

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
) AS 08-10
RCRA DELISTING ADJUSTED STANDARD) (Adjusted Standard - Land)
PETITION OF PEORIA DISPOSAL COMPANY)
)

COMMENTS OF PEORIA FAMILIES AGAINST TOXIC WASTE AND
HEART OF ILLINOIS SIERRA CLUB

Peoria Families Against Toxic Waste ("PFATW"), and Heart of Illinois Sierra Club ("Sierra Club")(collectively "Opposition Groups"), by and through their attorneys, Hasselberg, Williams, Grebe, Snodgrass & Birdsall, respectfully state and submit the following regarding the above-captioned Petition of the Peoria Disposal Company ("PDC") for a RCRA delisting adjusted standard ("Petition"):

INTRODUCTION

Despite its long history of operations at this location, the first time PDC ever had to seek local siting authority under Section 39.2 for the instant pollution control facility was on November 9, 2005, when it filed an application with the Peoria County Board for site location approval for a vertical and horizontal expansion of Petitioner's hazardous waste facility located in Peoria, Illinois. The PDC facility is the only one of its kind in Illinois, and is located adjacent to the only regulated recharge area in Illinois. The existing PDC facility, towers over residences a mere 200 feet away, is adjacent to the City of Peoria, and has 53,190 people living within 3 miles of its site. The Peoria County Board found that PDC had not established that the facility was needed, was so located and planned to be operated as to be protective of the health, safety and welfare of the

public, and was incompatible with the surround area and property. The Illinois Pollution Control Board ("Board") affirmed that denial of local siting authority in PCB 06-184.

Thereafter, PDC filed a permit modification application with the IEPA in an attempt to expand its PDC No. 1 Landfill. The IEPA denied the permit modification and this Board affirmed that denial in PCB 08-25 and ruled that PDC needed local siting authority before any such permit modification (expansion) would be allowed.

Now, PDC is attempting yet again to extend the life of its hazardous waste facility on the doorstep of Peoria, this time by seeking an adjusted standard to delist electric arc furnace dust it treats in its waste stabilization facility. As participants in PDC's siting attempt and permit modification attempt (as well as in several other PDC matters involving the PDC No. 1 Landfill), the Opposition Groups believe that their views in the form the comments contained herein would be beneficial to the Board.

The Petition should be denied where: the proposed adjusted standard is inconsistent with the suitability of location factors contained in Section 27(a) of the Act; the complete information on the contemplated future permit modifications attendant to the purported delisting were not presented by the Petitioner to the Board; local siting authority is required for the changes proposed to the facility in the delisting Petition; and significant shortcomings in the technical justification in the Petition warrant its denial.

I. PROPOSED ADJUSTED STANDARD INCONSISTENT WITH SECTION 27(a) OF THE ACT AND UNJUSTIFIED

Section 28.1(a) of the Act states that "[a]fter adopting a regulation of general applicability, the Board may grant, in a subsequent adjudicatory determination, an adjusted standard for persons who can justify such an adjustment consistent with

subsection (a) of Section 27 of this Act." 415 ILCS 5/28.1(a). Section 27(a) of the Act in turn states, in pertinent part:

In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. The generality of this grant of authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act. 415 ILCS 5/27(a).

The Illinois Supreme Court interpreted the Section 27(a) factors and the phrase that the Board shall "take into account" those factors to mean that the Board must "allow for, make allowance for, weigh carefully, consider, take into consideration, bear in mind, remember, realize, appreciate, have in one's mind." [Citation]". *Granite City v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 613 N.E.2d 719,733-34, 184 Ill. Dec. 402, 416-17 (1993).

