

CERTIFICATE OF SERVICE

I, on oath, state that I have served the attached **Brief of Petitioner Kramer Tree Specialists, Inc.** electronically on this 2nd day of June, 2014 to:

Greg Richardson
Deputy General Counsel
Illinois Environmental Protection Agency
1021 North Grand Ave. East
P.O. Box 19276
Springfield, Illinois 62794-9276

Christopher J. Grant
Assistant Atty General
69 W. Washington Street
Suite 1800
Chicago, IL 60602



Bruce White

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KRAMER TREE SPECIALISTS, INC.,)	
)	
Petitioner,)	
)	
vs.)	AS 14-2
)	(Adjusted Standard – Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

BRIEF OF PETITIONER KRAMER TREE SPECIALISTS, INC.

Petitioner Kramer Tree Specialists, Inc. (“Kramer”) submits this brief in response to the May 1, 2014 Order of the Board directing the parties to “brief the Board on the applicability of Part 830 of the Board’s regulations” (the “Order”). In its Order, the Board noted, “neither Kramer nor the IEPA has demonstrated that Part 830 of the Board’s Solid Waste and Special Waste Hauling regulations” (“Section 830”) “is applicable to Kramer.”

I. BACKGROUND

A. Kramer’s Operations

As described fully in its Petition for Adjusted Standard (the “Petition”), Kramer’s leaf-mulching operations are economically productive and environmentally beneficial. *See* Petition at 1 – 7. The only background necessary to respond to the Board’s Order are two simple facts: Kramer is returning fallen leaves to the economic mainstream as useful products and Kramer is not engaged in “composting” at its West Chicago facility. Kramer produces leaf mulch (both pure “leaf mulch,” exclusively comprised of virgin leaves, and “special blend,” which mixes roughly 10%-20% leaves with processed wood materials) by collecting leaves from local municipalities and then grinding and mixing that feedstock to create blends of desired color,

texture, and consistency.¹ Throughout the process, Kramer stores and handles feedstock and finished product so as to minimize the degree to which this organic material decomposes. For example, Kramer maintains low internal temperatures and moisture levels in leaf- and mulch-piles so as to impede decomposition. Indeed, IEPA has specifically pointed out that the goal of Kramer's leaf-mulch operation is to impede decomposition: "An important part of [Kramer's] production process is the storage of leaves in a manner that *does not allow them to decompose and produce compost.*" Recommendation of the Illinois EPA (filed Apr. 14, 2014) at 1 ("IEPA Recommendation") (emphasis added); *see also id.* at 1-2 ("Petitioner's procedures for the production of its leaf mulch, and the storage of the leaves required to produce the mulch, are *designed to prevent the decomposition of the leaves.*" (emphasis added)). Kramer's approach, as described by IEPA, is the opposite of that set forth in Section 830, which establishes practices and standards designed to *promote* decomposition and ensure responsible composting operations.

The Petition also describes the economics of Kramer's successful leaf-mulching business: Kramer is paid to remove the raw materials for its leaf-mulch by municipalities and other clients and – after processing, storage, and delivery – sells its leaf-mulch products to commercial landscapers, as well as residential and municipal customers. Kramer's business performs the socially beneficial function of using dead leaves as feedstock to create a useful and saleable product that is in high-demand. In 2012, Kramer sold leaf mulch to over 130 commercial customers and 11 municipal customers. *See* Petition at 7. For the production years 2009 through 2012, Kramer's annual leaf-mulch revenues were between \$713,012 and \$842,241. Petition at 7. Because Kramer's business generates revenues based on selling the leaves it collects, Kramer's specific business interest is in responsibly storing and preserving both its feedstock and product –

¹ Though Kramer believes that its operations should not be subject to the standards of Section 830, regardless of the outcome of this proceeding, Kramer will continue to manage its production process in an environmentally responsible manner.

allowing the decomposition of leaves or leaf-mulch would directly undermine Kramer's economic bottom line. Kramer's leaf-mulch business is generating significant revenues and jobs in West Chicago, while converting dead organic material into a product that conserves resources, promotes ecological landscaping, and beautifies our yards and parks.

In sum, Kramer's leaf-mulch operation converts fallen leaves into a saleable and sought-after product of high quality; allowing any of its raw materials or product to decompose into compost would be directly contrary to Kramer's business model and economic interests. Kramer's leaf-mulch business is both economically successful and environmentally sustainable.

B. History of Communications Between IEPA and Kramer

The organic material Kramer collects, sorts and processes into leaf-mulch does not constitute "waste" and Kramer's operations are not "composting." Therefore, Kramer's position is and has been that the regulations set forth in Section 830 do not apply to its operations.

