BEFORE THE ILLINOIS POLLUTION CONTROL BOARD JAN 14 2005

IN THE MATTER OF:	)	
	)	
PETITION OF JO'LYN CORPORATION	)	
and FALCON WASTE AND RECYCLING,	)	AS 04-02
INC. for an ADJUSTED STANDARD from	)	(Adjusted Standard – Land)
portions of 35 Ill.Adm.Code 807.103 and	)	
35 Ill.Adm.Code 810.103, or in the	)	
alternative, A FINDING OF	)	
INAPPLICABILITY.	)	

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 14th day of January 2005, the following was filed with the Illinois Pollution Control Board: **Petitioners' Post-Hearing Brief,** attached and herewith served upon you.

JO'LYN CORPORATION and
FALCON WASTE AND RECYCLING, INC.

By: Elizabeth S. Harvey
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CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of the above-described document to counsel of record in the above-captioned matter via U.S. Mail at One IBM Plaza, Chicago, IL 60611 on or before 5:00 p.m. on January 14, 2005.

Jeanette M. Podlin
Jeanette M. Podlin

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

6332-002

SERVICE LIST

AS 04-02
(Adjusted Standard – Land)

Mr. John J. Kim
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P.O. Box 19276
Springfield, IL 62794-9276

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PETITIONERS' POST-HEARING BRIEF

Petitioners Jo'Lyn Corporation ("Jo'Lyn") and Falcon Waste and Recycling, Inc. ("Falcon") (collectively, "petitioners"), by their attorneys Swanson, Martin & Bell, hereby submit their post-hearing brief.

INTRODUCTION

Petitioners seek a finding that the granulated bituminous shingle material (GBSM) that they purchase and use for a paving product called Eclipse Dust Control (EDC) is not a waste, such that petitioners are not required to obtain local siting approval and comply with the Board's waste regulations. In the alternative, if the Board finds that GBSM is a waste, petitioners seek an adjusted standard from specific sections of the waste regulations. Petitioners have previously made several filings, containing legal arguments, information, and exhibits in support of their request.[1] Petitioners will not repeat the arguments made in those filings, and refer the Board to the filings in this case. Instead, petitioners take this opportunity to provide additional information, as requested by the Board in its

[1] Petitioners have filed a petition for adjusted standard (April 21, 2004), an amended petition (July 8, 2004), a supplement (July 14, 2004), and a response to the Agency's recommendation (September 3, 2004).

October 7, 2004 order and at hearing, and further legal argument regarding whether GBSM is a waste.

Pursuant to its October 7, 2004 order, the Board held a hearing in this matter on December 22, 2004. Petitioners presented two witnesses: Kathy Powles, of Jo'Lyn and Falcon[2], and David Foulkes of IKO[3]. Ms. Powles testified on the operations of the facility, the specifications of Eclipse Dust Control (EDC), and other operational issues. (Tr. at 11-127.) Mr. Foulkes, of IKO, testified to the components of the GBSM and the history of IKO's interactions with the Illinois Environmental Protection Agency (Agency). Mr. Foulkes also testified that other states allow the use of GBSM as a paving product. (Tr. at 128-171.)

There were a number of members of the public in attendance at the hearing, including Senator Pam Althoff. Several members of the public made comments in support of this petition, including Beverly Meuch of the Lou Marchi Total Recycling Institute (Tr. at 62-63); Mr. Lowe (Tr. at 64-66, 70); Michael Murray, Heartland Township Commissioner (Tr. at 66-67); Jean Niemann, commenting as a citizen and as solid waste coordinator for McHenry County (Tr. at 67-69); Laura Stevens (Tr. at 69); Pamela Marsh (Tr. at 70); and William Turley, executive director of the Construction Materials Recycling Association (Tr. at 171-175). Additionally, Mike Mitchell, executive director of the Illinois Recycling Association, gave testimony in support of the petition. (Tr. at 176-

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[2] Ms. Powles is vice president of Jo'Lyn and president of Falcon. (Tr. at 12.)

