards, and they are legally allowed to be land disposed.

(Tr. 24/17-25-3).

Finally, in addition to the other physical and chemical changes undergone by the waste in the treatment process, the treatment residue has 40-50% greater mass than the material brought to the WSF by PDC's customers for treatment:

> Q [by Ms. Nair] You mentioned that fly ash, ferrous sulfate and cement are added to the materials received from customers. What percentage of mass does that constitute?
>
> A It's about 40 to 50 percent of the mass once treated.
>
> Q How does the facility acquire these materials that we mentioned?
>
> A They are purchased.
>
> Q And you may have already answered this, but what is the difference in the mass of the waste that's brought in from customers versus the treatment residue?
>
> A There is an increase of 40 to 50 percent.

(Tr. 23/2-14). Mark Crites, the witness offered by the IEPA at the hearing before the Board, agreed that PDC was the "generator" of the 40-50% of the mass of the treatment residue added

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during the treatment process, for the purposes of the siting exemption in 415 ILCS §5/3.330(a). (Tr. 37/6-38/17).

ARGUMENT

Local siting is a condition precedent to the issuance of permits only for new pollution control facilities. While courts have determined that a lateral or horizontal expansion of an existing facility can constitute a "new" pollution control facility (*see, e.g.*, M.I.G. Investments, Inc. v. E.P.A., 122 Ill.2d 392, 523 N.E.2d 1, 119 Ill.Dec. 533 (1988)), the Act specifically defines what is and is not a pollution control facility for purposes of siting. Specifically excluded from that definition is a facility where the owner stores, manages, transfers or disposes of waste that it generated. The relevant language, found at Section 3.330(a)(3) of the Act, specifically excludes a facility, which would otherwise be a pollution control facility, if that facility is: "used by any person conducting a waste storage, waste treatment, waste disposal, waste transfer or waste incineration operation, or a combination thereof, for wastes generated by such person's own activities, when such wastes are stored, treated, disposed of, transferred or incinerated within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person." (415 ILCS §5/3.330(a)).

In this case, the expansion proposed by PDC in its Application has been specifically fashioned to meet this exception. The Application is distinct from the expansion application originally contemplated by PDC for which siting was sought, which application would have allowed the Existing Landfill to operate into the future in the same manner it does now. The Application pending in this matter is limited to an expansion that is designed and permitted solely to accommodate the treatment residues from the RCRA regulated material that is accepted

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for treatment at the WSF and commingled with reagents in such a manner that the material is transformed by PDC into a new and different material, of which PDC is the generator. The WSF is not a subject of the Application.

In this case, it is clear that the requested permit meets the requirements of Section 3.330(a)(3) to be exempt from siting. Furthermore, PDC is the "generator" of the treatment residue as a matter of law, according to the Illinois Supreme Court and every relevant State and Federal law and regulation. The IEPA, historically, agreed that facilities like the WSF were "generators" of waste for purposes of Section 3.330(a)(3) of the Act; the IEPA's 180-degree change of position in this case was based on perceived public policy concerns rather than any change in the law. Finally, the IEPA's attempt to shift the Board's focus away from an analysis of the waste actually being landfilled under the requested permit contradicts the plain meaning of Section 3.330(a)(3) and the Act generally. There are strong State and Federal legislative and public policy motivations underlying the Section 3.330(a)(3) exemption; the IEPA's attempt to administratively rewrite the statute cannot be condoned by the Board.

AS A FACTUAL MATTER, THE PERMIT REQUESTED MEETS THE REQUIREMENTS OF SECTION 3.330(a)(3).

In order for a facility to be excluded from the definition of "new pollution control facility," Section 3.330(a)(3) requires that the wastes be treated and disposed of within the site or facility owned, controlled or operated by the generator of the wastes. It is undisputed that PDC owns, controls and operates the WSF and will own, control and operate the proposed RWL. (Ex. 1, ¶¶9 & 13). The WSF and the RWL are adjacent to and contiguous with each other. (Ex. 1, ¶12; R01219-20; Tr. 18/19-19/18). The treatment residue will be transported from the WSF to the proposed RWL via off-road trucks. (R00012). Only treatment residue generated at the WSF will be disposed of at the RWL. (R00012; Tr. 20/18-21/22). Therefore, the requested permit

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meets the exemption from status as a "new pollution control facility" contained in Section 3.330(a)(3) of the Act, and siting is not required for the Application.

Pursuant to the Application, the entirety of the waste to be disposed of in the RWL will originate at the WSF, located on the site. (R00012; Tr. 20/18-21/22). As is discussed above, in the WSF, PDC mixes metal-bearing wastes from various sources with chemical compounds or reagents to create a chemically stable new end-product with dramatically reduced leachable concentrations. (Ex. 1, ¶7). PDC then disposes of the treated residue in the Existing Landfill. (Ex. 1, ¶8). The WSF is a fully permitted existing pollution control facility. (Ex. 1, ¶19). PDC is not requesting any change to the WSF as a result of this Class 3 permit modification request. (Ex. 1, ¶20).

The treated residue is produced by PDC in a process where PDC commingles incoming hazardous waste with reagents, in order to alter the chemical and physical makeup of the hazardous waste, so that the resultant (or "residual") material is safe for disposal in the RCRA regulated landfill. The waste brought to PDC by PDC's customers for treatment at the WSF cannot legally be disposed of in a landfill. (Tr. 24/17-22). PDC is only permitted to accept waste for treatment and storage at the WSF, not for disposal. (*See* R01132-38; Ex. 1, ¶21). Once the treatment process is concluded, the treatment residues can be disposed of in a landfill. (Tr. 24/23-25/3). Undeniably, PDC's WSF process produces a waste which is distinct from the material sent to it for treatment from PDC's customers.

The WSF is currently authorized for storage and treatment of hazardous and non-hazardous wastes. (Ex. 1, ¶21). The principal treatment activity currently conducted in the WSF is microencapsulation of RCRA hazardous wastes utilizing reagents designed to reduce the leachability of inorganic hazardous constituents in accordance with the Best Demonstrated

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Available Technology Standards prescribed by the USEPA and the IEPA. (Ex. 1, ¶22). Once treated, the subject wastes become a new waste and PDC becomes the generator of the waste.