On December 5, 2008, IEPA issued a notice of violation to Kramer alleging statutory and regulatory violations arising from Kramer's alleged storage and treatment of "waste." Kramer's February 4, 2009 revised response to that notice, submitted after a timely initial response and a meeting with IEPA, set forth its consistent position that "[b]ecause the leaves on Kramer's property do not meet the definition of 'waste' under either the Act or the definition attributed to waste by the [IPCB], the leaves cannot be classified as 'landscape waste.'" Kramer Tree Specialists' Amended Response, Violation Notice L-2009-DP1069 (Feb. 4, 2009) at 2 (attached hereto as Exhibit A.)

In May of 2011, after further discussions with IEPA staff and at IEPA's suggestion that composting regulations should be applied to its leaf-mulch operations, Kramer applied for a Section 830 permit. On August 18, 2011, IEPA denied Kramer's permit because the material at

Kramer's facility "will not meet the standards for general use compost," and because testing and sample-collection could not be conducted as to Kramer's leaf-mulch in accordance with Section 830. *See* Letter from Stephen F. Nightingale, IEPA to Kramer Tree Specialists, Inc. (Aug. 18, 2011) (attached hereto as Exhibit B). In other words, IEPA found a Section 830 permit to be unavailable because Kramer's leaf-mulching operations – designed to *impede* decomposition – were inconsistent with the specific portions of Section 830 crafted to *promote* decomposition. Kramer appealed that permit denial to the Board on November 3, 2011.

Since filing the permit appeal, Kramer has consistently tried to accommodate IEPA's position that Kramer's leaf-mulching operations should be governed by Section 830. In consultation with IEPA and to clarify the status of its operations, Kramer filed the instant Petition for Adjusted Standard at IEPA's prompting and with IEPA's direct, editorial input. In the words of IEPA, Kramer "has satisfactorily addressed the Illinois EPA's questions and comments about the leaf mulch operation" and "[m]uch of" the parties' "discussions have been incorporated into the instant Petition." IEPA Recommendation at 2.

Though Kramer has always maintained that its operations do not involve "waste" or "composting" whatsoever, it has always cooperated with IEPA and sought to account for IEPA's contrary position by filing this Petition. Now, at the Board's suggestion, Kramer reiterates its long-held position and submits that Section 830 is inapplicable to its leaf-mulch business.²

² Though Kramer's leaf-mulch business involves neither "composting" nor "waste," if the Board decides to the contrary, Kramer is prepared to proceed with its operations regulated under Section 830 as adjusted in the manner set forth in the Petition.

II. LEGAL ARGUMENT

As the Board noted, a petition for an adjusted standard is appropriate only when the regulation at issue is “applicable to that petitioner,” in the first place.³ 415 ILCS 5/28.1(c)(1). Section 830.101 establishes that Section 830 is applicable to “all landscape waste compost facilities,” with certain exemptions not relevant here. 35 Ill. Adm. Code § 830.101. Section 830 is inapplicable to Kramer because its operations involve neither “waste” nor “composting.”

The Board’s regulations define “landscape waste compost facility,” as “an entire landscape waste composting operation, with the exception of a garden compost operation.” 35 Ill. Adm. Code § 830.102. To determine if that phrase applies to Kramer’s business, the Board should look to operative terms that comprise it: “landscape waste,” and “composting operation.”

A. Kramer’s Operations Do Not Implicate “Landscape Waste” Because Its Feedstock is Returned to the Economic Mainstream

The applicability provision of Section 830 hinges on the phrase “landscape waste,” which is defined as “all accumulations of grass or shrubbery cuttings, leaves, tree-limbs and other materials accumulated as the result of the care of lawns, shrubbery, vines and trees. 35 Ill. Adm. Code § 830.102 (citing 415 ILCS 5/3.270). Concededly, Kramer’s facility collects, sorts, and processes “accumulations of . . . cuttings, leaves [and] tree-limbs.” However, the regulatory definition is focused on the “landscape” aspect of “landscape waste,” and, the “waste” portion cannot be ignored; therefore, the Board reads the phrase “landscape waste” in consonance with decisions interpreting the term “waste.” *See Northern Illinois Serv. Co. v. IEPA*, 381 Ill. App. 3d 171, 180 (2d Dist. Ill. App. Ct. 2008) (endorsing “[t]he Board[’s] previous[] h[old]ing[] that

³ If the Board ultimately does find the standards set forth in Part 830 to be applicable to Kramer, the Board has already determined “that Kramer’s petition has generally addressed the requirements of the Board’s rules at 35 Ill. Adm. Code 104.406.” Order at 2. Additionally, IEPA has expressly declined to oppose Kramer’s statements regarding the specific requirements of § 104.406. *See* IEPA Recommendation at 2-3. Accordingly, if Section 830 does apply to Kramer, the Petition should be granted.

