ILLINOIS POLLUTION CONTROL BOARD
January 23, 1997

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<tr><td>ILLINOIS POWER COMPANY, an Illinois
Corporation (Unit 2 - Baldwin Power Station),

Petitioner,

v.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.</td><td>)
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(Permit Appeal - Air)</td></tr>
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(Permit Appeal - Air)
(Consolidated)</td></tr>
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OPINION AND ORDER OF THE BOARD (by J. Yi):

This case is before the Board on a denial of operating permit revisions requested by Illinois Power. On August 19, 1996, pursuant to Section 40(a) of the Environmental Protection Act (Act), Illinois Power filed a petition for review of the Illinois Environmental Protection Agency's (Agency) denial regarding Illinois Power's request for permit revision applications for its Baldwin Power Stations Units 1 and 2 in Baldwin, Illinois. (415 ILCS 5/40(a) (1994).) The Agency's permit denial letters were issued on August 8 and 15, 1996, as a result of the Agency's belief that the requested permit revision applications required Illinois Power to obtain local siting approval pursuant to Section 39.2 of the Act. (415 ILCS 5/39.2 (1994).) Illinois Power's permit appeal petition requests that the Board determine that local siting approval is not required and reverse the Agency's permit denial.

PROCEDURAL BACKGROUND

On October 17, 1996 Illinois Power filed a motion for summary judgment. On October 24, 1996 the Agency filed a motion to extend time to file a cross-motion for summary judgment in response to Illinois Power's motion for summary judgment. The Board granted

the Agency's motion on November 7, 1996. On December 9, 1996 the parties filed a joint stipulation of facts. On December 11, 1996 Illinois Power filed an amended motion for summary judgment and a memorandum in support of the amended motion for summary judgment.

On December 12, 1996 the Agency filed a cross-motion for summary judgment. On December 13, 1996 Illinois Power filed a response to the Agency's cross-motion for summary judgment. On December 16, 1996 the Agency filed a response to the Illinois Power's amended motion for summary judgment and Illinois Power filed a motion for leave to file a reply to the Agency's response and its reply.[1] On December 19, 1996 the Agency filed a response to Illinois Power's motion for leave to file a reply requesting that the hearing officer deny Illinois Power's motion for leave to file a reply.[2]

For the reasons stated below, the Board finds that there are no genuine issues of material fact remaining and that Illinois Power is entitled to judgment under the law. Therefore Illinois Power's amended motion for summary judgment is granted and the Agency' cross-motion is denied.

REGULATORY FRAMEWORK

The issue on appeal is framed by the Agency's denial letter. (See West Suburban Recycling and Energy Center, L.P. v. Illinois Environmental Protection Agency, PCB 95-119 and 95-125, (October 17, 1996); Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency, PCB90-142, at 6 (December 20, 1990); Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency, PCB 89-170, at 6 (May 10, 1990); City of Metropolis v. Illinois Environmental Protection Agency, PCB 90-8 (February 22, 1990).) In a proceeding for review of permit denial authorized by Section 40(a)(1) of the Act (415 ILCS 5/40 (a)(1)) and 35 Ill. Adm. Code Section 105.102(a), the statute provides that the burden of proof shall be on the petitioner. The petitioner bears the burden of proving that operating pursuant to a permit, issued as applied for from the Agency, would not violate the Act or the Board's regulations. This standard of review was discussed in Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E. 2d 616 (2nd Dist. 1989) and reiterated in John Sexton Contractors Company v. Illinois PCB 88-139, February 23, 1989. In Sexton, the Board held:

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[1] Illinois Power's amended motion for summary judgment's supporting memorandum law will be referenced to as "Pet. Mem. at ", the Agency's cross-motion for summary judgment's supporting memorandum of law will be referred to as "Ag. Mem. at ", Illinois Power's response to the Agency's cross-motion will be referred to as "Pet. Resp. at ", the Agency's response to Illinois Power's motion for summary judgment will be referenced to as "Ag. Resp. at ", and Illinois Power's reply to the Agency's response will be referred to as "Reply at ".

[2] Upon considering the Agency's response which was filed after the hearing officer's order that granted Illinois Power's motion for leave to file a reply, the hearing officer affirmed the previous order granting Illinois Power's motion for leave to file.

> …that the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued.

Therefore, a petitioner must establish to the Board that issuance of the permit would not violate the Act or the Board's rules if the requested permit was to be issued by the Agency. In this case, petitioner has the burden of demonstrating that approval of the operating permit revisions without the siting approval pursuant to Section 39.2 of the Act would not violate the Act.