[3] IKO is the shingle manufacturer, located in Bedford Park, Illinois, with which petitioners have a contract for the purchase of the GBSM. IKO is the entity which received, in 1993, the Agency's determination that GBSM is not a waste when used for a paving product. (See Exhibit D, attached to adjusted standard petition.)

182.) This public support is in addition to the support already generated for the petition. (See Petition, Exhibit G, and Public Comments #1-#12.)

GBSM IS NOT A waste

As demonstrated in the petition for adjusted standard and in petitioners' response to the Agency's recommendation, GBSM is not a waste under the Environmental Protection Act. Petitioners ask the Board to specifically find that GBSM is not a waste. If the Board so finds, there is no need for an adjusted standard.

First, in 1993 the Agency itself determined that GBSM is not a waste when used for a paving product. That determination was issued to IKO Chicago (the entity from which petitioners purchase their GBSM), and provides that GBSM is not a waste when used for the specific paving applications set forth in the determination. Petitioners' process uses the GBSM in the manner allowed by the waste determination. (See Petition, p.3 and Exhibit D; Response, pp. 4-6.) It is unclear why the Agency seeks to repudiate its own waste determination letter. The Agency has not stated a reasonable basis for its refusal to follow its own determination, as to GBSM from the same source. The Agency correctly found, in 1993, that GBSM is not a waste when used for paving applications. The Board should adopt that Agency determination, and find that GBSM is not a waste.

Second, the GBSM does not fit the definition of waste. The Act defines "waste" as "any garbage, sludge...*or other discarded material.*" (415 ILCS 5/3.53 (emphasis added).)[4] The GBSM is not discarded, and is a useful material sold to

[4] The same definition is used in Section 807.104 of the Board's rules.

petitioners for further use. Since the material is not discarded, and does not fit any of the other items in the definition of waste, the GBSM is not a waste.

This interpretation is supported by the Illinois Supreme Court's recent decision in *Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency*, No. 96071, 2004 Ill. LEXIS 1616 (October 21, 2004)("*AFI*").[5] Petitioners have discussed, in their previous filings, the appellate court's decision in *AFI*, 337 Ill.App.3d 857, 786 N.E.2d 1063, 272 Ill.Dec. 229 (5th Dist. 2003).[6] In its decision, the appellate court found that plastic materials processed and sold for use as fuel are not waste, because the plastic materials are not "discarded".

On October 21, 2004, the Illinois Supreme Court upheld the appellate court's decision. The supreme court reviewed the facts of the case, and then applied those facts to the statutory definition of waste. The court noted that the term "discarded" is not defined in the Act, but turned to the definition of "recycling, reclamation or reuse", which also uses the word "discarded". The court found that, pursuant to that definition, materials are "discarded" only if the materials are not returned to the economic mainstream. The court held:

> We therefore reject the Agency's contention that "discarded" is defined solely from the viewpoint of the supplier in that a material is putatively "discarded" as "any material which is not being utilized for its intended purpose" of the generator. There is nothing in the statute which would dictate this definition. Rather, the Act contemplates that materials that may otherwise be discarded by the supplier may be diverted from becoming waste and returned to the economic mainstream.
>
> *AFI*, 2004 Ill. LEXIS 1616, *33.

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[5] For the Board's convenience, the Illinois Supreme Court's decision is attached as Exhibit L. (Exhibits A-G are attached to the petition, Exhibits H-I are included with the amended petition, and Exhibit K is attached to the supplement to the petition.)

[6] See Petition, pp.5-6, and Response, pp. 6-9.

This statement applies directly to the GBSM used by petitioners. Petitioners purchase the GBSM, which might otherwise be discarded[7], and return the GBSM to the economic mainstream by producing Eclipse Dust Control. The supreme court's opinion, affirming both the appellate and the trial court, is clear and definite: a material is not a waste if it is returned to the economic mainstream. The Board should follow the supreme court's decision, and find that GBSM is not a waste.