As the Board noted in footnote 4 of its Order entered September 4, 2008 in this cause, the instant delisting Petition is the third recent proceeding before the Board regarding PDC and PDC's Peoria hazardous waste facility. *RCRA Delisting Adjusted Standard Petition of Peoria Disposal Company*, AS 08-10, slip op. at 12, note 4 (September 4, 2008). On June 21, 2007, the Board affirmed the Peoria County Board's decision to deny siting approval of PDC's application to site an *expansion* of PDC's hazardous waste landfill. PCB 06-184; *PDC v. The Illinois Pollution Control Board and County of Peoria*, No. 3-07-0435 (3d Dist.), *appeal pending*. On January 10, 2008, the Board affirmed the IEPA's denial of PDC's application for a Class 3 modification of its RCRA Part B permit to allow the *expansion* necessary to construct a proposed residual waste landfill at PDC's hazardous waste landfill. PCB 08-25; *PDC v. Illinois Pollution*

Control Board and Illinois Environmental Protection Agency, No. 3-08-0030 (3d Dist.), *appeal pending*. The Opposition Groups participated as objectors at the local siting hearing before the Peoria County Board and in proceedings before the Board in PCB 06-184, and participated as objectors at the permit modification hearing before the IEPA and in proceedings before the Board in PCB 08-25.

In addition to the two (2) other cases identified by the Board in its September 4, 2008 order, PDC's hazardous waste facility was most recently before the Board in a third-party appeal of the IEPA's renewal on November 27, 2007 of PDC's RCRA Part B permit (based on PDC's 1997 renewal application). *Tom Edwards v. Peoria Disposal Company and Illinois Environmental Protection Agency*, PCB 08-42. In addition to the foregoing, PDC unsuccessfully applied to the IEPA in the summer of 2006 for a Class 2 permit modification to allow *expansion* of its hazardous waste landfill. See Illinois EPA Response to Public Comments on the Draft RCRA Permit Renewal for Peoria Disposal Company of Peoria, Illinois November 2007, Response to Comment 9, pp. 43-44, in record in PCB 08-42.

The Board should, and must, "take into account" the Section 27(a) factors, and in so doing, "*remember, realize*" and "*appreciate*" the factual record and prior findings by this Board in the three (3) recent cases involving the same Petitioner, the same hazardous waste facility and site, the same waste stream, and the same intent of the Petitioner to evade the application of local siting review. See PCB 06-184 (siting appeal); PCB 08-25 (permit appeal); and PCB 08-42 (permit appeal); 415 ILCS 5/27(a); *Granite City v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 613 N.E.2d 719,733-34, 184 Ill. Dec. 402, 416-17 (1993).

The instant delisting Petition is brought in the midst of a perfect storm of recent evidence and findings related to the identical site. Bear in mind that several of the Section 27(a) factors are equivalent to several corresponding local siting review factors found in Section 39.2(a). Section 27(a) requires the Petitioner to justify its proposed adjusted standard consistent with "the existing physical conditions, the *character of the area* involved, including the character of the *surrounding* land uses, zoning classifications . . ." 415 ILCS 5/27(a)(emphasis added). Section 39.2(a) requires the petitioner to demonstrate that the proposed facility "is so designed, *located* and proposed to be *operated* that the public health, safety and welfare will be protected," and "is *located* so as to minimize incompatibility with the *character of the surrounding area* and to minimize the effect of the value of surrounding property." 415 ILCS 5/39.2(a)(ii) and (iii)(emphasis added). Both Sections 27(a) and 39.2(a) require the appropriate governing body, the Peoria County Board and this Board, respectively, to determine whether the petitioner produced sufficient evidence to satisfy these nearly identical criteria. We acknowledge that the previous three (3) PDC cases before the Board are "separate and distinct" from the instant delisting Petition. *RCRA Delisting Adjusted Standard Petition of Peoria Disposal Company*, AS 08-10, slip op. at 12, note 4 (September 4, 2008). However, application of Section 27(a) to this instant delisting Petition makes taking the other cases into account, especially the siting appeal in PCB 06-184, mandatory, highly relevant, material, and in fact, dispositive to the outcome of this instant case.