Summary judgment is appropriate when there are no genuine issues of fact to be considered by the trier of fact and the movant is entitled to judgment under the law. (Williamson Adhesives, Inc. v. EPA, No. PCB 91-112 (Aug. 22, 1991), Caruthers v. B.C. Christopher & Co., 57 Ill. 2d 376, 380, 313 N.E.2d 457, 459 (1974)). The Agency's permit denial letter denied Illinois Power's permit on the basis that local siting approval is required. Therefore, a grant of Illinois Power's amended motion for summary judgment would be appropriate if there are no genuine issues of fact remaining and the Board can decide that, based on the law, local siting approval is not required for the Agency to lawfully issue the revised operating permits. Otherwise, a grant of the Agency's cross-motion for summary judgment would be appropriate if there are no genuine issues of fact remaining and the Board can decide that, based on the law, local siting approval is required for the Agency to lawfully issue the revised operating permits.

STIPULATED FACTS

As discussed above, the parties filed a joint stipulation of facts in this matter. The following paragraphs are those facts stipulated to by the parties.

1. Petitioner, Illinois Power, is an Illinois corporation, and owns and operates the Baldwin Power Station, a power plant located in Baldwin, Randolph County, Illinois. The Baldwin Power Station produces electricity from its coal-fired boilers, i.e., Unit 1 and Unit 2, which are operated under existing air operating permits issued by the Illinois EPA's Bureau of Air, pursuant to Section 39 of to the Illinois Environmental Protection Act (Act) [415 ILCS 5/39].

2. On June 24, 1996 Illinois Power submitted Requests to Revise Air Permits (permit applications) to the Illinois EPA for Unit 1 and Unit 2 at its Baldwin Power Station. The permit applications requested the revision of air operating permits for Unit 1 and Unit 2 to allow the combustion of "alternate fuel," a nonhazardous fuel grade material (subject material). The subject material is composed primarily of shredded polyethylene plastic, which is produced from the processing of empty triple-rinsed agricultural chemical containers. If a hearing was held on this matter, Illinois Power would present evidence to support the following:

The subject material is to be produced through a coordinated effort between Illinois Power and Resourceful Environmental Ideas, Inc. (REI). The empty agricultural containers are provided by farm supply stores, which are member companies of the Agricultural Container Research Council (ACRC), and their customers. Such containers are returned by customers of ACRC member-owned stores, and are triple-rinsed at farm supply stores Tri-Rinse, Inc. (Tri-Rinse), in accordance with U.S. EPA and the Illinois Department of Agriculture guidelines. The empty containers are then inspected by trained personnel, and processed by Tri-Rinse utilizing mobile equipment. Empty pesticide containers present landfill problems due to their non-degradability.

The subject material will be purchased by Illinois Power, and transported and placed directly into the coal-handling system at Baldwin Power Station. Deliveries to the Baldwin Power Station are to be made on a "just-in-time" basis, and no storage of the subject material will be required.

Analytical results for the subject material demonstrate a Btu value of approximately 20,000 Btu/pound, and a sulfur content of 0.02% by weight. The permit applications contain the following conditions applicable to the use of the subject material:

1) The use of alternate fuel will be less than 3% by weight, as a daily average, when burned with coal;

2) The alternate fuel will have a heating value of 10,000 Btu per pound, with a typical heating value of 12,500 Btu per pound; and

3) The total ash content of the alternate fuel will be 12% or less.

The subject material is less costly than coal, and Illinois Power's purchase and use of such material will provide a cost benefit to customers of Illinois Power.

3. Illinois Power has also agreed to conduct Volatile Organic Material (VOM) and Particulate Matter (PM) testing following issuance of the revised air operating permits.

4. Petitioner was notified by letters from the Illinois EPA, dated August 8, 1996, and August 15, 1996, that the permit applications had been reviewed and denied. The Illinois EPA had determined that, in accordance with the decision of the Illinois Pollution Control Board In the Matter of: Petition of Illinois Wood Energy Partners, L.P., AS 94-1 (October 6, 1994), the material as described in the application, was a "waste."

5. In addition, the Illinois EPA stated it had determined that, pursuant to Section 39.2 of the Act, local siting approval was required with respect to such waste and, since such siting approval was not contained within the application, the application was denied.

6. The Illinois EPA has determined that the combustion of the subject material, pursuant to the above-listed conditions specified in the permit applications, will not result in a violation of the Illinois Pollution Control Board (Board) rules and Regulations.

THE PARTIES' ARGUMENTS

Petitioner's Arguments

The first argument raised by Illinois Power is that there is no genuine issue of material fact as to whether its combustion of alternate fuel made from the shredded polyethylene plastic containers would result in a violation of the Act or the Board's rules applicable to sources of air emissions. (Pet. Mem. At 12.) Illinois Power asserts that since the Agency's denial letter is based on the Agency's determination that the alternate fuel is a solid waste which requires Illinois Power to obtain local siting pursuant to Section 39.2 of the Act, "there is no genuine issue of material fact as to whether the combustion of the subject material, pursuant to the conditions specified in the permit applications, would result in a violation of the Act and/or the Board's rules governing air emission sources." (Pet. Mem. At 12.) Therefore Illinois Power concludes that it has otherwise demonstrated that issuance of the revised operating permit, as requested, would not violate the Act or Board's rules applicable to sources of air emissions. (Pet. Mem. at 12.)