The chemical and physical makeup of the waste received into the WSF is changed by the treatment process. (Ex. 1, ¶23). Chemically, PDC's addition of proprietary chemical reagents converts metals within the untreated waste into relatively non-leachable hydroxides and silicates bond to the metals to microencapsulate them, rendering the treated residue compliant with the RCRA Land Disposal Restriction ("LDR") standards, which are in most cases below those concentrations allowed at RCRA Subtitle D, non-hazardous landfill facilities. (Ex. 1, ¶24). Treatment is performed on a batch basis. (Ex. 1, ¶25). Generally, wastes from several producers are placed in a mixer. (Ex. 1, ¶26). Physically, the untreated waste is commingled and blended with other wastes, the chemical reagents, and water used as a slurrying agent, resulting in an exothermic chemical reaction which produces a residue possessing much greater mass, stability, load bearing capacity, and cohesion relative to the untreated waste. (Ex. 1, ¶27).

Samples of untreated wastes received at the WSF generally exceed the LDR standards for leachable metal compounds and are, therefore, prohibited from land disposal under RCRA. (Ex. 1, ¶29). After treatment, samples of the treated residues from this process undergo TCLP analysis to demonstrate that they do not exceed applicable LDR standards prior to disposal. (Ex. 1, ¶30). Sampling and analysis procedures are detailed in PDC's RCRA Part B Permit, copies of which have been submitted. Accordingly, PDC provides a service to the customer who sends its material to PDC, since the material must be treated prior to disposal. Therefore, PDC becomes the generator of the specific waste upon treatment and prior to landfilling.

In addition, PDC performs solidification of both hazardous and non-hazardous liquid wastes in the WSF. (Ex. 1, ¶32). This is accomplished through the use of pozzolanic reagents

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which convert liquids or semi-liquids into more stable solids. (Ex. 1, ¶33). Samples of these residues are subjected to the paint filter and load bearing capacity tests prior to disposal. (Ex. 1, ¶34). As with the bulk treated wastes previously discussed, these wastes change in physical and chemical form and, again, PDC becomes the generator of the specific waste prior to landfilling. (Ex. 1, ¶35).

It is PDC's own activities which generate the treated residue, and it is the treated residue which is the sole material which will be allowed to be disposed pursuant to the requested permit. The term "generate" is generally defined in the Act, at Section 3.205: "any person whose act or process produces waste." 415 ILCS §5/3.205. Therefore, the proposed RWL clearly satisfies the requirements of Section 3.330(a)(3) for exemption from local siting approval.

AS A MATTER OF LAW, PDC IS THE "GENERATOR" OF THE TREATMENT RESIDUE.

The IEPA recognizes that PDC is the "generator" of the treatment residue under each and every relevant State and Federal law and regulation, contesting only that PDC is the "generator" of the treatment residue under Section 3.330(a)(3). This distinction is without legal or factual basis, and is contrary to established laws, regulations and State and Federal public policies.

Designation as a "generator" by the Illinois Supreme Court.

The Illinois Supreme Court has already had occasion to review the very process utilized by PDC which is the subject of this permit. Envirite Corporation v. Illinois Environmental Protection Agency, 158 Ill.2d 210, 217, 632 N.E.2d 1035, 1038, 198 Ill.Dec. 424, 427 (1994). In doing so, the Court determined that, in law and in fact, (1) PDC is the generator of the treatment residue, (2) customers who ship hazardous waste to PDC for treatment are not generators of that waste, and (3) accordingly, customers who ship hazardous waste to PDC for treatment do not

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need to obtain special authorization as "generators" of hazardous waste pursuant to Section 39(h) of the Act. That is because, for purposes of disposal under RCRA, PDC is itself the generator.

The case was brought by Envirite Corporation ("Envirite"), a competitor of PDC, which argued that PDC inappropriately received material from a customer (Production Plated Plastics or "PPP", a Michigan company) since PPP was not an authorized generator of hazardous waste. The Supreme Court disagreed and ruled that in this factual circumstance, PDC is itself the generator of "Peoria Disposal's end-waste."

In reaching such decision, the Supreme Court affirmed an earlier determination of the Board, which held "that [PDC] is both the generator and the disposal site owner and operator for purposes of 39(h) because it is [PDC] that disposes of the waste residue after chemical stabilization." PCB 91-152, 1991 WL 303597, *4 (Illinois Pollution Control Board, December 19, 1991) (emphasis added). Based on argument by the IEPA and by PDC, the Board concluded that PDC was the generator of the wastes processed at the WSF and the owner and operator of the disposal site for same, as a matter of law:

> Here, it is undisputed that Peoria receives hazardous wastes from companies such as PPP, the waste is subject to a proprietary 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).

Id. at *5 (emphasis added).

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In upholding the Board's decision, the Illinois Supreme Court stated, in pertinent part, as follows:

> The plain language of the unamended section 39(h) expressly requires that only the generator of "that specific hazardous waste stream" that is deposited in a landfill must obtain Agency authorization prior to disposal. It is undisputed that Peoria Disposal combined PPP's F006 waste with other wastes and then subjected this mixture to a chemical stabilization process, which resulted in a new residue. Based on these undisputed facts, we agree with the Board that Peoria Disposal and not PPP was the generator of this specific hazardous waste stream, which Peoria Disposal deposited in its landfill.

Envirite Corporation, 158 Ill.2d at 217, 632 N.E.2d at 1038, 198 Ill.Dec. at 427 (emphasis added).

While Envirite Corporation, *supra*, concerned Section 39(h) of the Act, and the IEPA here suggests a distinction concerning the application of the term "generator" for purposes of siting, there is no valid distinction to be made under the law. In fact, the court in Envirite Corporation utilized and generally applied the very same definition of "generator" that is relevant here: "any person whose act or process produces waste." *See* id., at 215, 1037, 426. The Section 39(h) supplemental definition of generator, which it also applied by the Court in Envirite Corporation, takes nothing away from that broader definition for purposes of analysis of this Application.

Definitions of "generator" in the Act.