This Board is authorized by Section 27(a) to remember its prior factual and legal findings regarding the location and operation of the facility. The Board affirmed the Peoria County Board's findings that the site was not so located as to be protective of the

public health, and was incompatible with the surrounding area. The Board should apply those findings and rule that the Petition is inconsistent with Section 27(a) and unjustified. Even if the Board determines, after taking into account its prior findings and rulings in the related PDC cases, that failure to satisfy Section 39.2(a) criterion is not dispositive in the context of Section 27(a) consistency factors, PDC's delisting Petition still is unjustified where PDC has failed to present any evidence about how its operations after purportedly obtaining an adjusted standard will affect the existing physical conditions and surrounding area of the facility.

Despite the clear mandate of Section 27(a) to address location and surrounding land uses and character, PDC's delisting Petition is silent about the location, the character of the area, and whether operations at the facility, upon the purported granting of the adjusted standard, will affect the surrounding area. In local siting review, compatibility cannot be established based upon a pre-existing facility. *CDT Landfill Corp. v. City of Joliet*, PCB 98-60, slip op. at 17, citing *Waste Management of Illinois v. PCB*, 123 Ill. App. 3d 1075, 463 N.E.2d 969, 979, 79 Ill. Dec. 415, 425 (2d Dist. 1984). So too in the instant delisting Petition, consistency should not be allowed to be established based on a pre-existing facility. Regardless, PDC's Petition and related submissions are insufficient to establish consistency with the areas surrounding its facility. PDC included no information on how its operations after the purported granting of the adjusted standard would impact the surrounding area.

A cursory review of the Petition and supporting technical documents reveal several contemplated operations which will directly and negatively impact the location and the surrounding areas. For example, the "Treated Residue Storage" section of the Technical Support Document indicates that treated residue will be placed in rolloff

boxes or 168-cubic yard¹ gondola-type rail boxes and containers and *stored* "within the footprint of the PDC No. 1 Landfill." Tech. Supp. Doc., p. 3-12. In the "Miscellaneous Other Waste Management Units" section, it identifies a "Rolloff Staging/Container Area" unit and references it as being illustrated on Figure 5, the Site Layout. However, Figure 5 does not contain any reference to *where* the containers of treated residue will be stored, other than identifying the entire PDC No. 1 Landfill. Given that one (1) gondola container can hold approximately at least one (1) batch (a day's output of EAFDSR), and each can be stored for up to sixty (60) days, there could be well over sixty (60) containers in storage at any one time, *somewhere* within the footprint of PDC No. 1 Landfill.² The "EAFDSR Load-Out for Disposal" section of the Technical Support Document indicates that EAFDSR "will be removed from the gondola-type boxes using a track-type excavator and loaded into tractor-dump trailer combinations." Tech. Supp. Doc., p. 3-12. The "Process Materials" section then acknowledges "the potential for fugitive dust emissions when offloaded at the active landfill face," but is silent for whether that same potential exists during the "load-out for disposal." Tech. Supp. Doc., p. 3-16. With the existing character of the area containing residences within 200 feet of the landfill, PDC has not supplied any information that its proposed operations will not impact the surrounding areas involved. That PDC requested storage time limits to be increased from 15 to 60 days as part of its recent permit renewal indicates that, for whatever reasons, PDC desired significant leeway to store containers within PDC No. 1 Landfill. See PDC's IEPA Hazardous Waste Management RCRA Part B Permit issued November 27, 2007, Special Conditions E.11.a and E.12.A. The IEPA implied that PDC

¹ See PDC's IEPA Hazardous Waste Management RCRA Part B Permit issued November 27, 2007, page I-1, indicating maximum containment volume of containers for storage is 138.7-cubic yards.

