BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	AC 05-40
	)	
	)	EPA No. 567-04-AC
Complainant,	)	
	)	
v.	)	
	)	
NORTHERN ILLINOIS SERVICE COMPANY,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Michelle M. Ryan
Special Assistant Attorney General
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

PLEASE TAKE NOTICE that I have filed with the Office of the Clerk of the Pollution Control Board the Post-Hearing Brief of Respondent, a copy of which is herewith served upon you.

NORTHERN ILLINOIS SERVICE COMPANY,
Respondent,

By Peter DeBruyne, P.C.

By /s/
Peter DeBruyne, Its Attorney

Peter DeBruyne
838 North Main Street
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CERTIFICATE OF SERVICE

I hereby certify that I did on the 13th day of June, 2006, by regular mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the foregoing Notice of Filing on the following:

Michele M. Ryan
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Dorothy Gunn, Clerk
Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

by an electronic copy of the same foregoing instrument on the same date via electronic filing to:

Dorothy Gunn, Clerk
Pollution Control Board
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v.	)	(IEPA No. 567-04-AC)
NORTHERN ILLINOIS SERVICE COMPANY,	)	
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POST-HEARING BRIEF OF RESPONDENT

A. INTRODUCTION

Complainant, Illinois Environmental Protection Agency ("Illinois EPA") bears the burden of proof with respect to each allegation in its Complaint. *Aurora Metal Co., Faskure Division v. Illinois Pollution Control Board, 30* Ill.App.3d 956, 333 N.E.2d 461 (2nd Dist. 1975); see also 415 ILCS 5/31.1(2). It has failed to do so in this case. The Illinois Environmental Protection Act at 415 *ILCS* 5/33(c)(i) and (ii) provides that the Pollution Control Board ("PCB") is to take into account in its orders and determinations the "character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people . . . " and "the social and economic value of the pollution source; . . . ."

B. ARGUMENT

Illinois EPA has alleged in its Complaint that respondent "caused or allowed the open dumping of waste in a manner resulting in litter, a violation of §21(p)(1) of the Act, 415 *ILCS* 5/21(p)(1) (2002)." The general character of the testimony with respect to this was that the litter was composed of uprooted trees and/or dead trees. Both complainant's Exhibit 1 and Field Inspector Kaare Jacobsen's testimony (Tr. 11 & 12) describe the material as landscape waste.

Though the PCB held in *American Tree Service, Inc. v. Illinois Environmental Protection Agency,* PCB 94-93, 1994 WL 717836, that "landscape waste" was to be considered a subset of "waste," it did not disagree with the reasoning in C*ity of Lake Forest v. Pollution Control Board,* 146 Ill.App.3d 848, 497 N.E.2d 181 (2nd Dist. 1986). It noted that the holding in C*ity of Lake Forest v. Pollution Control Board,* 146 Ill.App.3d 848, 497 N.E.2d 181 (2nd Dist. 1986) was "still good law." *American Tree Service, Inc. v. Illinois Environmental Protection Agency,* PCB 94-93, 1994 WL 717836, at p. 11. In arriving at its holding, the Second District in *City of Lake Forest, supra,* noted at 146 Ill.App.3d 848, 855:

> The doctrine of *ejusdem generis* states that when a statutory clause specifically describes several classes of persons or things and then includes "other persons or things," the word "other" is interpreted to mean "other such like." *(Coldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton (1985),* 105 Ill.2d 389, 396, 86 Ill.Dec. 322, 475 N.E.2d *536; St. John's Evangelical Lutheran Church v. Kreider* (1977), 54 Ill.App.3d 257, 259, Il lll.Dec. 916, 369 N.E.2d 370.) Here, in determining the meaning of "other discarded materials," we must look to the examples provided by the legislature, *i.e.* garbage and sludge. We cannot say that leaves, which naturally grow and fall from trees, are of the same nature as garbage or sludge which is generated and discarded by people. We also note the legislature specifically included leaves in its definition of landscape waste" in the Act (Il1.Rev.Stat.l985, ch. 111 1/2 , par. 1003(uu)) as a separate category of waste, indicating a legislative intent that leaves do not come within the general definition of "waste" under section *2(ll)* of the Act (Ill.Rev.Stat.1985, ch. 111 1/2, par. 1003(*ll)).*

This doctrine of statutory construction is applicable here in considering the definition of landscape waste at 415 *ILCS* 5/3.270:

> "Landscape waste. 'Landscape waste' means all accumulations of grass or shrubbery cuttings, leaves, tree limbs and other materials accumulated as the result of the care of laws, shrubbery, vines and trees."