On November 12, 2004, the Agency filed a petition for rehearing of the *AFI* decision. That petition remains pending with the supreme court, with action on the request for rehearing expected in early February. Although the decision is not technically "final" because of the pending request for rehearing, the decision is effective, and states the law in Illinois. "[T]he filing of a petition for rehearing does not alter the effective date of the judgment of a reviewing court unless that court allows the petition for rehearing." *PSL Realty Company v. Granite Investment Company*, 86 Ill.2d 291, 427 N.E.2d 563, 570, 56 Ill.Dec. 368 (1981). *See also Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 734, 260 Ill.Dec. 541 (2001).

In short, petitioners ask the Board to find that GBSM is not a waste, and thus not subject to the statutes and regulations governing waste. The GBSM is not discarded, but is returned to the economic mainstream as a useful paving product. The supreme court's decision in *AFI* is clear and controlling: a material that is returned to the economic mainstream is not a waste. The Board itself, in a

[7] Mr. Foulkes of IKO testified that the GBSM generated at IKO is discarded only if no purchaser can be found. In all of IKO's plants in other states, IKO sells the GBSM to businesses which use it for paving applications. (See Tr. at 134-135, 146-148.)

case related to the *AFI* decision, has held that such material is not a waste. *Illinois Power v. IEPA,* PCB 97-35 and 97-36 (January 23, 1997). Additionally, the Agency has previously determined that this GBSM, from IKO, is not a waste. It is clear, from court and Board decisions, as well as the Agency's own 1993 determination, that GBSM is not a waste. Petitioners ask the Board to specifically find that GBSM is not a waste.[8]

REQUEST FOR ADJUSTED STANDARD

If the Board disagrees, and believes that the GBSM is a waste, petitioners seek an adjusted standard. As noted above, a great deal of information has previously been submitted to the Board in support of the request for an adjusted standard. In this brief, petitioners will take the opportunity to answer questions raised at hearing, and to address other remaining issues.

Issues raised at hearing

There were several questions asked at hearing, by the Agency and by Board staff, for which petitioners now provide answers and further information.

Experiences in other states

Mr. Foulkes of IKO testified that the GBSM from IKO facilities in other states (Delaware, Ohio, and Washington) is used for paving applications, and is not landfilled as a waste. In most of those applications in other states, the GBSM is used as an ingredient in hot mix paving. Illinois is the only state in which IKO has had issues with regulatory authorities about the use of GBSM as a paving product. (Tr. at 134-135.) In the early 1990s the Agency insisted that IKO

[8] If the Board so finds, there is no need for an adjusted standard, and all remaining issues are moot.

Chicago (as the Bedford Park plant is known) change the way it handled its waste stream, including GBSM.[9] In early 1993, IKO submitted two requests to the Agency: one for a waste determination that the GBSM was not a waste when used for paving applications, and one for special waste declassification. The documentation submitted to the Agency, and the Agency's responses, were admitted at hearing as Exhibit 5 and Group Exhibit 6. As a result of that submission, in May 1993 the Agency issued the waste determination at issue in this case, finding that IKO's GBSM is not a waste when used for paving applications. After submitting additional information, IKO then obtained a letter from the Agency declassifying the remainder of its waste stream from special waste. (Tr. at 137-142.)

As Mr. Foulkes testified, the other states in which IKO is located allow the use of GBSM in paving applications, and have for a number of years. Approvals from regulatory authorities in Delaware, Indiana, and Ohio were obtained in the early 1990s, and remain in effect today. (Tr. 146-147; Group Exhibit 6, IKO's January 29, 1993 submission to the Agency, Appendix E, pp. 79-97.) Those other states have allowed the beneficial use of GBSM for paving purposes since the early 1990s, while in Illinois the Agency has essentially "revoked" their 1993 approval, without stating a reason. Mr. Foulkes testified that, since petitioners' operations are on hold, IKO Chicago is forced to landfill most of its GBSM. The GBSM is landfilled only because Illinois has not allowed businesses such as petitioners to operate. (Tr. at 148-149.) This contrasts negatively to the other

[9] The Agency insisted, at that time, that IKO's waste stream should be classified as special waste. (Tr. at 136-137; 142.)

states, which allow the use of GBSM in paving products, and thus prevent the landfilling of GBSM.