The relevant language of Section 3.330(a)(3) reads: "wastes generated by such person's own activities." These provisions must be read together; instead, the IEPA suggests an entirely separate, unwritten definition of the word "generate" for purposes of siting, a definition not found in the Act. It is a "general rule of statutory construction that when the same words appear in different parts of the same statute, they should be given the same meaning absent some

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contextual indication that the legislature intended otherwise." People v. Grever, 222 Ill.2d 321, 331, 856 N.E.2d 378, 384, 305 Ill.Dec. 573, 579 (2006), *rehearing denied* (Sep 25, 2006); *see also* Guillen ex rel. Guillen v. Potomac Ins. Co. of Illinois, 203 Ill.2d 141, 152, 785 N.E.2d 1, 8, 271 Ill.Dec. 350, 357 (2003); McMahan v. Industrial Com'n, 183 Ill.2d 499, 513, 702 N.E.2d 545, 552, 234 Ill.Dec. 205, 212 (1998), *citing* People v. Talbot, 322 Ill. 416, 422, 153 N.E. 693 (1926). There is no contextual indication in this case that the legislature intended "generate" to mean anything different in Section 39(h) of the Act than it does in Section 3.330(a)(3) of the Act. Rather, for purposes of either section, "generator" should be ascribed the meaning set forth in Section 3.205 (formerly, Section 3.12). 415 ILCS §5/3.205.

Designation as a "generator" under RCRA.

As the Board knows, RCRA is a comprehensive Federal regulatory program which regulates hazardous waste "from cradle to grave." State regulations concerning hazardous waste are required to be identical-in-substance to Federal regulations. The RWL contemplated in the proposed permit will be subject to these identical-in-substance hazardous waste landfill regulations under RCRA, not the more generalized Subtitle D landfill regulations applicable to municipal solid waste landfills. *See, e.g.* City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 331, 114 S.Ct. 1588, 1590, 128 L.Ed.2d 302 (1994) ("RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934. (Nonhazardous wastes are regulated much more loosely under Subtitle D, 42 U.S.C. §§ 6941-6949.)"). RCRA embodies a strong, national public policy in favor of safe treatment and disposal of hazardous waste:

> RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste. See

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> *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331-332, 114 S.Ct. 1588, 1589-1590, 128 L.Ed.2d 302 (1994). * * *. RCRA's primary purpose ... is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b).

Meghrig v. KFC Western, Inc., 516 U.S. 479, 483, 116 S.Ct. 1251, 1254, 134 L.Ed.2d 121 (1996).

When PDC's customers generate hazardous waste, they turn to PDC to treat such waste pursuant to RCRA, which PDC has been doing (safely and in full compliance with RCRA) since 1989. PDC is an integral part of the comprehensive "cradle-to-grave" system for the management and treatment of hazardous waste established by the United States. Limitations and restrictions placed on PDC by the IEPA directly affect this national plan for hazardous waste treatment.

There is no dispute in this case that the treatment residues themselves are generated by PDC for RCRA purposes. The IEPA's sole witness at the hearing before the Board agreed that PDC is "a generator for purposes of RCRA." (Tr. 38/21-22). The IEPA is playing a dangerous game if it alleges that the definitions of terms under RCRA are subservient or subject to the IEPA's definitions of identical terms under Illinois law, where the facility at issue is permitted pursuant to RCRA.

Administrative treatment as a "generator."

Furthermore, from an administrative standpoint, PDC has always been considered the "generator" of the treatment residue. PDC is required by law and regulation to maintain a waste locator log which documents the location of all hazardous waste placed into the Existing Landfill. (Ex. 1, ¶36). Pursuant to regulation, PDC is required to list in the log the generator of

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the waste being deposited into the Existing Landfill. (Ex. 1, ¶37). From its initial operation of the WSF, PDC has always documented PDC as the specific generator of the waste generated at the WSF and deposited into the Existing Landfill. (Ex. 1, ¶38). The locator logs have undergone numerous reviews by IEPA personnel during landfill inspections. (Ex. 1, ¶39). Because the treatment residue is a new, homogeneous waste, the locator logs do not indicate what wastes were initially treated to create such residue.

The IEPA has issued a number of permits over the years acknowledging that PDC is the generator of the treatment residue created at the WSF, examples of which were provided with the Application and are summarized herein:

- On January 13, 1989, the IEPA issued supplemental permit number 881046 to PDC for the disposal of stabilization residues-K061 which designated PDC as the generator of the treated residues for K061 from the WSF and authorized PDC to deposit the treated residue into its on-site landfill. (Ex. 1, ¶42). In accordance with supplemental permit number 881046, PDC deposited treated K061 residue in the landfill beginning on January 17, 1989. (Ex. 1, ¶43).
- On February 10, 1989, the IEPA issued supplemental permit number 890106 to PDC for non-hazardous stabilization regarding waste class 80 non-hazardous which designated PDC as the generator of the treated residues. (Ex. 1, ¶45).
- On March 20, 1989, the IEPA issued supplemental permit number 890105 to Clinton Landfill, Inc. for non-hazardous stabilization regarding waste class 80 non-hazardous which designated PDC as the generator of the treated residue. (Ex. 1, ¶46).
- On August 2, 1989, the IEPA issued supplemental permit number 890800 to Peoria City/County Landfill, Inc. for non-hazardous stabilization regarding waste class 80

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non-hazardous which designated PDC as the generator of the treated residue. (Ex. 1, ¶49).

PDC is required to submit a Facility Annual Hazardous Waste Report to the IEPA each calendar year. (Ex. 1, ¶51). In the annual report, PDC is required to identify (by ID Number) the generators who deposited waste at the Existing Landfill for that year, the type of waste and the volume deposited. (Ex. 1, ¶52). In the annual reports, PDC has always been listed as the sole generator of the treated residue from the WSF. (Ex. 1, ¶53).

Hazardous waste generators are required to make certain LDR notification and certification statements to the facilities that will receive and manage their waste in order to ensure that RCRA-hazardous wastes are properly managed at treatment, storage, and disposal facilities. (Ex. 1, ¶55). It is PDC that is required by State and Federal law to make the required LDR notification and certification statements daily for each batch of treatment residue. (Ex. 1, ¶56). The notification and certification is made subsequent to chemical stabilization and upon receipt of analytical data indicating LDR compliance. (Id.) On those statements, PDC is always reported as the generator of the waste. (Ex. 1, ¶57).

The WSF has occasionally shipped treated residues off-site to other landfill facilities. (Ex. 1, ¶59). When this occurs, the treated residues become subject to the waste manifest system requirements. (Ex. 1, ¶60). Clearly, after effecting such dramatic chemical and physical changes in the waste, PDC must assume ownership of the waste for manifesting purposes. (*See* Ex. 1, ¶61). As such, PDC has always been identified as the generator on waste manifests representing off-site shipments. (Ex. 1, ¶62).