The next argument raised by Illinois Power is that the Agency erred in its determination that the alternate fuel described in the permit applications, is a "waste" based on the Board's decision in Wood Energy. (Pet. Mem. At 13.) Illinois Power states that upon review of the facts and circumstances of Wood Energy reveals that Illinois Power's alternate fuel proposal is factually distinguishable, and does not present the same issues or concerns as the burning of waste wood addressed in Wood Energy. (Pet. Mem. At 12.) In support of its contention Illinois Power raises three issues:

1. The Illinois Power's Baldwin Power Station is an existing electricity-generating facility which burns coal as its primary fuel, and, therefore, is not a solid waste management facility or a Qualified Solid Waste Energy Facility.

2. In contrast to the broad variety of "waste wood" at issue in Wood Energy, Illinois Power's alternate fuel proposal involves the combustion of a specific material, alternate fuel, to produce electricity as a primary product of the Baldwin Power Station's fuel-burning operation.

3. The alternate fuel product is a "valuable energy product," and exhibits no characteristics of being discarded when utilized under the conditions of Illinois Power (sic) proposal.

The next sections summarize Illinois Power's arguments pertaining to these issues.

> The Illinois Power's Baldwin Power Station is an existing electricity-generating facility which burns coal as its primary fuel, and, therefore, is not a solid waste management facility or a Qualified Solid Waste Energy Facility.

Illinois Power states that the petitioner in Wood Energy (Wood Energy Partners), sought an adjusted standard, or, alternately, a determination from the Board that wood chips produced from waste wood and incinerated as "produced wood fuel" at a proposed wood-to-energy incineration facility to be constructed and operated (by Wood Energy), were not a solid waste. (Pet. Mem. at 13-14.) Illinois Power maintains that "the Board's Order in Wood Energy relied to a great extent upon the designation of the Wood Energy facility as a QSWEF, and, thus, a solid waste management facility." (Pet. Mem. at 13-15.) Illinois Power asserts that it is neither a QSWEF nor a solid waste management facility but rather is an existing, legitimate, electricity-generating facility, which proposes to burn the alternate fuel product for energy recovery. (Pet. Mem. at 15.) Illinois Power states that "[a]s specified in the permit applications for Unit 1 and Unit 2, the daily use of the subject material at the Plant will be less than 3% by weight, when burned with coal, and therefore, not a primary component of its fuel source." (Pet. Mem. at 15-16.) Illinois Power argues that "[w]hile the Board's description of Wood Energy's incineration operation and/or waste treatment process is very similar to the incineration of landscape waste at issue in American Tree Service, Inc. v. Illinois Environmental Protection Agency, 1994 WL 717836 (PCB 94-43; December 14, 1994 Order), it is neither analogous nor applicable to the Illinois Power proposal, which involves the burning of alternate fuel for energy recovery." (Pet. Mem. at 16.)

> In contrast to the broad variety of "waste wood" at issue in Wood Energy, Illinois Power's alternate fuel proposal involves the combustion of a specific material, alternate fuel, to produce electricity as a primary product of the Baldwin Power Station's fuel-burning operation.

Illinois Power notes that Wood Energy Partners' proposal contemplated the use of wood from the following waste streams:

> [i]industry, construction, demolition, forest land management, general land clearing operations, sawmills, wood product manufacturers (including those who manufacture pallets, cable spools, railroad ties, and telephone poles) and other "urban waste wood."

Illinois Power notes that the "Board's Order explained, in fabricating 'produced wood fuel' from the incredible variety of above-described waste wood, all non-wood components, including scrap metal, would be separated and discarded, and the waste wood would be further processed into wood chips to comply with standards established by the Agency and Wood Energy" and that "[a]ny wood which does not meet the specified standards would be 'made to conform' and placed back into the produced wood fuel stream." (Pet. Mem. at 17.) Illinois Power further notes from the Board's opinion that "[t]he 'produced wood fuel' would then be transported to the storage building at the Wood Energy facility, conveyed to the Wood Energy

'power house,' and incinerated to produce energy using a steam turbine system." (Pet. Mem. at 17-18.)

Illinois Power argues that unlike the petitioner in Wood Energy its proposal does not involve the diversity and assortment of materials at issue in Wood Energy and instead, "involves the purchase and combustion of a specific material, alternate fuel, produced by Tri-Rinse and REI from non-hazardous fuel-grade material, which, in turn, is produced through the processing of empty agricultural chemical containers." (Pet. Mem. at 18.) Furthermore, Illinois Power states that the Board's conclusion correctly notes that the "waste treatment process" proposed by the Wood Energy Partners utilizes incineration to dispose of the waste wood, and that generation of energy is a by-product. (Pet. Mem. at 18-19.) Petitioner argues that in Wood Energy the petitioner's "waste treatment process" is "analogous to the incineration of landscape waste for disposal purposes, which was conducted under the facts of American Tree Service." (Pet. Mem. at 19.) Illinois Power argues that a "crucial distinction from both Wood Energy and American Tree, energy recovery is the primary purpose of the Baldwin Power Plant's combustion operation, and electricity is the primary product of such operations, rather than a by-product of a disposal system utilizing incineration." (Pet. Mem. at 19.) Illinois Power further asserts that its market for the generated electricity is well-established. (Pet. Mem. at 19.)