² See PDC's IEPA Hazardous Waste Management RCRA Part B Permit issued November 27, 2007, page I-1, indicating maximum number of containers for storage is presently ten (10).

could even increase the accumulation period further to the 90 days allowed the initial waste generators. See Illinois EPA Response to Public Comments on the Draft RCRA Permit Renewal for Peoria Disposal Company of Peoria, Illinois November 2007, Response to Comment 3, p. 78, in record in PCB 08-42. Certainly storage of containers should not be allowed over capped cells in PDC No. 1 Landfill; nor should they be allowed in any part of any active cell.

Please reference the multiple and detailed public comments submitted by numerous members of the Opposition Groups for additional, specific examples of PDC's contemplated operations which will directly and negatively impact the location and the surrounding areas.

Furthermore, PDC proposes to be allowed to accept EAF from at least ten (10) steel mills in Illinois, Wisconsin, Iowa, Kentucky, Indiana and Nebraska. See Hearing Exhibit 4. At least sixty percent (60%) of the EAF proposed to be accepted by PDC comes from out-of-state steel mills. PDC could accept more EAF from additional mills, potentially from a wide universe of potential sources in the Midwest and beyond. The recently renewed RCRA Part B Permit does not limit the amount of EAF residue that can be produced by PDC, nor does it limit PDC's hours of operation of its waste stabilization facility, and in fact allows the waste stabilization facility to operate 24 hours a day ("At the end of each eight hour shift, the Permittee shall clean the areas heavily trafficked during transport of waste to and from the mixing unit . . ." See PDC's IEPA Hazardous Waste Management RCRA Part B Permit issued November 27, 2007, Page X-5). PDC is not a typical generator. Unlike a steel mill which necessarily has generation limits as part of its operating permits, conceptually, PDC has none (other than the practical limitation of how much can be treated in the currently permitted waste

stabilization facility in a 24 hour period). The Petition does propose capping the amount of EAFDSR created at PDC to 142,500 tons per year, based on maximum annual gate receipts of 95,000 tons of EAF. See Technical Support Document, pp. 2-2 and 2-3. However, nothing prevents PDC from seeking to have that cap lifted in the future to link the EAFDSR quantity to the actual amount of waste purportedly generated by PDC. See Petition of Keystone Steel and Wire Co. for Hazardous Waste Delisting, AS 91-1, Supplemental Order, April 23, 1991, slip. Op. at 3. It is this analysis that turns the intent of a delisting on its head as being unrelated to a hazardous waste generated by a steel mill. In any event, capacity issues, and thereby container storage issues and truck traffic increases, among other things, directly impact the surrounding area.

Finally, it is the stated legislative declaration that one of the purposes of the Act is to "restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b). In this context, the Board is authorized to "determine, define and implement the environmental control standards in the State of Illinois" 415 ILCS 5/5(b). The people of the Peoria locality in general, and the people living in the area surrounding the PDC facility in particular, would be negatively impacted by allowing this delisting so that hazardous waste from at least five (5) states other than Illinois could be processed by PDC. Any Board finding that accepting PDC's claim that its EAFDSR will be generated or managed in Illinois elevates form over substance and would run contrary to the intent of the waste delisting regulations where it is the stated purpose of the Act as a whole that hazardous waste disposal and treatment obligations should be borne by those who initially generate it. 35 Ill. Adm. Code 720.122(p).

II. CONTEMPLATED FUTURE PERMIT MODIFICATIONS SHOULD BE PRESENTED TO BOARD AS PART OF DELISTING REVIEW

PDC states several times in its petition that a permit modification will be needed to accommodate their new way of doing business should the adjusted standard be granted. PDC wants delisting first, without addressing exactly what permit modifications will be needed. The Board should see what permit modifications will be proposed in order to fulfill its duties under Section 27(a) regarding location, location, location. PDC's petition is therefore incomplete and its delisting unjustified.