Comparison of test results to regulatory standards

As discussed in petitioners' previous filings, GBSM consists of asphalt, filler, granules (trap rock), and mat (either fiberglass or organic, such as cardboard). (Supplement, p. 2.) At hearing, petitioners submitted a great deal of information about the components of GBSM, their lack of toxicity, and testing results. (Group Ex. 6.) Much of this information was provided, by IKO, to the Agency in 1993, in support of IKO's request to the Agency for a determination that GBSM is not a waste. As Mr. Foulkes testified, the testing results showed that the GBSM is not toxic. (Tr. at 139-140.)

IKO's January 29, 1993 submittal to the Agency contains a great deal of information demonstrating that the GBSM is not an environmental concern.[10] IKO had a full range of TCLP tests performed on its GBSM. The analytical results, for all parameters, were below the regulatory criteria established in 40 CFR Part 261. (Group Exhibit 6, January 29, 1993 submittal to the Agency, Appendix B, pp. 22-27.) The testing lab certified that those results were below regulatory standards. (Group Exhibit 6, January 29, 1993 submittal to the Agency, Appendix B, p. 29.) pH tested at 8.7, well within the acceptable range for corrosivity. (Group Exhibit 6, January 29, 1993 submittal to the Agency, Appendix B, p. 28; 35 Ill.Adm.Code 721.122(a)(1).)

[10] Petitioners encourage the Board to review the full range of information presented in Group Exhibit 6, especially the two submittals (January 29, 1993 and October 29, 1993) from IKO to the Agency. Those submittals demonstrate conclusively that GBSM is not hazardous, and presents no environmental concerns.

The GBSM is not hazardous under Part 721 of the Board's rules. It is not: 1) a listed waste; 2) derived from a hazardous waste treatment; or 3) a mixture of hazardous waste. GBSM is solid and does not generate a liquid, and it is not hazardous by characteristic (not reactive, ignitable, corrosive, or toxic by characteristic as a demonstrated by TCLP testing). (Group Exhibit 6, October 29, 1993 submittal to the Agency, p. 5, and Appendix A, pp. 12-19.) Additionally, the testing results presented in Group Exhibit 6 are below the TACO Tier I Soil Remediation Objectives. (35 Ill.Adm.Code 742 Appendix B.)

The non-hazardous, non-threatening nature of GBSM is further demonstrated by the fact that, in 1992, Illinois classified reclaimed asphalt pavement (RAP) as "clean construction or demolition debris". (415 ILCS 5/3.160(b).) This action was taken after testing demonstrated that the RAP has no environmental impact on humans or the environment. Asphalt is a component of GBSM. (Group Exhibit 6, January 29, 1993 submittal to the Agency, p. 5.)

The extensive testing conducted by IKO demonstrates that GBSM is not hazardous, does not violate any regulatory standards, and does not present a threat to health or the environment. While that testing was performed in 1992 and 1993, the results remain applicable. Mr. Foulkes testified at hearing that the ingredients used by IKO have not changed appreciably since that time. (Tr. at 144.) The only real difference in the shingles produced by IKO is the shape of the finished products: the raw materials are essentially the same. (Tr. at 145; Exhibit 7.) In fact, IKO is more "vertically integrated" now than it was in the early 1990s. This means that IKO produces the majority of its raw materials, rather

than buying the raw materials. This allows IKO more control over the quality of the ingredients, as well as producing cost savings. (Tr. at 145-146.)

Are there any roadways which are not appropriate for application of EDC?

The Agency asked if there are any roadways which are not appropriate for the application of EDC. (Tr. 72-73.) As Ms. Powles noted, EDC is not an appropriate pavement for extremely high-traffic roads, such as interstate highways. This is no different than the fact that traditional asphalt pavement is not used on such high-traffic roads. EDC is used on lower-traffic, mostly rural, roads, in addition to on driveways and parking lots. EDC is typically attractive to people who currently have gravel or dirt driving surfaces. EDC is an excellent dust suppressant, and will also bind to the top of existing asphalt surfaces. In short, EDC is used for lower-traffic applications, just like traditional asphalt.

How much GBSM is currently at petitioners' facility?