Furthermore, Illinois Power notes Board member Girard's Concurring Opinion in Wood Energy. (Pet. Mem. at 19.) Illinois Power states that "[i]n fact, the concurring opinion notes that some subsets of the "produced wood fuel" may not be properly considered waste", and Illinois Power concludes this portion of its argument by stating "[t]he Board's above-cited holding demonstrates that the Illinois Power alternate fuel proposal is clearly distinguishable from the facts at issue in Wood Energy, and does not present the same concerns addressed by the Board in its Order". (Pet. Mem. at 19.)

> The alternate fuel product is a "valuable energy product," and exhibits no characteristics of being discarded when utilized under the conditions of Illinois Power (sic) proposal.

Illinois Power claims that upon review of the Board's discussion in R.R. Donnelley addressing the interpretation of "discarded material" reveals that MMT oil, the subject material, which is generated through R.R. Donnelley's web offset printing process and sold to oil companies for resale as a fuel product, is identical in several important respects to the alternate fuel that is the subject of this proposal. (Pet. Mem. at 23.) Illinois Power states "[s]pecifically, in R.R. Donnelley, the Board notes that the MMT oil 'does not have any characteristics of being discarded since it is used as a valuable energy product that is used in place of virgin oils and is preferable to other fuels due to its low sulfur content.'" (Pet. Mem. at 23.) Illinois Power asserts that based on this finding, the Board concluded that, when burned for energy recovery, "the MMT oil is not a 'discarded material,' and therefore is not a waste." (Pet. Mem. at 23.)

Illinois Power claims that one of the issues the Board addressed in R.R.Donnelly[3] was whether the generators of the subject materials maintained sufficient control over the material. (Pet. Mem. at 22.) Illinois Power states that the Board set forth its test for sufficient control in R.R. Donnelley, in explaining that, even though petitioner maintained only partial control over the MMT oil, it had sufficient knowledge about the subsequent management and use of the MMT oil, so as to insure that it was reused and not discarded. (Pet. Mem. at 22.) Illinois Power argues that "[u]nder the Illinois Power and REI proposal, the 'generators' of the non-hazardous fuel-grade material, which is produced from empty agricultural chemical containers, meet the test for control which is established by the Board in the above-referenced decisions." (Pet. Mem. at 22.) Illinois Power asserts that the ACRC member-owner stores and their customers are the "generators" of the subject material and they deliver the empty agricultural chemical containers to Tri-Rinse for the sole purpose of reusing the containers. (Pet. Mem. at 22.) Illinois Power states that "Tri-Rinse processes the non-hazardous fuel-grade materials at the ACRC member-owned stores and, in coordination with REI, will transport the resulting alternate fuel product to the Baldwin Power Station without further treatment, processing or storage." (Pet. Mem. at 22.) Illinois Power asserts "[t]herefore, the generators, by delivery of the materials to Tri-Rinse, also exhibit the requisite knowledge and control over the subsequent disposition of this material." (Pet. Mem. at 22.) Petitioner concludes that this new and valuable alternate fuel product will be reused and not discarded similar to the MMT oil in R.R. Donnelley. (Pet. Mem. at 22.)

Illinois Power argues that the alternate fuel developed by it and REI exhibits no characteristics of being discarded in that it has a high Btu content, a low sulfur content, and is a valuable energy product which can be burned with coal as supplemental fuel. (Pet. Mem. at 23-24.) Illinois Power claims that the alternate fuel, when burned for energy recovery, is not a discarded material, and thus, is not a "waste." (Pet. Mem. at 24.) In contrast, Illinois Power notes that the Board's determination in American Tree where the American Tree facility was a regional pollution control facility requiring local siting was predicated on the Board's finding that landscape waste is, in fact, a discarded material and therefore, a "waste," which is accepted for disposal by "incineration" at the facility. (Pet. Mem. at 24.)