On February 4, 1993, the Board granted to PDC an adjusted standard (delisting) for certain wastes generated at its WSF. (Ex. 1, ¶64). In the Order of the Board granting the

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delisting, the Board specifically identifies PDC as the generator of the treated waste, stating, in pertinent part, as follows:

> Peoria Disposal Company's treated F006 residues generated by the PDC F006 waste stabilization process described in their amended petition filed March 2, 1992 are non-hazardous as defined in 35 Ill. Adm. Code 721.

In the Matter of: Petition of Peoria Disposal Company for Adjusted Standard From 35 Ill.Adm.Code 721 Subpart D, AS 91-3, 1993 WL 46815, pg. 1 (Illinois Pollution Control Board, February 4, 1993); *see also* Ex. 1, ¶65.

Likewise, regarding PDC's delisting authorization in the Opinion of the Board dated March 11, 1993, the Board states, in pertinent part, as follows:

> The petition essentially seeks a hazardous waste delisting for certain listed hazardous wastes generated by PDC at its Peoria County facility. This opinion supports the Board's order of February 4, 1993 granting an adjusted standard on a joint motion for expedited decision, as explained below.

In the Matter of: Petition of Peoria Disposal Company for Adjusted Standard From 35 Ill.Adm.Code 721 Subpart D, AS 91-3, pg. 1 (Illinois Pollution Control Board, March 11, 1993); *see also* Ex. 1, ¶66.

THE IEPA HAS PREVIOUSLY (AND CORRECTLY) APPLIED THE SECTION 3.330(a)(3) EXEMPTION TO SIMILARLY SITUATED RCRA FACILITIES.

Envirite Corporation

As mentioned above, Envirite is and has been a competitor of PDC. Envirite owns and operates a hazardous waste treatment facility in Harvey, Illinois. (Ex. 1, ¶74). On April 29, 1992, without requiring siting, the IEPA issued a permit to Envirite to operate a pollution control facility in Livingtson County, near Pontiac, Illinois, for disposal of residual sludge generated by Envirite in its waste treatment process. (Ex. 1, ¶¶75, 78). The residual sludge was generated at its

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waste treatment plant in Harvey, Illinois. (Ex. 1, ¶77). Like PDC's treatment residue, the sludge was produced from the treatment of waste that was produced elsewhere and transported to the facility for treatment. (Id.) Upon generation of the sludge, Envirite was allowed to transport it approximately ninety (90) miles away to the Livingston County pollution control facility, which Envirite was allowed to develop without siting for this specific purpose. (Id.)

There were extensive discussions between Envirite and the IEPA concerning the applicability of local siting, and those discussions have been made a part of this record. (*See* R01304-18). While the relevant provisions of the Act were, for purposes of this analysis, identical to those in play here, the IEPA's determination was opposite to that which forms the basis of this appeal. (Ex. 1, ¶78). In a letter dated April 2, 1990, from IEPA Attorney Gary P. King to Fred C. Prillaman of Mohan, Alewelt, Prillaman & Adami, Mr. King discussed the applicability of the very exemption PDC urges here and stated:

> Materials generated by these operations at the Harvey facility which are transported to and disposed at the Envirite/Livingston Residual Waste Landfill in Livingston County would not cause the Livingston County facility to be a regional pollution control facility. I reach this conclusion because of the language of Section 3.32 of the Environmental Protection Act, Ill.Rev.Stat. Ch. 111 1/2, par. 1003.32. which exempts from the definition "regional-pollution control facility":
>
> > (3) sites or facilities used by any person conducting a waste storage, waste treatment, waste disposal, waste transfer or waste incineration operation, or a combination thereof, for wastes generated by such person's own activities, when such wastes are stored, treated, disposed of, transferred or incinerated within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person.
>
> Since the Livingston Residual Waste Landfill is not a regional pollution control facility, it is not a new regional pollution control facility. Therefore, unless the exemption set forth above ceases to

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> apply, this landfill may be permitted for development without obtaining local siting approval pursuant to Section 39.2 of the Act.

(R01319-21; *see also* Ex. 1, ¶¶78-79).

The issuance of the permit to Envirite to develop a landfill for the disposal of the residual sludge from its waste treatment plant without requiring local siting approval establishes precedent for the issuance of this Class 3 permit modification request to PDC without requiring local siting approval. In fact, it is hard to fathom how the IEPA can justify treating two competitors diametrically different, on the basis of the very same provisions of the Act.

Envirite and PDC both operate hazardous waste treatment plants that generate treatment residues. The treatment residue is deposited into a landfill owned respectively by Envirite and PDC; each of these landfills is dedicated solely for the disposal of their respective treatment residues. The IEPA decided that the landfill owned and operated by Envirite, the Livingston Residual Waste Landfill, is excluded from the definition of "pollution control facility" under Section 3.330(a)(3). (R01319-21; *see also* Ex. 1, ¶¶78-79). Clearly, the IEPA should have made the same determination for PDC's RWL, finding that it also is excluded from the definition of "pollution control facility" under Section 3.330(a)(3) of the Act.

At the hearing before the Board in this matter, Mr. Crites' attempt to rationalize the IEPA's changed position, discussed further below, rings hollow. (Tr. 35/15-36/5). PDC expects that the Board will apply the law as written, consistent with prior administrative and court decisions.[4]

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[4] In the permit record filed by the IEPA with the Board, the IEPA included documentation of discussions between IEPA land bureau personnel and IEPA lawyers that led to IEPA's decision to issue the Envirite permit without siting. (R01304-21). As to PDC's Application, similar discussions occurred, but IEPA redacted key portions of documents from the record prior to transmitting PDC's record to the Board. (*See* R01372-74, R01375). Specifically, IEPA redacted the opinions of IEPA Attorney Mark Wight who, as the Board is aware, has represented the IEPA before the Board on cases involving landfill and RCRA regulations. The following exchange occurred between counsel at hearing:

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Northwestern Steel and Wire Company

Northwestern Steel and Wire Company ("Northwestern") operated a steel manufacturing facility located near Sterling, Illinois. (Ex. 1, ¶67). Northwestern received a RCRA Part B permit for a hazardous waste landfill in 1987. (Ex. 1, ¶68). This permit authorized the disposal of non-hazardous and hazardous waste in Northwestern's hazardous waste landfill units which were initially developed prior to the SB-172 siting bill. (Id.) In 1992, as its landfill was nearing capacity, Northwestern filed a Class 3 permit modification with the IEPA to vertically expand its landfill, to accommodate disposal of K061 treatment residue from its on-site waste stabilization facility. (Ex. 1, ¶69). Apparently applying the exemption set forth in Section 3.330(a) of the Act, the IEPA permitted the facility without first requiring siting. (*See* Ex. 1, ¶¶70-72).