The Agency also asked how much GBSM is currently at petitioners' facility. (Tr. 76.) While petitioners are not currently purchasing GBSM, while they wait for this issue to be resolved, there is GBSM on site from purchases made prior to learning that the Agency believe the GBSM is a waste. (Tr. at 124.) Petitioners currently have approximately 4,730 tons of GBSM at their facility. As noted in the amended petition, petitioners have sold essentially all of the existing supply, with installation of the EDC delayed awaiting the conclusion of this proceeding. (See Amended Petition, pp. 10-11.)

How much GBSM is needed to produce enough EDC for a given application?

The Agency asked whether there is a conversion factor to determine how much GBSM is needed to produce sufficient EDC for a given paving project. Petitioners use an Excel spreadsheet to calculate both the amount of GBSM needed and the price for the project. Attached, as Exhibit M, is a printout of the results for a hypothetical project. Assuming a driveway measuring 10 feet by 100 feet (1000 square feet), 16.667 tons of GBSM are needed. Please note that the reference to "shingle thickness" in the bottom left corner is the thickness of the GBSM before compaction. Please also note that the price information contained on Exhibit M is also hypothetical, and is included only for the purposes of illustration.

Inspections of GBSM

There was quite a bit of discussion at the hearing about how petitioners inspect the GBSM they purchase to insure that only GBSM, without any other materials, is used in the process. There are three separate visual inspections of the GBSM. Petitioners first inspect the GBSM at the IKO facility, prior to loading, for any material not GBSM. Because of the high quality of IKO's operations, there has never been anything in the GBSM container which was not GBSM, so petitioners have never rejected a load. However, if the visual inspection revealed some other material (such as scrap paper or other non-GBSM material), petitioner would decide whether to simply remove it and take the load, or to reject the load.[11] (Tr. at 125-126.) A second visual inspection is done at petitioners'

[11] Ms. Powles' reference at hearing to "rules and guidelines" for inspections was not intended literally. (Tr. at 99-101.) There are no formal, independent rules or guidelines for

facility upon arrival of the GBSM. The third visual inspection occurs when the material is placed into the grinder. It is essential that the feed stock consist only of GBSM, without any debris or foreign material. The grinder could be damaged if debris entered the grinder.

As noted, petitioners have never encountered any debris in GBSM obtained from IKO, and do not anticipate such a situation. However, in the unlikely event that a load of GBSM was found to be unacceptable after it arrived at petitioners' facility, that load would be rejected. Petitioner's contract with IKO specifically requires IKO to pay Jo'Lyn any charges incurred by Jo'Lyn for hauling and disposal of any rejected GBSM. (See Exhibit A; Tr. at 84-89, 99-101.)

Height of the stockpiles of GBSM

Petitioners do not allow the stockpiles of GBSM at their facility to exceed 25 feet. This limitation exists so that the height of the stockpile is below the height of the large trees on the property. Those trees provide a natural visual barrier and "fence" at the facility, so that the stockpiles are screened from view. Additionally, there is a possibility that the weight of the material could cause the lower layers of GBSM to partially bind together. This would adversely affect production time, and make the grinding process more expensive.

Can road salt be used on EDC?

The Agency inquired whether road salt can be used on EDC. (Tr. 96-97.) Road salt can indeed be used on EDC, just as it can be used on any other pavement surface. Petitioners are not aware of any adverse effect of road salt

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inspection of GBSM. Petitioners' visual inspection is based on practical observation, to see if the load contains anything other than GBSM.

on the longevity of EDC. However, one of the benefits of the trap rock (the small cubical rock) contained in the GBSM is skid resistance, which would lessen the need for salting. Petitioners do not personally use road salt on any of their pavement, because of the adverse impact of run-off of salt into the environment.

Would EDC be sold to customers for installation by the customer?