Finally, Illinois Power states that "[t]he General Assembly and the Board have successfully addressed the issues and concerns associated with 'discarded material' in the context of used and waste tire recycling, as well as, in the promulgation and implementation of the Illinois Used Tire Program, as established in Title XIV of the Act (415 ILCS 5/53, et seq. and 35 Ill. Admin. Code 848-101 et seq.)" (Pet. Mem. at 24.) Illinois Power claims that in Title XIV of the Act, the General Assembly specifically endorses the use of used and waste tires as a fuel source, and encourages the development of facilities where used and waste tires can be processed for energy recovery. (Pet. Mem. at 24.) Illinois Power also notes the Board's exemption for on-site use of fuel derived from used and waste tires is based on the

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[3] Illinois Power cites to the following Board opinions which also discuss this issue: Southern California Chemical Co., Inc. v. Illinois Environmental Protection Agency, PCB 84-51 (September 20, 1984 Order); and Safety-Kleen Corp. v. Illinois Environmental Protection Agency, PCB 80-12 (February 7, 1980 Order). (Pet. Mem. at 21.)

Board's findings that "there is little chance that this fuel will be abandoned once transported to the facility." (Pet. Mem. at 24.) Illinois Power states that it currently combusts fuel derived from used and waste tires and its procedures for managing fuel derived from used and waste tires provide a mechanism to insure control over alternate fuel, as well. (Pet. Mem. at 25.)

The Agency, in response, argues that Illinois Power's arguments on "reuse" as they relate to a determination in this action should not be persuasive. (Ag. Resp. at 2.) The Agency asserts that the Board in Wood Energy does not directly reach any conclusions regarding reuse of wood waste in that opinion. (Ag. Resp. at 2.) The Agency states that Illinois Power offers Wood Energy to introduce the concept that a determination on the issue of "other discarded material" has been connected to a review of whether the material has been recovered and reused. (Ag. Resp. at 2.) The Agency asserts, however, that "the only supporting case law cited are Board decisions as to whether material generated by a facility by its own processes was governed by the Board's special waste hauling regulations." (Ag. Resp. at 2.)

Additionally the Agency asserts that the Board in R.R. Donnelley did not find that the combustion of MMT oil was disposal and did not hold that combustion is a form of reuse. (Ag. Resp. at 2.) The Agency asserts that Illinois Power's "contention is that when burned for energy recovery, the subject material is not being disposed of as a waste, but instead is being reused." (Ag. Resp. at 3.) Furthermore, the Agency notes that Illinois Power cites the definition of recycling contained in the Solid Waste Management Act (415 ILCS 20/1 *et seq.*) in addition to the definition contained in the Act for the definition of recycling. (Ag. Resp. at 3.) The Agency notes that "House Bill 2020, signed by the Governor on September 13, 1991, added Section 2.1 which became effective on January 1, 1992, nearly two years after the *R.R. Donnelley* decision." (Ag. Resp. at 3.) The Agency asserts that the definition of "recycling" contained in Section 2.1 of the Solid Waste Management Act expressly states that "recycling" occurs to "solid waste[s]" which are reused and does not include the combustion of waste for energy recovery or volume reduction as a form of "recycling." (Ag. Resp. at 3.)

The Agency states that it will not reevaluate the R.R. Donnelley based on the Solid Waste Management Act, but states under the definition of "recycling" in the Solid Waste Management Act, the action of combustion for volume reduction or energy recovery is not recycling. (Ag. Resp. at 3-4.) The Agency argues that it is not reuse under the definition of recycling since for something to be "recycled" that material must be processed for reuse which excludes the combustion of such waste for energy recovery or volume reduction. (Ag. Resp. at 3-4.)

The Agency states that Illinois Power further claims that "'combustion with energy recovery' [is] immediately below recycling and above incineration" in the waste management hierarchy found within Section 2 of the Solid Waste Management Act. (Ag. Resp. at 4.) The Agency argues that this statement is not an accurate reflection of the law. (Ag. Brief at 4.) The Agency asserts that there is no definition within the Solid Waste Management Act that states that "incineration" is defined solely as "combustion for volume reduction" and Illinois Power merely states this conclusion and does not provide any basis for its reasoning. (Ag.

Resp. at 4.) The Agency contends that Illinois Power is suggesting this conclusion in an attempt to establish a distinction between itself, as an alleged reuser of material for recovery, which would not be regulated for inspection, storage, treatment of material, as opposed to a facility using combustion for volume reduction, which would be required to comply with storage, inspection, treatment and other environmental regulation. (Ag. Resp. at 4.) Additionally the Agency notes that Illinois Power defines the term "reused" as "recycled or burned for energy recovery" without providing any supporting reasoning or analysis. (Ag. Resp. at 4.)

Agency's Arguments

The Agency states that the issue before the Board is whether the alternate fuel, when burned in the Illinois Power's boilers, is a waste consistent with the reasoning in the Board's Wood Energy decision. (Ag. Mem. at 6.) The Agency states that Wood Energy Partners sought a determination from the Board that the wood proposed to be burned to produce energy was not a solid waste, and, therefore, Wood Energy Partners need not be permitted pursuant to 35 Ill. Adm. Code Part 807. (Ag. Mem. at 6.)