Pursuant to Section 703.271(c) of the RCRA Permit Program regulations, a new statutory requirement or regulation is cause to seek modification of an existing permit. 35 Ill. Adm. Code 703.271(c). Each contemplated modification identified in the petition and Technical Support Documents (and those not identified) affects and directly impacts the existing physical conditions at the facility as a whole, and the character of the surrounding residential areas. As part of any permit modification request, however, the IEPA cannot consider the suitability of the facility location. 35 Ill. Adm. Code 703.273. Pursuant to Section 27(a) of the Act, these "suitability of the facility location" issues are within the mandatory charge of the Board to take into account, just like the suitability issues are forefront in the analysis of whether local siting authority should be granted pursuant to Section 39.2 of the Act. Where the facts in the underlying siting appeal and permit denial appeal, including those concerning location, proximity to population masses and presence of toxic substances, all relate to the suitability of the facility location, the Board should take them into account. PDC included no information on how its operations after the purported granting of the adjusted standard, or after obtaining a permit modification, would impact the surrounding area.

The Board is the only decision maker which can determine whether the adjusted standard - which triggers permit modification - is justified by being consistent with the Section 27(a) factors. The delisting Petition has significant shortcomings and lacks a justification for not only the proposed adjusted standard being consistent with the Sections 27(a) factors, but also for the contemplated permit modifications arising out of said delisting. For the Board to refuse to hold the Petitioner accountable for contemplated permit modifications arising out of a purported delisting essentially places the IEPA in a vacuum, with no review or allowance for suitability of the facility location.

III. LOCAL SITING AUTHORITY IS REQUIRED FOR THE CHANGES PROPOSED TO THE FACILITY IN THE DELISTING PETITION

The proposed delisting Petition would create a new pollution control facility pursuant to Section 3.330 of the Act. PDC needs to go through the local siting approval process before the Petition can be granted.

A. Section 3.330(b)(2). PDC is attempting to turn its PDC No. 1 Landfill waste disposal unit into a transfer station. 415 ILCS 5/3.500. PDC admits that its waste disposal capacity is quickly being used, and that PDC has engaged in the multiple matters before this Board because of the capacity reality. Even if PDC engages in a plan of action to delay achieving maximum disposal capacity to delay closure obligations, the facility will be transformed from a waste disposal site to a transfer station. If the delisting is granted, in the very near future, none of the EAF dust treated in the waste stabilization facility will be deposited in the PDC No. 1 Landfill. Container storage and truck traffic in and out of the facility will expand the facility from one of waste disposal to one of a waste transfer station.

Although Section 3.330 (b)(2) speaks in terms of the area of expansion beyond the boundary of a currently permitted pollution control facility, the Illinois Supreme Court has held that these terms should not "be considered in a vacuum", but in the broader context of the landfill in question. In *M.I.G. Investments, Inc. v. IEPA*, 122 Ill. 2d 392, 523 N.E. 2d 1, 119 Ill. Dec. 533 (1988), the court recognized the authority of local governmental units under Section 39.2 to "assess not merely the location of proposed landfills, but also the impact of alterations in the scope and nature of previously permitted landfill facilities." *M.I.G. Investments*, 523 N.E.2d 4. In the context of this instant delisting Petition, coming after numerous previous attempts by the Petitioner to expand its facility, the proposed alteration of the scope and nature of the facility is sufficiently expansive to warrant application of Section 3.300(b)(2) to the instant case and require local siting review pursuant to Section 39.2 of the Act.

B. Section 3.330(b)(3). On numerous occasions in its Petition and Technical Support Document, PDC acknowledges that the EAFDSR is a new waste stream. See Technical Support Document, pp. 2-2, 2-3 ("PDC is not currently managing nor has it ever managed the petitioned waste in a land-based management unit."). The EAFDSR should still be considered, at a minimum even if the purported delisting is granted, a special waste. 415 ILCS 5/3.345. Since PDC is requesting approval to store and transfer, for the first time, the EAFDSR special waste, the proposed delisting creates a new pollution control facility. 415 ILCS 5/3.330(b)(3).