'landscape waste' is a subset of 'waste'" (citing *Am. Tree Serv., Inc. v. IEPA*, Case No. 1994-043, Slip Op. at 16 (Ill. Pol. Control Bd. Dec. 14, 1994)). Consistent with the Board's previous interpretations of "landscape waste," it must apply that term only to the extent that the material at issue fits within the Act's "other discarded material" category of "waste."⁴ See *Am. Tree Serv., Inc.*, Slip Op. at 14 (emphasizing the "other discarded material" clause of "waste" definition to "find that the general definition [of 'waste'] includes all specifically-defined types of waste, such as landscape waste"). Therefore, the Act requires that material must be "discarded" to constitute "waste," including "landscape waste."

In *Alternative Fuels, Inc. v. IEPA*, 830 N.E.2d 444 (2005) ("*AFP*"), the Illinois Supreme Court interpreted the Act's definition of "waste" as "other discarded material." The Court held that "materials are 'discarded' unless they are returned to the economic mainstream." *Id.* at 456. See also, *In re: Petition of Jo'Lyn Corp.*, AS 04-2, 2005 WL 871123, at *12 (Ill. Pol. Control Bd. Apr. 7, 2005) ("[T]he proper inquiry is whether the materials are returned to the economic mainstream."); *Safety-Kleen Corp. v. IEPA*, PCB 80-12, 1980 WL 13691, at *1 (Ill. Pol. Control Bd. Feb. 7, 1980) ("Since it is destined to be reused, rather than discarded, it is not waste."). Here, Kramer's leaf-mulch business is based entirely on preventing its feedstock materials from being "discarded" and on returning that material to the economic mainstream by taking fallen leaves and turning them into saleable leaf-mulch product. See *IEPA v. Gruen et al.*, AC 06-49, Slip Op. at 10 (Ill. Pol. Control Bd. Jan. 24, 2008) (finding that logs cut and stored on-site for

⁴ One Illinois appellate court has found that "leaves, which naturally grow and fall from trees," are characteristically dissimilar from the listed examples of "waste" in the Act. *City of Lake Forest v. Pol. Control Bd.*, 146 Ill. App. 3d 848, 855 (2d Dist. Ill. App. Ct. 1986). This observation reinforces the dispositive weight of the "discarded" question when considering whether leaves constitute a type of "waste" under specific circumstances. The Board has affirmed that *Lake Forest* remains "good law" for the "holding" that "leaves which fall naturally from the trees . . . do not constitute waste" despite subsequent statutory amendments related to the regulation of "landscape waste" and "composting." See *Am. Tree Serv.*, Slip Op. at 14-15 (distinguishing facts of *Lake Forest* as based on on-site leaf disposal expressly authorized by Act rather than off-site burning of leaves that would render such facility subject to pollution control siting requirements).

sale or use as firewood had not been “discarded” and therefore were not “waste”). *C.f. Northern Illinois*, 381 Ill. App. 3d at 180 (finding abandoned, uprooted trees to be “waste” because “there was no evidence presented that the trees had ever been ‘collected, separated or processed and returned to the economic mainstream’” (citing 415 ILCS 5/3.380)). The production process description and annual revenue information Kramer provided in its Petition readily establish that, after processing, Kramer’s organic feedstock is not discarded, but rather is sold in a viable market and used by customers for beneficial purposes.

Additionally, the *AFI* Court determined that the term “waste” should not be applied to feedstock processed at a facility that recycles, reclaims or reuses that material, based on the distinction drawn by the Act between the “two main categories of” “items that may be recycled, reclaimed, or reused . . . : (1) ‘waste’ from which contaminants may be removed and (2) ‘materials’” that are either “discarded” or “collected, separated or processed and returned to the economic mainstream.” *AFI*, 830 N.E.2d at 456 (quoting 415 ILCS 5/3.380). The Court held that the “material” at issue in *AFI* was not “waste” because “AFI was not removing contaminants from” it and it was returned “as a ‘product’ into the economic mainstream.” *Id.* The Board has previously invoked this reasoning to find that particular material that is reclaimed or reused should not be considered “waste” where the business’s “process removes no contaminants and produces no residuals,” and where the operator “maintain[s] control over the quality of the materials . . . and process[,] ensuring that no unknown contaminants enter the material.” *Jo’Lyn*, 2005 WL 871123 at *13; *see also In re: Westwood Lands, Inc.*, AS 09-3, 2010 WL 4059855 (Ill. Pol. Control. Bd. Oct. 7, 2010) (finding that material was not “waste” because “visually examining the incoming loads for trash or other [non usable] material and . . . removing those items from the incoming load or rejecting the load altogether provides assurance that

contaminants will not be introduced”). So too here, where Kramer inspects incoming leaf and wood feedstock to ensure it is not contaminated or comingled with substances that cannot be converted into leaf mulch, *see* Petition at 11, and “collect[s], separate[s and] processe[s]” feedstock material, which, “would otherwise be disposed of or discarded,” to sell it as a product in “the economic mainstream.”