Citing Safety-Kleen Corp. v. Illinois Environmental Protection Agency, (Feb. 7, 1980), PCB 80-12; S. California Chemical Co. Inc. v. Illinois Environmental Protection Agency, (Sept. 20, 1984), PCB 84-51; and R.R. Donnelley Sons Co. v. Illinois Environmental Protection Agency, (Feb. 23, 1989), PCB 88-79, the Agency asserts that significant to the Board's finding that the wood fuel was a waste was that in order for a material not to be considered discarded under the Special Waste Handling regulations, after it has been used for its primary purpose, the generator (*i.e.*, the reuser) must have control over the material generated from its own processes, which when combined with other factors makes it clear that the material is not discarded. (Ag. Mem. at 6-7.) The Agency states that in all of these cases, the businesses generate the material in question, maintain control over the material, and reuse the material over and over again. (Ag. Mem. at 7.)

The Agency maintains that in Wood Energy, the Board found Part 807 applicable and the above cases distinguishable because wood material is generated off-site from landscaping, construction, and other commercial activities and burned to produce energy fall within the definition of "other discarded material." (Ag. Mem. at 7.) The Agency asserts that in Wood Energy the wood material is thrown away, discarded, by the generator, is not generated as part of the petitioner's processes and is accepted from off-site sources and quotes the following from the Board's opinion:

> Wood Energy's produced wood fuel is nothing more than waste wood conforming to size requirements and air permitting requirements that would be necessary as part of any disposal system. Incineration of the waste wood in this context is a waste treatment process. That energy is a by-product of this waste treatment process does not alter the character of the waste wood. Therefore, the produced wood fuel is and continues to be a solid waste and Wood Energy is a

solid waste management facility which is governed by the Part 807 regulations. (Ag. Mem. at 7.)

The Agency states that it based its permit decision in this case on the following factors that it asserts were the basis of the Board's decision in Wood Energy:

1) the material was customarily thrown away or discarded;

2) it is generated off-site and does not result from Illinois Power's own processes; and

3) Illinois Power plans to purchase the subject material (discards from farmers or farm supply stores) from a third party, and will not have controlled the subject material during the time from its original use to its delivery on-site.

The Agency asserts that Illinois Power is receiving polyethylene plastic that has been shredded after the agricultural chemical containers have been used for their primary purpose of holding chemicals. (Ag. Mem. at 7-8.) The Agency claims that the "primary purpose of the agricultural chemical containers, to store agricultural chemicals, does not take place at Baldwin", and, "the shredding of the polyethylene plastic occurs so that it will conform to current size requirements in the air permit just as chipping the wood in IWEP (Wood Energy) enabled that Petitioner to comply with size requirement of its equipment." (Ag. Mem. at 8.) Based on the foregoing, the Agency respectfully requests the Board to either 1) distinguish the facts in this case from those in Wood Energy; or in the alternative 2) find that the shredded polyethylene plastic is a waste and that the permit denial was appropriate because proof of local siting approval was not provided with the applications. (Ag. Mem. at 9.) Additionally, the Agency states "[s]hould the Board distinguish these facts from those in IWEP, it should tailor any order so as to limit its applicability to the Baldwin facility, and not any other facility handling the subject material or any other 'alternate fuel.'" (Ag. Mem. at 9.)

Illinois Power, in response to the Agency's first factor, asserts that the Agency overlooks that fact that the agricultural chemical containers are not "discarded or thrown away". (Pet. Resp. at 2.) Illinois Power argues that the containers are returned for the specific purpose of manufacturing the alternate fuel. (Pet. Resp. at 2.) Additionally, Illinois Power argues that the cases cited by the Agency do not suggest the material thrown away or discarded cannot be returned as a raw material or product. (Pet. Resp. at 2-3.)

Illinois Power, in response to the second and third factors, agrees that the alternate fuel is generated off-site and does not result from its processes. (Pet. Resp. at 3.) Illinois Power states, however, that the alternate fuel does not consist of discards from farmers or farm supply stores but is a new product generated from the processing and reuse of the collected agricultural chemical containers. (Pet. Resp. at 3.) Illinois Power asserts that the generators of the alternate fuel exhibit sufficient knowledge and control over the subsequent disposition of the subject material by returning the empty containers to the farm supply stores for processing by Tri-Rinse into alternate fuel. (Pet. Resp. at 3.)

Additionally, in response to the Agency argument that the alternate fuel is waste because the primary purpose of the containers has been completed, Illinois Power states that this is not a factor in determining whether the alternate fuel is waste. (Pet. Resp. at 4.) Illinois Power argues that the Board's decision in Wood Energy and R.R. Donelley find that this is not a determinative factor because the primary use of the MMT oil in R.R. Donnelley is not a fuel yet the Board found that it was not a waste. (Pet. Resp. at 4.)