Again, the word "other" must be construed to mean "other such like" and dead or uprooted trees are totally unlike all of the specifically mentioned items in the definition. Further, to consider uprooted trees or dead trees as within the definition of landscape waste would do violence to the

definition inasmuch as the definition defines "landscape waste" in relevant part as resulting from the care of "trees." Clearly uprooted or dead trees do not result from the "care" of trees. Thus trees would not be within the definition of waste because they are not within the subset of landscape waste and likewise would not be considered as within the "waste" definition because uprooted or dead trees are totally unlike the items specifically mentioned in 415 *ILCS* 5/3.535 such as "garbage, sludge from a waste treatment plant . . . ."

Illinois EPA's further problem of proof is found in the definition of the word "discarded," which is in included both in the definition of "waste" and "litter" in the Litter Control Act. "Discarded," as defined by Webster Third New International Dictionary is "to drop, dismiss, let go, or get rid of as no longer useful, valuable, or pleasurable." There was no evidence presented at the hearing that any of the dead or uprooted trees, from whatever source, were discarded by respondent. The trees referenced were in three categories: 1) those physically on the premises when respondent purchased the premises; 2) those from the premises taken down by respondent in preparing or in renovating the premises, and 3) those very few trees from respondent's worksites which did not economically justify the hiring of a third party to haul them away, i.e. "stragglers." The evidence of "value" of such trees, which will be discussed below, demonstrates that these materials were not discarded. It should further be pointed out that the word "trees" is not included in the definition of "litter" in the Litter Control Act and, following the *ejusdem generis* doctrine of statutory construction, substances totally unlike and of a different character from those specifically mentioned are not included. Thus the definition of "litter"[1]

[1] "Litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings or other lawn or garden waste, newspaper, magazines, glass, metal, plastic or paper containers or other packaging construction material, abandoned vehicle (as defined in the Illinois Vehicle Code), [FN1] motor vehicle parts, furniture, oil, carcass of a dead animal, any nauseous or offensive matter of any kind, any object likely to injure any person or create a traffic hazard, potentially infectious medical waste as defined in Section 3.360 of the Environmental Protection Act, [FN2] or anything else of any

which includes items clearly of no value to anyone, e.g. "garbage, trash, refuse, debris, rubbish, oil, carcass of a dead animal . . . " would not extend to trees. Further, uprooted or dead trees are hardly similar to "grass clippings," clearly of no use, and it is difficult to conceive that a reasonable person would consider an uprooted tree as included in the category "lawn or garden waste." Thus the definition of litter in and of itself seems to exclude uprooted trees as within its category.

The Court in *Miller v. Pollution Control Board*, 267 Ill.App.3d 160, 642 N.E.2d 475, 483 (4th Dist. 1994) noted in relevant part:

> "A person of common intelligence can understand the terms 'litter.' . . . 'litter' like 'junk' is capable of being understood by a person of common intelligence. Given its ordinary meaning, 'litter' refers to material of little or no value which has not been properly disposed of. . . .

The unrebutted evidence provided by the respondent demonstrated that the uprooted or dead trees on respondent's premises were of substantial "value."

First, 65 to 75 percent of the trees observed by Field Inspector Kaare Jacobsen were home grown (Tr. 48, hereinafter "Tr.") and the remainder of the trees observed by the Field Inspector were not the result of whole scale dumping from respondent's construction activities. Instead, contrary to Jacobsen's assumptions (Tr. 21-22), Wayne Klinger, president of respondent testified credibly that isolated trees for which it could not hire a commercial contractor were removed by it and deposited on the premises (Tr. 42-45). Klinger credibly testified that the documents Jacobsen assumed were invoices for the deposit of trees on the premises instead were invoices from commercial contractors who were removing the trees for respondent and depositing them on another site (Tr. 45-47).

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unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly. 415 *ILCS* 105/3(a).