The IEPA's change of position in this case regarding the application of Section 3.330(a)(3) is not controlling on the Board.

The Act and relevant case law does not require that the Board defer to the IEPA's determinations in permit decisions, especially when those permit decisions are based, as they are here, on a question of law. The Board, should, however, recognize that of the IEPA's two positions at play in this case (*i.e.*, permitting Envirite and Northwestern without requiring siting, vs. its position regarding the Application in this case), the former position is consistent with the Act, though the latter may be more publicly and politically acceptable. As Mr. Crites admitted, the IEPA's changed position in large part results from a sense that local siting has assumed a

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Q: [Ms. Manning to Ms. Ryan] I don't assume you want to share with us today, do you, what Mr. White's [*sic*] opinion is?

A: [Ms. Ryan to Ms. Manning] Mark may want to share it, but I don't want him to share it.

(Tr. 40/15-19). Counsel for PDC later moved that the IEPA produce the documents without redaction. The Board's Hearing Officer specifically declined to rule on the motion.

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more important role in recent years. (Tr. 36/2-5). Importantly, the specific provisions of the Act relevant to the question before the Board have not changed, as key lawyers at the IEPA recognize. (*See also* Tr. 39/21-40/1).

As an administrative agency, the IEPA is charged with implementing the Act as written, and has no authority to legislate a new or tortured definition of terms that are legislatively defined. *See* Alternate Fuels, Inc. v. Director of Illinois E.P.A., 215 Ill.2d 219, 238, 830 N.E.2d 444, 455, 294 Ill.Dec. 32, 43 (2004), *as modified on denial of rehearing* (2005) ("We give statutory language its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction. [Citation omitted.] We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent.").

THE ORIGINAL PRODUCTION OF THE HAZARDOUS WASTE ACCEPTED FOR TREATMENT AT THE WSF IS IRRELEVANT TO THE SECTION 3.330(a)(3) EXEMPTION.

The proper focus of the 3.330(a)(3) exemption is on those materials to be disposed of at the proposed RWL (the facility sought to be permitted), *i.e.*, the treatment residues. Clearly, under every legal, regulatory and administrative definition available, those treatment residues are generated by PDC through its treatment activities at the WSF. Instead of keeping this narrow focus, the IEPA in its denial letter attempts to shift the focus to the materials brought into the WSF, stating that the exemption does not apply because "[t]he treatment residues are derived from wastes that were initially generated by off-site generators...." (R01370; Ex. 2 hereto, pg. 2).

As stated above, such position attempts to write a new definition into the Act. The fact that PDC accepts hazardous waste from third parties for treatment has no bearing on the fact that the residual waste is generated by PDC's "own activities." Even if one were to accept the IEPA's assertion that the materials received by the WSF are relevant to the analysis of whether the

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treatment residues are generated by PDC, at least one Appellate Court in Illinois would disagree with the IEPA's conclusions. In Northern Trust Co. v. County of Lake, a developer claimed that local zoning of his new wastewater treatment plant, constructed as part of a townhouse development, was preempted because the plant was a "new pollution control facility" governed by the Act. 353 Ill.App.3d 268, 818 N.E.2d 389, 288 Ill.Dec. 701 (2 Dist. 2004), *appeal denied*, 213 Ill.2d 562, 829 N.E.2d 789, 293 Ill.Dec. 864 (2005). The Court disagreed, finding that the exclusion in Section 3.330(a)(3) applied to the plant:

> [W]e agree with Lake County that the facility meets the description of section 3.32(a)(3) [now Section 3.330(a)(3)] of the Act, which excludes certain sites and facilities from the definition of a "pollution control facility." Conceding that they would own, control, or operate the facility and put it to their own use, plaintiffs nevertheless argue that the facility does not meet the definition exclusion of section 3.32(a)(3) because the residents of the townhomes would use the facility as well. Plaintiffs cite no authority for the proposition that a facility is excluded as a new pollution control facility only if the owner, controller, or operator is also its sole user. Because it conflicts with the plain language of the statute, we reject plaintiffs' interpretation of section 3.32(a)(3).
>
> Plaintiffs further argue that the facility does not fall under section 3.32(a)(3) because "the waste will not be completely treated within the site or facility owned." We again disagree with plaintiffs' interpretation. Nothing in section 3.32(a)(3) requires that wastes be treated completely for a facility to be excluded from the definition of a "new pollution control facility" under the Act. Moreover, the section expressly includes operations involving the transport of wastes within the site, which would naturally occur before treatment is ever completed.

Id. at 280-81, 712, 400. While the case was not a siting case, it is clear from the Court's analysis that the proper focus of the Section 3.330(a)(3) exemption is not on the fact that non-PDC material is accepted to the facility for treatment. Instead, the proper focus is on the ownership and management of the treatment residues which are subject to disposal in the proposed RWL.

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The analysis in the IEPA's denial letter is not the analysis called for in the statutory exemption. Moreover, under the IEPA's test, almost no applicant could ever be a "generator" of waste. Nearly all wastes "were initially generated by off-site generators" as defined by the IEPA in the denial letter. For example, in the case of City of Chicago v. Environmental Defense Fund, the Supreme Court stated that "RCRA defines 'generation' as 'the act or process of producing hazardous waste.' 42 U.S.C. § 6903(6). There can be no question that the creation of ash by incinerating municipal waste constitutes 'generation' of hazardous waste...." 511 U.S. at 336, 114 S.Ct. at 1592, 128. Obviously, the City of Chicago was not only incinerating waste it produced itself, but waste produced by thousands of manufacturers, and further used and reproduced by tens of thousands of consumers.

The original producer of the waste, who sent the material to the WSF for treatment and ultimate disposal, is essentially irrelevant to the status of generator which, in RCRA terminology, is tantamount to bearing sole responsibility for the waste. PDC bears sole responsibility for the treatment residue it generates in its WSF and, for purposes of siting, ought to be allowed to continue to dispose of such treatment residue onsite without siting, as the relevant exemption allows.