The Agency also presents two other arguments which do not necessarily support a finding of grant for its cross-motion for summary judgment but are in response to Illinois Power's arguments. The first statement concerns Illinois Power's argument that the alternate fuel should be treated like tire derived fuel. (Ag. Mem. at 8.) The Agency states that the General Assembly has not spoken on this subject, as it did with tires and with regard to tires, the General Assembly speaks of them as "waste tires" but merely exempted facilities used for their collection, storage or processing from the definition of "pollution control facility" and cites to 415 ILCS 5/3.32(a)(9) and 55-55.15. (Ag. Mem. at 8.) The Agency also notes that "the combustion of any used or waste tires is subject to regulations adopted by the Board for control of air pollution control and requirements consistent with the provisions of Section 9.4 of the Act" citing to 415 ILCS 5/55(h). (Ag. Mem. at 8.)

Finally, the Agency states that "while the subject material represents a small percentage of the total amount of material used to fuel Baldwin, percentage is not a relevant factor to a determination of whether the subject material is a waste". The Agency notes that the definition of waste contains no threshold requirement that a facility treat a specified percentage of discarded material. (Ag. Mem. at 8.)

BOARD DISCUSSION

The issue before the Board is whether the alternate fuel, made from the agricultural containers that are being used to fuel the boiler, is a "solid waste" or "waste," as defined under the Act or the Board regulations. Section 3.82 of the Act defines "solid waste" to mean "waste" (415 ILCS 5/3.82 (1994)), and Section 3.53 of the Act, in relevant part, defines "waste" as:

> any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded, material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities. (415 ILCS 5/3.53 (1994))

As noted in Wood Energy the Board has interpreted the meaning of "other discarded material" in connection with material that has been recovered and reused in decisions as to whether that material is governed by special waste hauling regulations. In Safety-Kleen Corp., Southern California Chemical Co., Inc., and R.R. Donnelley & Sons Co., we found that since the petitioners, the generators of the material, maintained control over the material in question, and the material was to be reused and not discarded, it was not a waste that required special

waste hauling manifests. In R.R. Donnelley, on a motion to reconsider, the Board further concluded that even though R.R. Donnelley did not maintain complete control over the material (used oil) it was generating, it did have knowledge of who bought the used oil and that the used oil was subsequently sent directly for reuse without further treatment, processing, or storage.

In Wood Energy, the Board distinguished it from these cases because the wood material being utilized by the Wood Energy Partners was not generated by its manufacturing process. (Wood Energy, AS 94-1 at 9.) In Wood Energy, the wood material was going to be accepted from off-site generators and then further refined to conform to the specifications of produced wood fuel by Wood Energy Partners. The material was not immediately used or stored to be used. (Id. at 4.) The situation in Wood Energy was different than in the above special waste cases. The Board's decisions in those cases that the material was not a waste or solid waste centered around the fact that the material was generated by the company using the material and was part of its ongoing process. (Id. at 9.) In Wood Energy, however, there was on-site manufacturing of the wood fuel. As discussed in the opinion, upon receiving the waste wood, it would be inspected before being stored and if it failed to conform to the established requirements, it could have been shipped back or made to conform on-site. (Id. at 4.) Wood Energy Partners employed a processing building that would have contained an electromagnetic separator, a disc scalping screen, a hammer mill, and screening equipment which would have been utilized, as necessary, to ensure that the wood chips conform to the produced wood fuel standards established by the Agency and Wood Energy Partners. (Id. at 4.) Additionally, there was minimal control over the waste wood which was received from various generators.

In its amended motion for summary judgment, Illinois Power raises three arguments to distinguish its process from Wood Energy to support that the alternate fuel is not a waste. The first argument presented by Illinois Power is that its Baldwin Power Station is an existing electricity-generating facility which burns coal as its primary fuel and, therefore, is not a solid waste management facility or a Qualified Solid Waste Energy Facility. Illinois Power claims that the Board relied, to a great extent in Wood Energy, that the proposed facility was determined to be a Qualified Solid Waste Energy Facility. As the Board stated in Wood Energy, "the ICC (Illinois Commerce Commission) determination is neither binding on the Board, nor dispositive of the issues before us." (Id. at 8) While the Board did state that the issues were related, there was no further discussion.

The second argument presented by Illinois Power is that "[i]n contrast to the broad variety of "waste wood" at issue in Wood Energy, Illinois Power's alternate fuel proposal involves the combustion of a specific material, alternate fuel, to produce electricity as a primary product of the Baldwin Power Station's fuel-burning operation." The Board does not find this argument persuasive. The Board, given a different set of facts than in Wood Energy, could use an alternate fuel source on-site that is derived from various waste streams, as long as the alternate fuel has already been converted to its fuel form off-site. The Board does recognize that certain waste being used as a fuel may never be appropriate for these purposes. Section 2(a) of Illinois Solid Waste Management Act sets forth the following pertinent public policy statement:

(7) that there are wastes for which combustion would not provide practical energy recovery or practical volume reduction, which cannot be reasonably recycled or reused and which have reduced environmental threat because they are non-putrescible, homogeneous and do not contain free liquids. Such wastes bear a real and substantial difference under the purposes of the Illinois Solid Waste Management Act from solid wastes for which combustion would provide practical energy recovery or practical volume reduction, which can be reasonably recycled or reused, or which are putrescible, non-homogeneous or contain free liquids.

