BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

REPLY BRIEF OF
PETITIONER PEORIA DISPOSAL COMPANY

NOW COMES the Petitioner, PEORIA DISPOSAL COMPANY ("PDC"), through its undersigned attorneys, and as and for its Reply Brief, responding to the Post-Hearing Brief of Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (the "IEPA")[1], filed on November 28, 2007, states as follows:

Introduction

The IEPA's Brief itself discloses the weakness of its position on the law in this matter. As the question before the Board is one of law, review is de novo.

In its Brief, the IEPA struggles to make some reasonable argument that PDC is not the generator of the treatment residue under Section 3.330(a)(3). It does so by interpreting the exemption in isolation, without regard to the comprehensive environmental scheme envisioned by the Illinois Environmental Protection Act (the "Act") and the Federal law incorporated therein. Such isolated reading essentially ignores RCRA, in favor of purported public opinion given a limited voice by the Illinois siting law. In this context, the Board cannot condone an

[1] For the purposes of this Reply Brief, all capitalized terms are ascribed the meanings given them in PDC's initial Brief filed in this matter on November 16, 2007.

overly broad application of the Illinois siting law to trump a carefully crafted Federal scheme designed to provide the American public with an environmentally safe method for the disposal of hazardous waste. The IEPA's argument that PDC does not generate wastes from its own activities for purposes of application of the exemption from siting to the RWF in this permit application, when PDC is the generator of the treatment residue under each and every other relevant State and Federal law and regulation, cannot stand. Illinois law simply cannot obfuscate federal law, which the United States Supreme Court has held, in other contexts, might well preempt the field when state and federal legislative goals are at odds. *See*, *e.g.*, Gade v. National Solid Wastes Management Association, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992).

PDC IS EXEMPT FROM LOCAL SITING APPROVAL, BECAUSE PDC IS THE "GENERATOR" OF THE TREATMENT RESIDUE SOUGHT TO BE DISPOSED OF AT THE PROPOSED RWL.

There is only one citation offered by the IEPA in support of its contention that PDC is not the generator of the treatment residue under Section 3.330(a)(3). It is not a citation to a law. It is not a citation to a regulation. It is not a citation to case law or to an administrative decision. It is a citation to the American Heritage Dictionary. In any case, the definitions from the American Heritage Dictionary are supportive of PDC's position.

During PDC's treatment process, the chemical and physical characteristics of PDC's customers' wastes are dramatically and irreversibly changed and a new treatment residue is created. The IEPA argues that "PDC does not 'produce' waste by bringing it forth, creating it, manufacturing it, or causing it to exist." (IEPA Brief, pg. 3; emphasis added). In actuality and under the law, PDC does in fact "produce" the treatment residue that is sought to be disposed of in the proposed RWL by "bringing it forth, creating it, manufacturing it, or causing it to exist." The exemption in Section 3.330(a)(3) applies to disposal of "wastes generated by such person's own activities...." The wastes generated by PDC's activities in this case are the treatment

residues, which treatment residues do not exist until PDC creates them at the WSF. The treatment residues come into being solely as the result of PDC's own activities. The treatment residues are the only material sought to be disposed of in the RWL. The IEPA's constrained interpretation of these definitions in the context of PDC's actual process is fatally flawed. .

Moreover, the IEPA's citation to the American Heritage Dictionary is incomplete. The dictionary provides the following additional meaning of "produce": "To manufacture or create economic goods and services." (The American Heritage® Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004).[2] Clearly, PDC creates and performs an economic service for its customers, one envisioned and established by Federal law, by treating waste that would otherwise be incapable of lawful and proper disposal, pursuant to State and Federal laws. Pursuant to RCRA and through its treatment process, PDC treats and transforms what otherwise could not be lawfully disposed of into a product safe for disposal.

In spite of the IEPA's arguments to the contrary, the statute does not exclude from the definition of "generator" all entities that utilize "waste" to create new, fundamentally different products. Nearly anything can be considered a "waste." Oxygen is waste produced by photosynthesis in trees and plants. Coal is waste produced by dying trees and plants. Diamonds are waste produced by coal. Where would the IEPA draw the line?