A delisted waste is capable of being declassified from manifest and record keeping requirements if certain conditions are met, including that it not be a "special waste." However, if the delisted and proposed declassified waste still needs special precautions for its shipment and transportation, it is automatically deemed a special

waste ("special handling waste" equals "special waste.") 415 ILCS 5/3.475(c); 35 Ill. Adm. Code 808.110 definition of "special handling waste."

PDC's own Technical Support Document establishes that the EAFDSR is "special handling waste." The "Process Materials" section acknowledges "the potential for fugitive dust emissions when offloaded at the active landfill face," and would seem to indicate that that same potential exists during the "load-out for disposal." Tech. Supp. Doc., p. 3-16. Any handler of EAFDSR needs special instructions and information on how to handle it due to safety concerns different from normal household waste.

PDC, the Board in its written questions to PDC and PDC in its answers, have addressed this potential in their filings. PDC relies on correspondence from Steve Nightingale of the IEPA in support of PDC's assertion of waste classification. However, the IEPA letter to PDC is incomplete, and even though IEPA knew the EAFDSR would be transferred to Indian Creek, it nonetheless fails to consider that PDC will be transporting something that needs added safety precautions during transit (special handling waste). Even though the EAFDSR is declassifiable in concept, it flunks the test because of another definition that restores its "special waste" moniker. This is true even if the EAF dust is given a hazard ranking of zero, as long as it needs special handling.

Therefore, EAFDSR constitutes a special waste not subject to declassification. Since PDC is requesting approval to store and transfer, for the first time, the EAFDSR special waste, the proposed delisting creates a new pollution control facility. 415 ILCS 5/3.330(b)(3). In the alternative, should the Board find that the delisting Petition does not constitute a new pollution control facility, the Board should nonetheless find that EAFDSR is a special waste by virtue of the special handling waste moniker, subject to

manifesting requirements, and transporter fee regulations adopted by the IEPA. See Petition of Stericycle, Inc. For An Adjusted Standard, AS 08-2, slip op. at 18 (August 21, 2008)(Board lacks authority to grant adjusted standard from PIMW transporter fee regulations adopted by IEPA, citing Section 28.1 of the Act).

**IV. SHORTCOMINGS IN TECHNICAL JUSTIFICATION IN PETITION
WARRANT DENIAL OF DELISTING REQUEST**

Please reference the multiple and detailed public comments submitted by numerous members of and retained consultants to the Opposition Groups for additional, specific examples of PDC's shortcomings in technical justification for its Petition.

CONCLUSION

Based on the foregoing, the delisting Petition of PDC should be denied in the entirety as unjustified on technical and substantive grounds.

Peoria Families Against Toxic Waste
and
Heart of Illinois Sierra Club

By: /s/ David L. Wentworth II
One of Their Attorneys

David L. Wentworth II
Hasselberg, Williams, Grebe,
Snodgrass & Birdsall
124 SW Adams Street, Suite 360
Peoria, Illinois 61602-1320
Telephone: (309) 637-1400
Facsimile: (309) 637-1500

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
) AS 08-10
RCRA DELISTING ADJUSTED STANDARD) (Adjusted Standard - Land)
PETITION OF PEORIA DISPOSAL COMPANY)
)

NOTICE OF FILING

The undersigned hereby certifies that the foregoing, *Comments of Peoria Families Against Toxic Waste and Heart of Illinois Sierra Club*, was filed on the 25th day of September, 2008, with the Illinois Pollution Control Board via electronic filing as authorized by the Clerk of the Illinois Pollution Control Board, and as further authorized by the Board in its Order entered in this cause on September 4, 2008.

Peoria Families Against Toxic Waste
and
Heart of Illinois Sierra Club

By: /s/ David L. Wentworth II
David L. Wentworth II
One of their attorneys

David L. Wentworth II
Hasselberg, Williams, Grebe,
Snodgrass & Birdsall
124 SW Adams, Suite 360
Peoria, IL 61602
Telephone: (309) 637-1400
Facsimile: (309) 637-1500