CONCLUSION

The IEPA's sole contention in this case is that PDC is not the "generator" of the treatment residue under Section 3.330(a)(3), even though PDC is the "generator" of the treatment residue under each and every other relevant State and Federal law and regulation. This contention is not correct. At the end of the analysis, the original producer of the waste, who sent the material to the WSF for treatment, is irrelevant to the status of PDC as the generator of the

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treatment residues. PDC bears sole responsibility for the treatment residues, and is recognized as the generator thereof by the IEPA, pursuant to all State and Federal laws and regulations.

The issuance by the IEPA of the Class 3 permit modification does not require siting approval because the increase in the maximum waste elevation and horizontal expansion adjacent to the southwestern portion of Area C is solely for the disposal of treated residue generated by PDC and, therefore, the proposed RWL does not constitute a "pollution control facility" under Section 3.330(a) of the Act. The treated residue from the WSF is waste generated by PDC's activities.

Based on all the foregoing, the IEPA should have reviewed the Class 3 permit modification to PDC for the development and operation of PDC's RWL without requiring PDC to submit proof of local siting approval.

WHEREFORE, PDC respectfully requests that the Board enter judgment in favor of PDC, reverse the IEPA's permit denial, and remand this matter to the IEPA for technical review of the Application.

Respectfully submitted,

PEORIA DISPOSAL COMPANY,
Petitioner

Dated: November 15, 2007

By: _____
One of its attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB No. 08-25
v.	)	
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

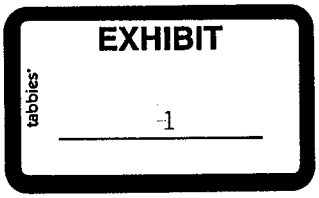
STIPULATED STATEMENT OF FACTS

NOW COME the Petitioner, PEORIA DISPOSAL COMPANY ("PDC"), through its undersigned attorneys, and the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (the "IEPA"), through its undersigned attorneys, and as and for their Stipulated Statement of Facts, state as follows:

The Application

1. On or about January 5, 2007, PDC submitted to the IEPA an application for modification of PDC's RCRA Part B Permit No. ILD000805812/1438120003, Log No. 24, which was issued to Petitioner by the IEPA's Bureau of Land on November 4, 1987 (the "Application").

2. As explained in the Application, the modification sought "to allow the development and operation of a landfill unit known as the PDC No. 1 Residual Waste Landfill ... for acceptance of residual waste from PDC's RCRA-permitted Waste Stabilization Facility.... The RWL would be a dedicated landfill that would accept only waste residuals generated by PDC in its WSF." Application, D-6-A-1.



3. The Application relates to a proposed vertical expansion over the currently permitted 32.4 acre landfill ("Area C") plus an approximately 8.2 acre horizontal expansion adjacent to the southwestern portion of Area C.

4. The area sought to be developed pursuant to the Application will be referred to as the "PDC No. 1 Residual Waste Landfill" (herein referred to as the "RWL").

5. The RWL will provide approximately 2 million tons of disposal space to be used for residual waste from the PDC hazardous waste stabilization facility.

6. By letter dated August 30, 2007, the IEPA denied PDC's Application. The IEPA's stated rational for the denial was that the Application was deficient because it did not show proof on local siting pursuant to Section 39.2 of the Illinois Environmental Protection Act ("Act"). A true and accurate copy of such letter is included in the Administrative Record filed herein at Bates 01369-01370.

Brief Description of the WSF and the Residual Waste Landfill

7. PDC owns and operates a hazardous waste stabilization facility ("WSF") in which PDC mixes metal-bearing hazardous wastes from various sources with chemical compounds ("reagents") to create a chemically stable product with dramatically reduced leachable concentrations.

8. PDC then disposes of the treated residue in PDC Landfill No. 1 (the "Existing Landfill").

9. PDC owns the Existing Landfill.

10. A picture of the WSF is attached in Appendix D-6-16-A of the Application as Exhibit A.

11. A portion of the location of the proposed RWL is shown in the background in Exhibit A.

12. A site plan showing the location of the WSF and the proposed RWL is attached in Appendix D-6-16-A of the Application as Exhibit M.

13. Attached in Appendix D-6-16-A of the Application as Exhibit N is a deed and plat of survey which shows PDC is the owner of both the WSF and the RWL.

Permitting of the WSF

14. The WSF was approved in PDC's RCRA Part B Permit issued by the IEPA for operation in 1989.

15. In 1995, PDC submitted a Class 2 permit modification request to the U.S. Environmental Protection Agency (the "USEPA") to change the WSF from a waste pile to a containment building unit.

16. This request was approved in a letter from the USEPA dated May 3, 1996.

17. Copies of the permits for the WSF are attached in Appendix D-6-16-A of the Application as Exhibit B.

18. PDC receives waste at the WSF in accordance with PDC's issued RCRA Part B Permit.

19. This issued permit authorizes PDC to accept the wastes for treatment at the WSF.

20. PDC is not requesting any change to the WSF as a result of the Class 3 permit modification requested in the Application.

The Operations of the WSF

21. The WSF is currently authorized for storage and treatment of hazardous and non-hazardous wastes.

22. The principal treatment activity currently conducted in the WSF is microencapsulation of RCRA hazardous wastes utilizing reagents designed to reduce the leachability of inorganic hazardous constituents in accordance with the Best Demonstrated Available Technology Standards prescribed by the USEPA and the IEPA.

23. The chemical and physical makeup of the waste received into the WSF is changed by the treatment process.

24. Chemically, PDC's addition of proprietary chemical reagents converts metals within the untreated waste into relatively non-leachable hydroxides and silicates, rendering the treated residue compliant with the RCRA Land Disposal Restriction ("LDR") standards, which are in most cases below those concentrations allowed at RCRA Subtitle D, non-hazardous landfill facilities.

25. Treatment is performed on a batch basis.

26. Generally, wastes from several producers are placed in a mixer.

27. Physically, the untreated waste is commingled and blended with other wastes, the chemical reagents, and water used as a slurrying agent, resulting in an exothermic chemical reaction which produces a residue possessing much greater mass, stability, load bearing capacity, and cohesion relative to the untreated waste.