Kramer’s leaf-mulch business does not involve “waste,” and therefore, Section 830 does not apply.

B. Kramer is Not Engaged in “Composting Operations”

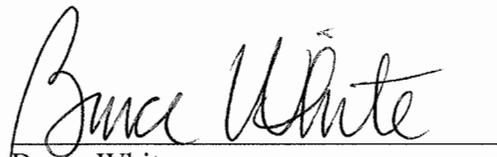
A second, independent reason that Section 830 cannot govern Kramer’s leaf-mulch operations is that those operations simply do not involve any “composting” as required under the applicability provision of Section 830.101. “Composting operation,” is defined as “an enterprise engaged in the production and distribution of end-product compost.” *Id.* The Board has imported its definition of “compost” from the Environmental Protection Act (the “Act”): “‘Compost’ means the humus-like product of the process of composting waste” *Id.* (citing 415 ILCS 5/3.150). “Composting,” finally, is defined as “the biological treatment process by which microorganisms decompose the organic fraction of the waste, producing compost.” *Id.* *See also* 415 ILCS 5/3.155 (same). Thus, each of the Board’s definitions of relevant terms limit the applicability of Section 830 to facilities engaged in “composting” to produce “compost.”

Kramer’s operations –as described in the Petition and by IEPA itself – simply do not involve “composting” or the production of “compost.” Quite to the contrary, in IEPA’s words, Kramer’s production process is defined by “the storage of leaves in a manner that *does not allow them to decompose and produce compost.*” IEPA Recommendation at 1 (emphasis added). Without “compost” there is no basis to apply the “composting” regulations of Section 830.

III. CONCLUSION

Kramer's leaf-mulch production involves neither "waste" nor "composting operations." Accordingly, the provisions of Section 830 do not apply to Kramer's operations because it is not a "landscape waste composting facility." The square peg of Kramer's operations cannot and need not be pounded into the round hole of Section 830; Kramer should be allowed to continue to operate its leaf-mulch operations in accordance with its environmentally responsible practices.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink that reads "Bruce White". The signature is written in a cursive style and is positioned above a horizontal line.

Bruce White

Counsel for Petitioner Kramer Tree Specialists, Inc.

Dated: June 2, 2014

Bruce White
Robert A. Weinstock
Barnes & Thornburg LLP
One North Wacker Drive
Suite 4400
Chicago, Illinois 60606
(312)214-4584
(312)759-5646 (fax)

EXHIBIT A

VEDDERPRICE

VEDDERPRICE P.C.
222 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
312-609-7500
FAX: 312-609-5005

PETER J. KELLY
312-609-7875
pkelly@vedderprice.com

CHICAGO • NEW YORK CITY • WASHINGTON, D. C.

February 4, 2009

VIA CERTIFIED MAIL
RETURN RECEIPT REQUEST

Joy Hinz
Environmental Specialist
DuPage County Economic Development & Planning
421 North County Farm Road
Wheaton, IL 60187

Re: Violation Notice L-2009-DP1069
Kramer Tree Specialists

Dear Ms. Hinz:

Enclosed please find a revised response to the referenced notice. As you will see we continue to believe that Kramer Tree Specialists' collection of tree branches with leaves and leaves without branches on its property for the purpose of making mulch for sale does not require a permit from IEPA. None of the material is disposed. None is transferred offsite for treatment or disposal. All of the materials brought onto the Kramer property are sold as product. We cannot find any support for the proposition the IEPA issues permits for Kramer's activity.

We respectfully request that you reconsider your views of the regulatory status of Kramer's activity.

Sincerely,

Peter J. Kelly

PJK/jab
Enclosure
cc: C. Grigalauski
G. King
T. Dragovich
J. Kramer
M. Fleming

ECONOMIC DEVELOPMENT AND PLANNING

DUPAGE COUNTY

DUPAGE COUNTY REGULATORY
SERVICES DIVISION,

Complainant,

v.

Violation Notice L-2009-DP1069

KRAMER TREE SPECIALISTS, INC.,

Respondent.

KRAMER TREE SPECIALISTS' AMENDED RESPONSE

NOW COMES Kramer Tree Specialists, Inc. ("Kramer"), by and through its attorneys Vedder Price P.C., and amends its response to Violation Notice L-2009-DP1069.