Questions arose whether petitioners contemplated selling the EDC to customers (for example, townships) for installation by the customer. All of petitioners' contracts for the sale of EDC, to date, include installation by petitioners. Petitioners have not yet encountered such a situation where the customer installs the EDC. However, petitioners believe that there may be potential customers who would like to purchase the paving product for their own installation. This is particularly possible in the case of townships or small paving contractors, which have experience in paving operations. If petitioners sold the EDC for installation by the customer, petitioners would provide detailed installation instructions. Those installation instructions would be the same as the installation procedures used by petitioners. (See petitioners' Operating Manual, introduced as hearing as Exhibit 2.) Petitioners would also visit the pavement installation, upon the customer's request, and provide technical assistance.

Information on petitioners' grinder

Board staff asked for additional information on the grinder used by petitioners to grind the GBSM into EDC. As noted in the equipment list in petitioners' operating manual (Exhibit 2, p. 4), petitioners use a Peterson Pacific

2400-B horizontal grinder. Attached as Exhibit N is additional information on the grinder, including photos.

Board staff also asked if an air permit is needed for the grinder. As Ms. Powles testified, and as noted in the petition for adjusted standard, an air permit may be required. Petitioners will obtain any and all required air permits, and have in fact already obtained a storm water discharge permit. (Tr. 122; Petition, p.10.) Petitioners seek an adjusted standard only from the waste regulations, not from other permit programs.

Language of proposed adjusted standard

There was discussion at the hearing about potential changes to the language of the proposed adjusted standard. Petitioners have proposed the following language (see Amended Petition, p. 8):

> Jo'Lyn Corporation and Falcon Waste and Recycling are hereby granted an adjusted standard from the following definitions of 35 Ill.Adm.Code 807.104: "facility," "solid waste," "solid waste management," "waste," and "unit." Jo'Lyn Corporation and Falcon Waste and Recycling are further granted an adjusted standard from the following definitions of 35 Ill.Adm.Code 810.103: "facility," "landfill," and "solid waste." These enumerated definitions do not apply to operations conducted by Jo'Lyn and/or Falcon at the facility in McHenry County, Illinois, so long as:
>
> 1. Jo'Lyn and Falcon continue to use only clean granulate bituminous shingle material ("GBSM") acquired from a manufacturer of roofing products or other source of clean GBSM.
>
> 2. For purposes of this adjusted standard, GBSM is defined as "clean and consistent post-production material generated at the end of the manufacturing of roofing shingles, such as tabs or punchouts, and miscolored or damaged shingles. GBSM excludes post-consumer material or shingle tear-offs."
>
> 3. Jo'Lyn and Falcon continue to grind the GBSM into uniform pieces, either course ground or fine ground.

4. Jo'Lyn and Falcon use the GBSM chips to form paving surfaces.

5. Jo'Lyn and Falcon operate the facility in compliance with other provisions of the Environmental Protection Act.

First, there was discussion whether the word "clean" is necessary in paragraph one of the language. (Tr. at 108-109.) The word "clean" was proposed to indicate that the GBSM must be not contain any debris or foreign materials. William Turley, executive director of the Construction Materials Recycling Association, stated at hearing that the word "clean", in the context of recycling, is used to denote that a material has no debris or contaminants in it. (Tr. at 173.) Petitioners believe that "clean" does serve a purpose in the language of the adjusted standard, but would have no objection if the Board chose to strike that word.

Second, there was discussion as to whether the description of the ground GBSM as either coarse ground or fine ground (paragraph 3 of the adjusted standard) was necessary. (Tr. at 109-111.) As Ms. Powles testified, that language was included to track the language of the Agency's 1993 waste determination. However, the phrase "coarse ground or fine ground" could be stricken from the proposed language without changing the meaning of the adjusted standard.[12]

There was also testimony and discussion as to whether the installation specifications used by petitioners (thickness, manner of compaction, etc.) should be included in the language of the adjusted standard. Ms. Powles testified that there might be circumstances in which petitioners would need to make

[12] As noted by the Agency, if the phrase remains in the adjusted standard, the spelling of "course" should be corrected to "coarse".

adjustments to the installation specifications. Petitioners continue to develop and refine their product, in order to achieve the best and most long-lasting paving surface. (Tr. 113-114.) Mr. Turley supported that position, noting that the recycling industry prefers that states not regulate product specifications, so that the product producer can find out what works best and modify their products to use the material most efficiently. (Tr. at 172-173.) This is an important point: the development of products made from materials being "returned to the economic mainstream" must continue to be flexible. Adding specific installation specifications, such as how thick the GBSM is to be applied or how it is compacted, would very likely prohibit minor modifications to the process that would improve the product. There is no evidence that adding installation specifications to the language of the adjusted standard would provide any environmental benefit. Petitioners ask the Board not to add such language.