(415 ILCS 20/2(b)(1994).)

The Board is persuaded by the third argument of Illinois Power to distinguish Wood Energy, that the alternate fuel product is a "valuable energy product" and exhibits no characteristics of being discarded when utilized under the conditions of Illinois Power's proposal. As stipulated by the parties, the alternative fuel is to be produced through a coordinated effort between Illinois Power and REI. The empty agricultural containers are provided by farm supply stores, which are member companies of the ACRC, and their customers. Such containers are returned by customers of ACRC member-owned stores, and are triple-rinsed at farm supply stores by Tri-Rinse, in accordance with U.S. EPA and the Illinois Department of Agriculture guidelines. The empty containers are then inspected by trained personnel, and processed by Tri-Rinse utilizing mobile equipment. The alternate fuel will be purchased by Illinois Power, and transported and placed directly into the coal-handling system at Baldwin Power Station. Deliveries to the Baldwin Power Station are to be made on a “just-in-time” basis, and no storage of the subject material will be required.

Unlike Wood Energy Partners, Illinois Power is not manufacturing the alternate fuel necessitating on-site handling and separating of waste material to conform to the specifications of the alternate fuel. By the time the alternate fuel is received by Illinois Power it is no longer garbage, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities that is then processed into an alternate fuel. Instead, the alternate fuel is immediately used by Illinois Power once on-site. Thus, Illinois Power is in the position of the purchaser of R.R.Donnelley's used MMT oil because the alternate fuel is sent directly by Tri-Rinse for reuse without further treatment, processing or storage.

The Agency bases its argument that the material is solid waste on these factors; 1) the material was customarily thrown away or discarded; 2) the material is generated off-site and does not result from Illinois Power’s own processes; and (3) Illinois Power plans to purchase the subject material (discards from farmers or farm supply stores) from a third party, and will not have controlled the subject material during the time from its original use to its delivery on-site. The Agency asserts that these factors were the basis of the Board’s decision in Wood Energy. While the Board agrees that those were the factors we used in making our

determination in Wood Energy we were applying those factors to a wholly different situation. The Agency is correct in stating that the containers' primary purpose was to store chemicals and the production of the alternate fuel does not take place as part of Illinois Power's manufacturing process. However, Illinois Power is not transforming the containers on-site. The line of cases R.R. Donnelley, Southern California Chemical Co., and Safety-Kleen Corp., were addressing the issue concerning the handling of the material. In Wood Energy and in this case, the issue is whether the material being received by the facility is waste or a raw material. Here, Illinois Power is simply receiving the alternate fuel after it has been processed and transformed by Tri-Rinse and using it in its boilers. There is no indication that combustion of the alternate fuel will create special emission problems, and in fact, the parties stipulated that, pursuant to the certain conditions specified in the permit applications, will not result in a violation of the Board's rules and regulations. Additionally, the alternate fuel has been cleaned of contaminants, is non-hazardous, and Illinois Power, REI and Tri-Rinse have sufficient control over the material to preclude unknown contamination from entering into the alternate fuel. Therefore, the Agency is correct that those factors were used in our determination in Wood Energy, but when applied to the facts here, the alternate fuel is not a waste and Illinois Power is not handling a waste.

The question before the Board is limited to whether Illinois Power is a pollution control facility, as defined by Section 3.32(a) of the Act, that would require Illinois Power to obtain local siting pursuant to Section 39.2 of the Act in order for the Agency to issue the revised operating permits. (415 ILCS 5/3.32(a)(1994).) Section 3.32(a) of the Act states in pertinent part:

> "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. The following are not pollution control facilities:

Since the Board has determined that the alternate fuel is not a waste, Illinois Power is not a pollution control facility which is required to obtain local siting. Additionally, since the only reason the Agency's based its denial was due to Illinois Power's lack of local siting approval, the Board finds that there are no genuine issues of material fact remaining and that Illinois Power is entitled to judgment under the law. Therefore Illinois Power's amended motion for summary judgment is granted and the Agency' cross-motion is denied. This matter is remanded to the Agency for issuance of Illinois Power's revised operating permits.

Finally, the Board notes that today's decision turns solely on the facts of this case, including the site-specific conditions and process employed by Illinois Power and REI.

This opinion constitutes the Board's findings of fact and conclusions of law in the matter.

ORDER

The Board finds that there are no genuine issues of material fact remaining and that Illinois Power is entitled to judgment under the law. Therefore Illinois Power's motion for summary judgment is granted, and the Agency' cross-motion is denied. This matter is remanded back to the Agency for issuance of Illinois Power Company's revised permits consistent with its application and this order.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days of the date of service of this order. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of ___________, 1997, by a vote of ______________.

____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board