I. INTRODUCTION

On November 14, 2008, Inspector Joy Hinz of the DuPage Department of Economic Development and Planning conducted an inspection of Kramer's property. Upon inspection, Inspector Hinz noted an accumulation of leaves on the property. On December 5, 2008 Inspector Hinz issued Violation Notice L-2009-DP1069 to Kramer pursuant to Section 31(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a). The Notice of Violation indicated that Kramer was in violation of 415 Ill. Comp. Stat. 5/21 (d), 415 Ill. Comp. Stat. 5/21(e), 35 Ill. Admin. Code § 807.201 and 35 Ill. Admin. Code § 807.202. Kramer's initial response to the Violation Notice was sent on January 7, 2009, and requested a meeting with Representatives of the Division. This meeting took place on January 20, 2009. Unfortunately, the meeting did not result in an agreed Compliance Agreement.

With all due respect, Kramer continues to disagree with Inspector Hinz's classification of the leaves as "landscape waste." Kramer disputes that leaves are treated differently than any

other kind of "waste" or "landscape waste" under Illinois' Environmental regulatory scheme. Further, since "landscape waste" is a subset of "waste" under the Act, then logically any material that does not meet the definition of "waste" cannot constitute "landscape waste." Because the leaves on Kramer's property do not meet the definition of "waste" under either the Act or the definition attributed to waste by the Illinois Pollution Control Board ("IPCB"), the leaves cannot be classified as "landscape waste." Therefore, the activity cited in the Notice of Violation is not covered by the Act.

II. RELEVANT FACTS

Kramer is in the business of planting, trimming, removing and transplanting trees. All of the material Kramer gathers and accumulates in the process of trimming and removing trees is resold, reprocessed and returned to the stream of commerce. For instance, high quality large diameter trunks that are gathered from tree trimming and removal operations are sold to furniture makers or saw mills; lower quality branches over six feet in length are sold to pallet makers; and some cut wood is sold for firewood. All other material resulting from Kramer's tree trimming and tree removal work (brush, branches, short logs, hollow or decayed logs, tree chips, tree stump grindings, etc.) are transported to Kramer's property and ground into mulch products. All the leaves gathered and accumulated in the course of Kramer's business are returned to Kramer's property, ground into mulch and then blended with mulch from winter operations (which lacks leaves). The blending is necessary to assure a uniform mulch product year round. All mulch is sold.

The mulching process is a large part of Kramer's business. Kramer has contracts with clients to collect leaves from both residential and municipal properties. Leaves collected from Kramer's clients are brought back to Kramer's property, where all of the leaves are stored on concrete pads constructed to direct and control precipitation in anticipation of the mulching

process. Once the leaves are on Kramer's property, none of them are transported to another location. In addition to residential work, over a dozen municipalities pay Kramer to transport his grinder to their public works yards to grind their collected bushes, brush, branches, chips and leaves into mulch. Kramer produces two types of mulch: double ground and special blend, which are sold to retail customers and wholesale to landscape contractors. Leaves are an important component of the production of mulch to assure a consistent quality of the special blend mulch. In the winter, leaves are necessary because there are no leaves on trimmed branches. Kramer has a significant investment in a large grinder, four tractor loaders and several trucks. In 2008, Kramer sold approximately 53,000 yards of mulch, priced between \$11.50 and \$20.00 per yard, depending on the type of mulch and the purchaser. In 2008, Kramer earned over half a million dollars from its mulch sales.

The mulching process is a business for Kramer, however, it is not a waste business. There is no "waste" brought onto the property because none of the materials meet the definition of "waste" under the Act. Additionally, there is no "waste" transferred from Kramer's property to any other location for treatment or disposal. All materials resulting from the business that are brought back to Kramer's property are reprocessed, recycled and resold. Kramer's business is "green" and has an overall positive effect on the environment. Illinois EPA's own website encourages the use of mulch to protect trees and plants.

III. ARGUMENT

A. Statutory Provisions

Section 21 of the Illinois Environmental Protection Act ("the Act") lists prohibited acts, stating in relevant part, "[n]o person shall: . . . (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation: (1) without a permit granted by the agency . . . (e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage

or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.” 415 ILCS 5/21.

The Act 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 semi-solid or contained gaseous material resulting from industrial commercial mining and agricultural operations.” (Emphasis added.) 415 ILCS 5/3.535. The Supreme Court of Illinois has held that the term “discarded” as it appears in section 5/3.535 is an exclusive modifier for the term “material.” *Alternate Fuels, Inc. v. IEPA*, 215 Ill.2d 219, 239-40 (Ill. 2005) (opinion adopted by Illinois Pollution Control Board in *IEPA v. Gruen*, IEPA No. 96-06-AC (Jan. 24, 2008)). Therefore, under the Act, material constitutes waste only if it is garbage or sludge from one of the listed facilities or “any other discarded material.” 415 ILCS 5/3.353.