CONCLUSION

Petitioners have demonstrated that GBSM is not a waste, and ask the Board to make a finding that GBSM is indeed not a waste when used to return the material to the economic mainstream. If the Board makes such a finding, no further action on the petition is needed. If, however, the Board disagrees and finds that GBSM is indeed a waste, petitioners ask the Board for an adjusted standard as set forth above. Petitioners' filings, and the testimony and exhibits introduced at hearing, show compliance with the requirements to obtain an adjusted standard. There is no environmental detriment from petitioners' process. In fact, the use of GBSM to create EDC is a benefit to the environment,

because it prevents the unnecessary landfilling of GBSM. Petitioners have demonstrated the simplicity of the process which creates EDC, a beneficial new paving product. EDC is of use to petitioners' customers, to the economy, and (most importantly) to the environment. Petitioners ask that the Board find that the GBSM is not a waste, or, in the alternative, grant an adjusted standard.

Respectfully submitted,

JO'LYN CORPORATION and
FALCON WASTE AND RECYCLING, INC.

By: _____
One of its attorneys

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*2004 Ill. LEXIS 1616, **

ALTERNATE FUELS, INC., Appellee, v. DIRECTOR OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY et al., Appellants.

Docket No. 96071

SUPREME COURT OF ILLINOIS

2004 Ill. LEXIS 1616

October 21, 2004, Opinion Filed

NOTICE: [*1] THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD.

PRIOR HISTORY: Alternate Fuels, Inc. v. Dir. of the Ill. EPA, 337 Ill. App. 3d 857, 786 N.E.2d 1063, 2003 Ill. App. LEXIS 296, 272 Ill. Dec. 229 (Ill. App. Ct., 2003)

DISPOSITION: Judgment of the appellate court affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants, the Illinois Environmental Protection Agency and its director (Agency), appealed a decision by an appellate court (Illinois) affirming summary judgment in favor of appellee company on its declaratory action that its manufacturing processes were not "wastes" under the Illinois Environmental Protection Act, 415 Ill. Comp. Stat. Ann. 5/1 et seq. (2002). The company challenged summary judgment rejecting its claim for attorney fees.

OVERVIEW: The Agency issued a violation notice under § 31(a)(1) of the Act, 415 Ill. Comp. Stat. Ann. 5/31(a)(1) (1998), for the company's failure to secure a permit to burn alternate fuel at one of its plants. When the parties could not agree on whether the alternate fuel was "waste" under the Act, the company sought a declaration that the fuel was not waste and for attorney fees under the Illinois Administrative Procedure Act, 5 Ill. Comp. Stat. Ann. 100/1-1, based on the Agency's allegedly impermissible rule-making. The parties cross-appealed summary judgment for the company on the declaratory action and for the Agency on attorney fees. The Agency argued that the declaratory action was not justiciable and the fuel was "discarded material" under the Act's definition of waste. The court found that the case was ripe and justiciable since an actual controversy existed and hardship would result if the declaratory action were not resolved. Since the fuel was recycled, it was not "discarded" and was not "waste" that would require a permit. The Agency's interpretation of "discarded material" was not a statement of general applicability, so no rule-making occurred to trigger the right to fees.

OUTCOME: The court affirmed both summary judgment rulings.

CORE TERMS: waste, notice, discarded, fuel, discarded material, supplier, plastic, ripeness, environmental, alternate, ripe, judicial review, recycling, siting, pollution control, processing, containers, issuance, mainstream, stored, solid waste, memorandum, prosecutoria

justiciable, violator, contamination, storage, ceased, matter of law, contaminant

LexisNexis(R) Headnotes ◆ Show Headnotes

COUNSEL: For Illinois Environmental Protection Agency, APPELLANT: Mr. Jerald S. Post, Assistant Attorney General, Chicago, IL.