Respondent called expert witness Ronald Foss to testify (Tr. 26). Foss explained that he operated two businesses, Foss Landscapes and Outdoor Living and Garden Center (Tr. 27). Foss Landscapes has been in operation for 12 years and works with, among other things, brick pavers, trees, shrubs, and mulch (Tr. 27). It is certified by the state of Illinois to do state and federal work and municipal projects (Tr. 28). The retail garden center sells, among other products, mulch (Tr. 28). Foss had observed the uprooted or dead trees on respondent's site in the years 2004, 2005, and on the Monday before the hearing (Tr. 29-30). Foss pointed out that the trees could be ground up into mulch which is placed around trees and shrubs to keep weeds down, hold moisture in, put nitrogen back into the soil, and for decorative purposes (Tr. 30-31). Foss testified that he has purchased mulch in both of his businesses and also manufactured mulch (Tr. 31). Foss noted that he has ten acres of trees and as he cleared them he would hire a contractor with a tub grinder costing three or four hundred dollars an hour to grind up the trees into mulch (Tr. 31). Even after paying the hourly charge, Foss testified that the mulch he obtained was half the cost of the normal $12.50 per cubic yard (Tr. 36). Foss added that the trees that he ground up for mulch were identical to the trees on respondent's site (Tr. 32).

Foss identified respondent's Exhibits 1 and 3 as invoices to his business Outdoor Living in April 2006 for brown mulch in the amount of $12.50 per square yard. He further identified respondent's Exhibit 2 as an invoice for red mulch to Outdoor Living in the amount of $14 per square yard. Foss explained there was a red dye injected into the mulch and thus it was sold as a designer mulch (Tr. 34). These were typical of the prices that Foss' retail outlet would pay for the mulch (Tr. 33). Foss further explained that the sale price from his retail outlet to the general public was $21.95 a cubic yard for standard mulch and $28.95 a cubic yard for the colored

mulch (Tr. 35). These prices were commonly received by Foss' retail outlet for the mulch (Tr. 35).

Jacobsen agreed with Foss that the trees he observed on respondent's premises which he referred to as "landscape waste" could have a "market value" (Tr. 17). Jacobsen further admitted that he was familiar with wood mulch and that it had economic value because people bought it and used it in their gardens (Tr. 16). Jacobsen further testified that he was familiar with the purposes of mulch which was, according to Jacobsen, aesthetic, for dressing plants, holding in moisture and building around a house (Tr. 16). Jacobsen testified that it came into his mind during the inspection that the wood on the property was open dumped material but it did not come into his mind that the wood had the potential of being used for mulch (Tr. 17).

From the above testimony and evidence, it is an objective fact that the trees on respondent's premises had economic value, and, as such, could not be considered litter. Complainant's Exhibit 1 reported the presence of 10,000 cubic yards of trees (complainant's Exhibit 1, page 1) which if sold at wholesale, according to the testimony of value from Foss would yield $125,000 if undyed and $140,000 if dyed. At retail, the trees would bring $215,000 undyed and $285,000 if dyed. This is clear economic value. The only support complainant has for its case is the whim, albeit innocent, of Jacobsen that when looking at the pile of wood he thought of open dumped material rather than of mulch. This arbitrary classification of supposedly polluting material based on the momentary thoughtlessness of a Field Inspector cannot convict respondent. As noted above, the PCB is required to take into account the economic value of the pollution source. On this point, complainant has failed in its burden of proof.

Furthermore, Wayne Klinger, president of respondent, testified that respondent applied for an EPA open burning permit in September 2004. The permit was introduced and accepted into evidence as respondent's Exhibit 4. It was only after the application for the permit that Field Inspector Jacobsen filed his inspection report (October 4, 2004; complainant's Exhibit 1). Likewise, complainant filed a Complaint with respect to the trees in November but complainant issued an open burning permit for the trees on December 21, 2004. As noted in the introduction, the PCB is to take into account the "character and degree of injury to, or interference with the protection of the health, general welfare, and physical property of the people." The PCB should consider that the complainant thought so little of the alleged violation that it permitted respondent to burn the material while at the same time it was citing it for an environmental violation.

CONCLUSION

The dead and uprooted trees on respondent's premises are not explicitly listed within the definitions of landscape waste, waste, or litter. They are not akin to the items that are listed within those definitions. Thus, the Legislature did not intend that the trees would be treated as within any of these categories. The dead and uprooted trees as agreed to by both parties had economic value. As such, they could not be considered litter. The PCB's mandate as stated above in 415 *ILCS* 5/33(c)(i) and (ii) suggest that the PCB should find against complainant here.

Respectfully submitted,

NORTHERN ILLINOIS SERVICE COMPANY,
Respondent,

By PETER DeBRUYNE, P.C.

By _____/s/_____
Peter DeBruyne, One of its attorneys

_____/s/_____
Lewis B. Kaplan, One of its attorneys

CERTIFICATE OF SERVICE

I hereby certify that I did on the 13th day of June, 2006 by regular mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the foregoing Post-Hearing Brief of Respondent on the following:

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