28. Attached in Appendix D-6-16-A of the Application as Exhibit C is a drawing of the Stabilization Mixer at the WSF.

29. Samples of untreated wastes received at the WSF generally exceed the LDR standards for leachable metal compounds and are, therefore, prohibited from land disposal under RCRA.

30. After treatment, samples of the treated residues from this process undergo TCLP analysis to demonstrate that they do not exceed applicable LDR standards prior to disposal.

31. Sampling and analysis procedures are detailed in PDC's RCRA Part B Permit, copies of which are attached in Appendix D-6-16-A of the Application as Exhibit D.

32. PDC also performs solidification of both hazardous and non-hazardous liquid wastes in the WSF.

33. This is accomplished through the use of pozzolanic reagents which convert liquids or semi-liquids into more stable solids.

34. Samples of these residues are subjected to the paint filter and load bearing capacity tests prior to disposal.

35. As with bulk treated wastes, these wastes change in physical and chemical form during the solidification process.

Locator Logs

36. PDC is required by law and regulation to maintain a waste locator log which documents the location of all hazardous waste placed into the Existing Landfill.

37. Pursuant to regulation, PDC is required to list in the log the generator of the waste being deposited into the Existing Landfill.

38. From its initial operation of the WSF, PDC has always documented PDC as the specific generator of the waste generated at the WSF and deposited into the Existing Landfill.

39. The locator logs have undergone numerous reviews by IEPA personnel during landfill inspections.

40. PDC was correctly identified as the generator of the treated residue deposited into the Existing Landfill in the locator logs.

41. Excerpts from the waste locator logs are attached in Appendix D-6-16-A of the Application as Exhibit E.

Supplemental Permits

42. On January 13, 1989, the IEPA issued supplemental permit number 881046 to PDC for the disposal of stabilization residues-K061 which designated PDC as the generator of the treated residues for K061 from the WSF and authorized PDC to deposit the treated residue into the Existing Landfill.

43. In accordance with supplemental permit number 881046, PDC deposited treated K061 residue in the Existing Landfill beginning on January 17, 1989.

44. Attached in Appendix D-6-16-A of the Application as Exhibit F is a copy of supplemental permit number 881046 and copies of the locator logs for this date.

45. On February 10, 1989, the IEPA issued supplemental permit number 890106 to PDC for non-hazardous stabilization regarding waste class 80 non-hazardous which designated PDC as the generator of the treated residues.

46. Attached in Appendix D-6-16-A of the Application as Exhibit G is a copy of supplemental permit 890106.

47. On March 20, 1989, the IEPA issued supplemental permit number 890105 to Clinton Landfill, Inc. for non-hazardous stabilization regarding waste class 80 non-hazardous which designated PDC as the generator of the treated residue.

48. Attached in Appendix D-6-16-A of the Application as Exhibit H is a copy of a supplemental permit 890105.

49. On August 2, 1989, the IEPA issued supplemental permit number 890800 to Peoria City/County Landfill, Inc. for non-hazardous stabilization regarding waste class 80 non-hazardous which designated PDC as the generator of the treated residue.

50. Attached in Appendix D-6-16-A of the Application as Exhibit I is a copy of supplemental permit 890800.

Facility Annual Hazardous Waste Reports

51. PDC is required to submit a Facility Annual Hazardous Waste Report to the IEPA each calendar year.

52. In the annual report, PDC is required to identify (by USEPA ID Number) the generators who deposited waste at the Existing Landfill for that year, the type of waste and the volume deposited.

53. In the annual reports, PDC has always been listed as the generator of the treated residue from the WSF.

54. Attached in Appendix D-6-16-A of the Application as Exhibit J are excerpts from the Facility Annual Hazardous Waste Reports for the calendar years 2004 to 2005.

LDR Notification and Certification Statements

55. In order to ensure that RCRA-hazardous wastes are properly managed at treatment, storage, and disposal facilities, 35 Ill. Adm. Code §728.107 requires hazardous waste generators to make certain LDR notification and certification statements to the facilities that will receive and manage their waste.

56. After chemical stabilization and upon receipt of analytical data indicating LDR compliance, the WSF must make to the Existing Landfill the required LDR notification and certification statements daily for each treated batch.

57. On those statements, PDC has always been reported as the generator of the waste.

58. Attached in Appendix D-6-16-A of the Application as Exhibit K are representative copies of these documents, one each from the calendar years 2004 through 2006.

Waste Manifests

59. The WSF has occasionally opted and still may at its option ship treated residues off-site to landfill facilities other than the Existing Landfill.

60. When this occurs, the treated residues become subject to the waste manifest system requirements.

61. After the chemical and physical changes in the waste, PDC must assume ownership of the waste for manifesting purposes.

62. PDC has always been identified as the generator on waste manifests representing off-site shipments.

63. Attached in Appendix D-6-16-A of the Application as Exhibit L are representative copies of such manifests, as well as the corresponding LDR notification and certification statement.

1993 Delisting

64. On February 4, 1993, the Illinois Pollution Control Board (the "IPCB") granted to PDC an adjusted standard (delisting) for certain wastes generated at its WSF.

65. In the Order of the IPCB granting the delisting, the IPCB specifically identifies PDC as the generator of the treated waste, stating, in pertinent part, as follows:

> Peoria Disposal Company's treated F006 residues generated by the PDC F006 waste stabilization process described in their amended petition filed March 2, 1992 are non-hazardous as defined in 35 Ill. Adm. Code 721.

66. Likewise, regarding PDC's delisting authorization in the Opinion of the IPCB dated March 11, 1993, the IPCB states, in pertinent part, as follows:

> The petition essentially seeks a hazardous waste delisting for certain listed hazardous wastes generated by PDC at its Peoria County facility. This opinion supports the Board's order of February 4, 1993 granting an adjusted standard on a joint motion for expedited decision, as explained below.

Northwestern Steel and Wire Company

67. Northwestern Steel and Wire Company ("Northwestern") operated a steel manufacturing facility located near Sterling, Illinois.

68. Northwestern received a RCRA Part B permit for a hazardous waste landfill in 1987, authorizing the disposal of non-hazardous and hazardous waste in Northwestern's hazardous waste landfill units which were initially developed prior to the SB-172 siting bill.

69. As its landfill was nearing capacity, Northwestern filed a Class 3 permit modification with the IEPA in 1992 to vertically expand its landfill.

70. Although the SB-172 siting bill, now incorporated into Section 39.2 of the Act, applied during the time of the referenced expansion, Northwestern determined that the expansion was exempt from the siting law pursuant to Section 3.330(a) of the Act.