The sole question in this case is whether the treatment residues are generated by PDC or by someone else. If PDC is not the generator of the treatment residues, who is? The IEPA's single witness at the hearing in this case agreed that PDC was the generator of, at least, 40-50% of the mass of the treatment residue added during the treatment process, for the purposes of the siting exemption in 415 ILCS §5/3.330(a). (Tr. 37/6-38/17). Yet the witness indicated that PDC was not the generator of 50-60% of the treatment residue under Section 3.330(a)(3), even though

[2] Dictionary.com. http://dictionary.reference.com/browse/produce (accessed: November 29, 2007).

PDC is the generator of such waste for every other State and Federal legal and regulatory purpose, and the waste has no other identifiable generator.

The IEPA mischaracterizes PDC's treatment process, in order to deemphasize the results of such process. In the Conclusion to its Brief, the IEPA argues that if PDC's (and the Federal and State governments' and agencies') interpretation of the term "generator" is correct, then "[a]ny landfill in the State could take all the waste it receives, mix it with some of its own material, and be exempt from local siting approval for all waste in the landfill." (IEPA Brief, pg. 10). First, if the hypothetical landfill were to begin to treat waste, the new treatment business would be required to obtain a permit from the IEPA, and would obviously require siting as a new pollution control facility. *See* 415 ILCS §5/3.330(a) (including waste treatment facilities in the definition of pollution control facility). The IEPA's hypothetical is nonsensical.

Secondly and more substantively, as the IEPA well knows, PDC's process does not merely involve tossing together some waste and some other materials and dropping the mixture in the landfill. PDC's process creates a new waste (and a new waste stream), fundamentally physically and chemically different than its constituent elements, and capable of land disposal. If this were not the case, (a) why would the treatment process be required, and (b) why would the IEPA itself treat PDC as the generator of the resulting treatment residues for all legal and regulatory purposes?

Moreover, IEPA is wrong to label PDC the "treater" and not the generator of the treatment residues. Admittedly, the WSF treats the waste from those customers who seek safe disposal; but no changes are sought to PDC's WSF permit. It is a distinct unit from the RWL. On the other hand, the RWL, which PDC seeks to have permitted, will only accept for disposal that waste generated by PDC.

SECTION 39(h) OF THE ACT SUPPORTS PDC'S INTERPRETATION OF SECTION 3.330(a)(3).

The IEPA's analysis of the relationship between Section 39(h) of the Act and Section 3.205 of the Act is also fatally flawed. Section 3.205 of the Act broadly defines "generator" as "any person whose act or process produces waste." This definition creates the universe of possible generators under the entirety of the Act, and is relevant for our purposes here. Section 39(h) of the Act limits that universe of possible generators under Section 3.205, providing that if "the hazardous waste is treated, incinerated, or partially recycled for reuse prior to disposal," then only a generator that is also "the last person who treats, incinerates, or partially recycles the hazardous waste prior to disposal" is classified as a generator under Section 39(h). Therefore, if an entity is found to be a generator under Section 39(h), it is automatically a generator under Section 3.205. (In its Brief, the IEPA mistakenly reversed this analysis).

This analysis is reflected in the Illinois Supreme Court's analysis of PDC's status as the generator of the treatment residue in Envirite Corporation v. Illinois Environmental Protection Agency, 158 Ill.2d 210, 217, 632 N.E.2d 1035, 1038, 198 Ill.Dec. 424, 427 (1994). 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). Thus, it was the chemical stabilization process "which resulted in a new residue" that

made PDC the generator of the treatment residue according to the Illinois Supreme Court. This process, and the Illinois Supreme Court's conclusions about its effects, plainly brings PDC into the definition of generator found in both Section 3.205 and Section 39(h) (by express incorporation): "any person whose act or process produces waste."

THE RCRA DEFINITION OF "GENERATOR" CLARIFIES THE PROPER INTERPRETATION OF SECTION 3.330(a)(3), AND SUPPORTS PDC'S INTERPRETATION OF SECTION 3.330(a)(3).

RCRA provides two possible definitions of the term "generator." The first mirrors the definition in Section 3.205 of the Act: "any person, by site, whose act or process produces hazardous waste...." 35 Ill. Adm. Code §720.110. The second definition provides another, separate definition of "generator" under RCRA: "any person ... whose act first causes a hazardous waste to become subject to regulation." Id. The IEPA argues that because of the two possible definitions of "generator" under RCRA, "it is logically possible for a person to be a 'generator' or subject to the generator requirements of RCRA, without necessarily meeting the definition of a 'generator' in the Act." (IEPA Brief, pg. 7).