The term “discarded” is not explicitly defined in the Act. However, in interpreting the meaning of “discarded,” the Illinois Supreme Court looked to Section 3.380 of the Act, which also uses the term, for guidance. Upon doing so, the court concluded that the term “discarded” is unambiguous. *Alternate Fuels*, 215 Ill. 2d at 242. In section 3.380, the Act reads as follows “Recycling, reclamation or reuse means a method, technique, or process designed to remove any contaminant from waste so as to render such waste reusable, *or any process by which materials that would otherwise be disposed of or discarded are collected, separated or processed and returned to the economic mainstream in the form of raw materials or products.*” (Emphasis added.) 415 ILCS 5/3.380. Therefore, according to the language of the Act, materials that are collected, separated or processed are by definition not “discarded.” The result is that any materials that are not either “garbage, sludge from a waste treatment plant, water supply plant, or air pollution control facility” *or “discarded”* cannot constitute “waste” under the Act. 415 ILCS

5/3.353. Further, because “landscape waste” is a subset of “waste”, materials that are not “waste” cannot logically be categorized as “landscape waste.” *American Tree Serv. Inc. v. IEPA*, Ill. Pollution Control Bd. Op. Case No. 1994-043, slip op. at 16 (December 14, 1994)); *Northern Ill. Serv. Co. v. IEPA*, 381 Ill. App. 3d 171 (Ill. App. Ct. 2008) (holding that landscape waste is a subset of waste).

Under the language of the Act, the leaves on Kramer’s property, which are the material at issue in this case, do not qualify as “waste.” The leaves are not “garbage or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility.” Therefore, in order to constitute “waste” under Section 3.535 the leaves must be “other discarded material.” However, the Act is clear that materials that are collected, separated or processed are by definition not “discarded.” Here, Kramer collects and grinds all leaves brought onto its property. This does not meet the definition of “discarded.” Further, instead of being “discarded” the leaves are recycled and resold as mulch in accordance with Section 3.380, which outlines what activities constitute recycling, reclamation and reuse. Because the leaves are not “waste” under the provisions of the Act, they cannot be “landscape waste,” a subset of “waste.”

B. Case Law

Likewise, Illinois case law on this matter supports the conclusion that the leaves on Kramer’s property are not “waste.” The Illinois Supreme Court has held that “materials” as it appears in the Act is subdivided into two categories: (1) materials that are “ ‘discarded’; and (2) “ ‘materials that would otherwise be disposed of or discarded [which] are collected, separated or processed and returned to the economic mainstream in the form of raw materials or products.’” *Alternate Fuels*, 215 Ill. 2d at 240, quoting 415 ILCS 5/3/380. While the legislature has not defined ‘discarded materials,’ it has clearly stated what it is not: ‘materials that would be otherwise disposed of or discarded [which] are . . . returned to the economic mainstream in the

form of raw materials.” *Alternate Fuels*, 215 Ill.3d at 240. Thus, materials are discarded if they are not collected or separated or processed and returned to the economic mainstream. *Id.* In *Alternate Fuels*, the Illinois Environmental Protection Agency (“IEPA”) issued a violation notice to an alternate fuel producer, requiring the producer to submit a permit application for a waste storage and waste treatment operation. *Id.* at 221. In response, the producer filed action against the Agency seeking a declaratory judgment that none of the “materials” used to make the fuel (shredded plastic containers) nor the fuel itself was “waste” within the meaning of the Act. *Id.* at 238-40. The Illinois Supreme Court affirmed the grant of summary judgment for the producer, holding that the materials used to produce the alternate fuel were not “discarded” and therefore, were not “waste” under the Illinois Act. *Id.* at 248. The court found that the “materials” were not discarded because the producer processed the materials for use in the marketplace, a process which the court noted retained more of the characteristics of a recycling center than a pollution control facility or a waste treatment center. *Id.* at 238-40.