71. The IEPA concurred with this exemption as Northwestern was allowed to expand without having to submit proof of siting.

72. In 1993, the IEPA issued a permit to Northwestern to operate a hazardous waste landfill at its facility for the disposal of K061 treatment residue from its on-site waste stabilization facility.

73. Attached in Appendix D-6-16-A of the Application as Exhibit O are documents evidencing the issuance of the permit to Northwestern.

Envirite Corporation

74. Envirite Corporation ("Envirite") owns and operates a hazardous waste treatment facility in Harvey, Illinois.

75. On April 29, 1992, the IEPA issued a permit to Envirite to operate a pollution control facility near Pontiac, Illinois, for disposal of residual sludge generated by Envirite in its hazardous waste treatment process.

76. A copy of the permit is attached in Appendix D-6-16-A of the Application as Exhibit P.

77. The residual sludge was generated at its waste treatment plant in Harvey, Illinois, and then transported approximately ninety (90) miles away to the pollution control facility in Livingston County, near Pontiac, Illinois.

78. The IEPA determined that local siting approval was not required for the pollution control facility that was sought to be located in Livingston County and the landfill was permitted without such siting, as the landfill was subject to exclusion from the definition of "pollution control facility" pursuant to Section 3.330(a)(3). *See* Exhibit Q, attached in Appendix D-6-16-A of the Application.

79. Attached in Appendix D-6-16-A of the Application as Exhibit R is a letter dated April 2, 1990, from Gary P. King, Attorney Advisor, IEPA Enforcement Programs to Fred C. Prillaman of Mohan, Alewelt, Prillaman & Adami, regarding this matter.

80. Envirite and PDC both operate hazardous waste treatment plants which generate treatment residues, which treatment residue is to be deposited into a landfill owned respectively by Envirite and PDC dedicated solely for the disposal of their respective treatment residues.

Previous Siting Request

81. Previously, on November 9, 2005, PDC filed a request for siting approval with the County of Peoria, requesting siting for a horizontal and vertical expansion of the Existing Landfill.

82. In that siting request, PDC sought to extend the life of the Existing Landfill by fifteen years, at the current operating levels.

83. The expansion siting request, if approved, would have resulted in an expansion of approximately 2 million tons.

84. Approximately 60-65% of the waste currently deposited at the Existing Landfill is treated residue from the WSF.

85. While the RWL will provide approximately 2 million tons of disposal space, that space is proposed to be permitted solely to accept treated residue from the WSF.

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10/05/2007

Bureau

5th

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 – (312) 814-6026

ROD R. BLAGOJEVICH, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217-524-3300

August 30, 2007

Certified Mail
7004 2510 0001 8617 3810

Peoria Disposal Company, Incorporated
Attn: Mr. Ron Edwards, Vice President
4349 Southport Road
Peoria, Illinois 61615

Re: 1438120003 – Peoria County
Peoria Disposal Company #1
ILD000805812
Log No. B-24-M-58
RCRA Permit – Administrative Record

RELEASABLE

SEP 10 2007

REVIEWER MD

Dear Mr. Edwards:

This is in response to a submittal dated January 5, 2007, and received by Illinois EPA on the same date. The subject submittal contained a request for a Class 3 modification to the RCRA Part B permit at the referenced facility. Specifically, the submittal requested an expansion of the facility through the addition of a "Residual Waste Landfill."

The subject submittal has been reviewed by Illinois EPA, which hereby denies the request for modification in accordance with 35 Ill. Adm. Code 703.283(f) and 705.128(b). The Agency finds that the request for modification is not justified for the following reason:

> Section 39(c) of the Illinois Environmental Protection Act (415 ILCS 5/1 et seq.) ("Act") prohibits Illinois EPA from granting a permit for the development of a new pollution control facility unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of the Act. Changes included in the subject submittal constitute creation of a new pollution control facility as defined in Section 3.330(b)(2) of the Act because the changes result in an increase of waste elevation, horizontal extent, and total disposal capacity over the previously approved RCRA Part B permit.
>
> PDC's proposed "Residual Waste Landfill" would not qualify for the exclusion from the definition of "pollution control facility" at Section 3.330(a)(3) of the Act because the treatment residues from PDC's treatment operations do not constitute "wastes generated

EXHIBIT 2 Peoples

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by such persons own activities" for purposes of the exclusion. The treatment residues are derived from wastes that were initially generated by off-site generators and, for purposes of the exclusion, are not generated and managed exclusively at facilities owned, controlled or operated by PDC.

Because of the deficiency discussed above no technical review was conducted on the application.

Pursuant to Section 705.128(b), this denial is not subject to public notice, comment, or public hearing requirements, and therefore will be effective immediately. However, as required by Section 703.283(f), notification of this action will be made to those members of the public who commented on the application.

As provided in Section 705.128(b), the Permittee may contest the denial of the request to modify by filing an appeal to the Illinois Pollution Control Board within 35 days of notification. The petition shall include a statement of the reasons supporting a review. In all other respects the petition shall be in accordance with the requirements for permit appeals set forth in 35 Ill. Adm. Code 105.

If you have any questions regarding this matter, please contact Mark L. Crites of my staff at 217-524-3269.

Sincerely,

Stephen F. Nightingale, P.E.
Manager, Permit Section
Bureau of Land

MLC
SFN:MLC/mls/071506s.doc

bcc: Bureau File
Peoria Region
Mark Wight -- DLC
Steve Nightingale
Marc Schollenberger
Paula Stine
Mark Crites
Marc McGinnis

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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NOV 16 2007
STATE OF ILLINOIS
Pollution Control Board

PEORIA DISPOSAL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB No. 08-25
v.	)	
	)	(Permit Appeal – RCRA/Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned certifies that an original and nine (9) copies of the Brief of Petitioner, were served upon the Clerk of the Illinois Pollution Control Board, and one copy thereof was served on the Respondent, by enclosing same in envelopes addressed as set forth below, and sending same as set forth below, from Peoria, Illinois, before 5:00 p.m. on the 15th day of November, 2007:

Ms. Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
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Michelle M. Ryan
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Illinois Environmental Protection Agency
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THIS FILING IS ON RECYCLED PAPER AS REQUIRED BY 35 ILL ADM. CODE 101.202 AND 101.302(g).