As PDC fits the first definition of "generator" under RCRA, not the second definition, the IEPA's analysis is irrelevant. There is presumably no argument to be made that the waste received by PDC at the WSF is not already "subject to regulation" at the time it is so received, meaning that the second RCRA definition cannot apply to the WSF. Clearly, PDC is classified as the generator of the treatment residue under RCRA, by reason of a definition that is essentially identical to the definition in Section 3.205 of the Act.

The IEPA's analysis also dangerously ignores and misapplies the carefully crafted RCRA, which is to apply in Illinois (and all states) in a manner identical in substance to the

manner prescribed Federally. The Board simply cannot condone a strained application of the local siting law, and relevant exemptions thereto, in a fashion that redefines RCRA.

The IEPA's struggle to isolate Section 3.330(a)(3) from the rest of the Act and the entire body of State and Federal environmental law is nowhere more apparent than in the IEPA's discussion of the "1990 Envirite situation." The IEPA has conceded throughout the hearing and in the Brief that the IEPA actually permitted Envirite, PDC's competitor, without requiring siting pursuant to the exemption in Section 3.330(a)(3) (formerly Section 3.32). Although the IEPA suggests, without any valid explanation, that the record in that matter is somehow not a "full record," for the purposes of this case it is absolutely complete – and in direct conflict to the position of the IEPA. (IEPA Brief, pg. 8). In particular, the record contains a letter-decision of IEPA Attorney Gary P. King, providing as follows:

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

(R01319-21).

In sharp contrast to the Envirite situation, the IEPA in this case has redacted the portion of this permit record which contains the legal opinion of IEPA Attorney Mark Wight. As the Board knows (and of which the Board can take administrative notice), Mr. Wight has appeared before the Board as IEPA Counsel in many land matters. Presumably, if Mr. Wight's opinion supported the IEPA's position, the IEPA would have tendered the document willingly. Instead, the IEPA's sole witness, a permit reviewer and engineer by training, was called upon to express the legal position of the IEPA on the Application. Likely, Mr. Wight's legal opinion is consistent with the opinion set forth by Mr. King in Envirite – because that opinion is the law.

Both in testimony and in its Brief, the IEPA offered only one distinction between the Envirite permit application and this permit application: "Since [Envirite's application] IEPA's interpretation has evolved to refocus consideration on the concerns of the local community." (IEPA Brief, pg. 8). The law cannot be "refocused" to provide greater consideration to the concerns of the local community. The issues before this Board involve essentially the same statutory language that applied at the time of Envirite. Neither RCRA nor the siting law has changed in any way relevant here. As the Board well knows, a state agency can only act in a manner consistent with the statute it is charged to apply and enforce. *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). The Board has the responsibility of properly interpreting the Act, in a manner consistent with its comprehensive scheme and not in a manner which obfuscates the federal RCRA scheme incorporated therein. As an independent quasi-judicial body charged with the proper interpretation of the Act, the Board simply cannot allow

purported public opinion to trump the well-crafted provisions of the Act and the comprehensive environmental regulatory scheme it sets forth.

Conclusion

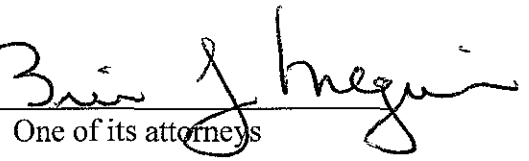
Based on all the foregoing, and for the reasons stated in PDC's previously filed Brief, the IEPA should have reviewed the Class 3 permit modification to PDC for the development and operation of PDC's RWL without requiring PDC to submit proof of local siting approval.

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: December 3, 2007

By: 
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	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned certifies that the Reply Brief of Petitioner was filed with the Clerk of the Illinois Pollution Control Board electronically, and was served on the Respondent by sending same as set forth below, from Peoria, Illinois, before 5:00 p.m. on the 3rd day of December, 2007:

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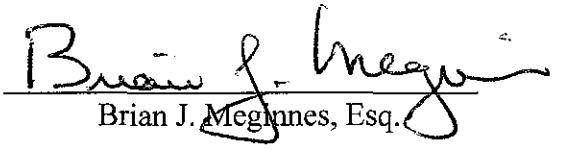

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