Materials that are “collected, separated or processed and returned to the economic mainstream in the form of raw materials,” may not be classified as “other discarded material” *Northern*, 381 Ill.App.3d at 175. In *Northern*, NISC, an excavation and demolition contractor, hauled dirt and other matter, including dead uprooted trees, back to a quarry owned by the company. *Id.* at 172. The uprooted trees that were brought back were laid to rot on the premises for as long as ten years. *Id.* The Illinois Environmental Protection Agency sent an inspector to examine the quarry. *Id.* at 172-73. Upon inspection, the inspector noted an estimated 9,700 cubic yards of uprooted, dead trees piled ten to thirteen feet high. *Id.* The inspector came back after four months later and noted that the trees had not changed position between inspections and showed evidence of decay. *Id.* at 173. The agency filed an administrative citation charging that

NISC engaged in the “open dumping of waste.” *Id.* In response, NISC did not deny the presence of the trees at the site but instead argued that the trees were not “waste” or “litter” under the Act. Before classifying the trees as waste, the court went through the proper analysis of first determining if the trees were “discarded.” *Id.* at 176. In *Northern*, there was no evidence that the trees had ever been collected, separated or processed. *Id.* Because the trees were just “laid to rot” and not processed or returned to the economic mainstream, the court determined that the trees had been “discarded.” *Id.* Only after determining the trees had been “discarded” did the Court determine that they constituted “waste.” The court did not analyze whether or not the trees were “landscape waste” without first going through this reasoning process, exhibiting that the proper method of analysis under the Act is to first determine if the materials are “discarded” and therefore “waste” before ever reaching the issue of whether the materials qualify as the subset of “landscape waste.” *Id.* at 177.

Large quantities of logs that were stacked and maintained on a company’s property during the seasoning process did not constitute “waste” under the Act. *Gruen*, IEPA No. 96-06 (Jan. 24, 2008). In *Gruen*, a tree service engaged in the business of cutting trees and selling firewood brought tree trimmings onto its property in order to cut the wood into logs and store them during the seasoning process. *Id.* An Environmental Protection Specialist with the Illinois Environmental Protection Agency inspected the site. *Id.* During the inspection, the inspector observed a large volume of stacked, cut logs lined along a fence for approximately 250 feet and along each side of the site’s driveway. *Id.* The inspector classified the logs as “waste” and issued a violation notice that the company was in violation of the Act. *Id.* However, Gruen maintained that the logs did not constitute waste under the Act because the logs had not been “discarded.” *Id.* In *Gruen*, the logs were resold as firewood, accounting for 20% to 25% of the

company's annual income. *Id.* The IPCB agreed with Gruen, holding that because the wood was processed and returned to the economic mainstream in the form of firewood, it had not been "discarded" and thus did not constitute "waste." *Id.* Because the wood was not "waste," the court did not reach the issue of whether or not the logs constituted "landscape waste." *Id.* Again, this illustrates the statutory construction of "landscape waste" as a subset of "waste" rather than an independent, unrelated source of coverage under the Act. *Id.*

Like materials at issue in *Alternate Fuel*, the leaves on Kramer's property are processed and returned to the economic mainstream when they are resold as mulch. In fact, all of the materials that Kramer gathers from tree trimmings are resold as products. If the Illinois Supreme Court held that plastic containers that are shredded and resold as alternate sources of fuel have not been "discarded" and therefore do not constitute "waste," then surely leaves that are ground into mulch and resold to retail and commercial landscapers have not been "discarded" and therefore are not "waste." Additionally, as noted in *Alternate Fuels*, when materials are reprocessed for use in the marketplace, the operation retains more of the characteristics of a recycling center than a waste management site.

Further, unlike the dead, uprooted trees in *Northern*, all of the leaves transported to Kramer's property are processed, recycled and resold. Even the manner in which the leaves are stored on Kramer's property indicates that the leaves are brought onto the property with the intent to grind them into mulch. In *Northern*, the court did not classify the dead uprooted trees as "landscape waste" merely because the words "tree limbs" and "other materials accumulated as the result of care of trees" appeared in the section defining "landscape waste." Rather, the court, recognized principles of statutory construction and held that because "landscape waste" is a subset of "waste," the trees must first meet the definition of "waste" to be "landscape waste." In

determining that the trees in *Northern* constituted “waste,” the court focused on the way in which the trees were discarded and the fact that some trees had been present for more than ten years. This is totally unlike the leaves at issue in this case. The leaves on Kramer’s property are not “laid out to rot” for extensive periods of time. Rather, the leaves are stored in conditions conducive to mulching, processed in the grinder and resold to retailers and landscape contractors. If the trees in *Northern* had not been “discarded,” the court would not have classified them as “waste” despite the fact that the word “trees” appears in the section defining “landscape waste.” Here, therefore, it is not a plausible argument that leaves that have not been “discarded” are necessarily landscape waste merely because the word “leaves” appears in Section 3.270.

Finally, just as the logs in *Gruen* were not discarded “waste,” here too, the leaves on Kramer’s property are not “waste.” In *Gruen*, relevant to the determination that the logs had not been “discarded” was the evidence of sales receipts for firewood and the existence of equipment used to turn logs into firewood. The IPCB determined that this was evidence that the logs were being processed and returned to the marketplace. Here too, Kramer has ample evidence that the leaves on its property are resold as mulch. In addition, Kramer has invested in a large grinder that is used to turn leaves into mulch. Despite the listing of the word “wood” in the statutory definition of “landscape waste,” the IPCB did not determine that the wood was “landscape waste.” Rather, the IPCB first determined that the material did not constitute “waste” because it had not been “discarded” and therefore never reached the issue of whether or not the wood was “landscape waste.” In this case then, it is clear that unless the leaves are first determined to be “discarded” and therefore “waste” they cannot be classified as “landscape waste.” If the logs in *Gruen*, which were rotting and stored for a longer period of time than the leaves on Kramer’s property are stored, were not determined to be “discarded,” then Kramer’s leaves are not

“discarded.” Just as the logs in *Gruen* were not “discarded” because they were “returned to the economic mainstream,” the leaves on Kramer’s property are not “discarded” because they are processed and resold as mulch. Because the leaves have not been “discarded,” they do not meet the definition of “waste” and therefore it is not proper to classify them as “landscape waste.”

IV. CONCLUSION

The leaves on Kramer’s property are “collected” “processed” and “returned to the economic mainstream.” Therefore, they have not been “discarded” and they do not constitute “waste” under either the language of the Act or Illinois case law. Further, because they do not constitute “waste” they cannot possibly be classified as “landscape waste” which is a subset of waste. There is nothing in the language of the Act, case law interpreting the pertinent provisions or Illinois’ environmental regulatory scheme that suggests in any way that leaves returned to the economic mainstream differ from tree branches cut into firewood. As such, the leaves on Kramer’s property, which are the subject of this Violation Notice, are not “waste” and are not covered by the Act.

Kramer has not proposed a compliance agreement because the alleged violations are not in fact violations under the Act.

Dated: February 4, 2009

Respectfully Submitted,

KRAMER TREE SPECIALISTS, INC.

By: _____
One of Its Attorneys

Peter J. Kelly
Vedder Price P.C.
222 North LaSalle Street
Suite 2600
Chicago, IL 60601-1003
(312) 609-7500
E-Mail: pkelly@vedderprice.com

EXHIBIT B



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR

217/524-3300

August 18, 2011

Certified Mail
7009 3410 0002 3750 4047

Kramer Tree Specialists, Inc.
300 Charles Court
West Chicago, Illinois 60185

Re: 0430905909 -- DuPage County
Kramer Tree Specialists, Inc.
Log No. 2011-205
03T Compost
Permit Denial

Dear Mr. Kramer:

This will acknowledge receipt of your Application for Permit to develop and operate a landscape waste compost facility, dated May 18, 2011 and received by the Illinois EPA on May 24, 2011.

Your permit application to develop and operate a landscape waste compost facility is denied.

You have failed to provide proof that granting this permit would not result in violations of the Illinois Environmental Protection Act (Act). Section 39(a) of the Act [415 ILCS 5/39(a)] requires the Illinois EPA to provide the applicant with specific reasons for the denial of permit. The following reason(s) are given:

1. The size of the storage piles and the operating plan associated with the leaf mulch does not provide proper conditions for composting, pursuant to 35 IAC 830.205(a)(1)(A) and 35 IAC 830.206.
2. The compost generated at the proposed facility will not meet the standards for general use compost, pursuant to 35 IAC 830.503.
3. The facility cannot perform testing of the leaf mulch in accordance with 35 IAC 830.504
4. Samples from the leaf mulch cannot properly be taken in accordance with 35 IAC 830.507.

Within 35 days after the date of mailing of the Illinois EPA's final decision, the applicant may petition for a hearing before the Illinois Pollution Control Board to contest the decision of the Illinois EPA, however, the 35-day period for petitioning for a hearing may be extended for a

Rockford • 4302 N. Main St., Rockford, IL 61103 • (815) 987-7760

Elgin • 595 S. State, Elgin, IL 60123 • (847) 608-3131

Bureau of Land – Peoria • 7620 N. University St., Peoria, IL 61614 • (309) 693-5462

Collinsville • 2009 Mall Street, Collinsville, IL 62234 • (618) 346-5120

Des Plaines • 9511 W. Harrison St., Des Plaines, IL 60016 • (847) 294-4000

Peoria • 5415 N. University St., Peoria, IL 61614 • (309) 693-5463

Champaign • 2125 S. First St., Champaign, IL 61820 • (217) 278-5800

Marion • 2309 W. Main St., Suite 116, Marion, IL 62959 • (618) 993-7200

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period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Illinois EPA within the 35-day initial appeal period.

Should you wish to reapply or have any questions regarding this application, please contact Derek Rompot at 217/524-3262.

Sincerely,



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

SFN:^{TD}DCR:bjh\111353s.doc

cc: John Lardner, P.E., JPL Environmental Engineering