For Alternate Fuels, Inc., APPELLEE: Ms. Christine Zeman, Hodge, Dwyer & Zeman, Springfield, IL.

JUDGES: JUSTICE FITZGERALD delivered the opinion of the court. JUSTICE FREEMAN, dissenting. CHIEF JUSTICE McMORROW and JUSTICE KILBRIDE join in this dissent.

OPINIONBY: FITZGERALD

OPINION: JUSTICE FITZGERALD delivered the opinion of the court:

The primary question in this appeal is whether a business which has been issued a violation notice under section 31(a) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (West 2002)) for failure to secure a permit as allegedly required by the Act, and then ceases operations, may bring a declaratory action to test the validity of the alleged violation. Alternate Fuels, Inc. (AFI), filed such an action against the Director of the Illinois Environmental Protection Agency (Agency) and the Agency itself. The circuit court of St. Clair County determined that the declaratory action was justiciable, found that the Act did not require AFI to secure a permit, and rejected AFI's claim for attorney fees; the appellate court affirmed. 337 Ill. App. 3d 857, 786 N.E.2d 1063, 272 Ill. Dec. 229. For the following reasons, we affirm the appellate court.

BACKGROUND **[*2]**

David Wieties, a former Agency employee, was president of Resourceful Environmental Ideas, Inc. (REI), a company located in East St. Louis, Illinois, with the principal objective to produce and sell "alternate fuel." REI was the predecessor company to AFI. On June 14, 1994, Wieties sent a letter to the Agency to determine if AFI's product constituted waste under the Act and therefore required an Agency permit. The subject material consisted of various types of plastics generated by the shredding of empty agricultural chemical containers into chips approximately one inch in size. Prior to shredding, a company named Tri-Rinse, Inc., "triple rinsed" the containers according to United States Environmental Protection Agency and Department of Agriculture guidelines to remove residual agricultural chemicals. AFI would transport the resulting chips to Illinois Power for use as fuel at its Baldwin Power Station. On August 31, 1994, the Agency responded that all materials burned for energy recovery retained their classification as waste under the Act and that a facility receiving this material would require a permit from the Agency.

Following this response, REI filed an appeal with the Illinois **[*3]** Pollution Control Board (Board) on September 29, 1994. The Agency filed a motion to dismiss before the Board arguing that the letter was not a "final determination." On November 9, 1994, REI filed a motion to withdraw the appeal and the Board granted REI's motion.

Illinois Power subsequently requested a revision to its operating permit to burn the alternate fuel at the Baldwin plant. The Agency denied Illinois Power's application, contending that the alternate fuel was a "waste" pursuant to section 3.53 of the Act (415 ILCS 5/3.53 (West 1994)). According to the Agency, because the material was a "waste," Illinois Power would be functioning as a "pollution control facility" under section 3.32 of the Act (415 ILCS 5/3.32 (West 1994)). As a "pollution control facility," Illinois Power faced significant hurdles to

secure a permit.

As part of the permitting process, a pollution control facility must obtain local siting approval. 415 ILCS 5/39.2(a) (West 1994). To obtain local siting approval, the county board or the governing body of the municipality must approve of the facility according to various **[*4]** criteria listed in section 39.2(a) of the Act (415 ILCS 5/39.2(a) (West 1994)). The governing body must hold at least one public hearing within 120 days of the application (415 ILCS 5/39.2(d) (West 1994)) and must generally take final action on the application within 180 days (415 ILCS 5/39.2(e) (West 1994)). Local siting approval expires at the end of two calendar years from the date upon which it was granted. 415 ILCS 5/39.2(f) (West 1994).

Illinois Power appealed the Agency's rejection of its permit application to the Board. The Board's decision, published January 23, 1997, noted that the subject materials are "empty pesticide containers [which] present landfill problems due to their non-degradability" and that "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 rules and regulations." *Illinois Power Co. v. Illinois Environmental Protection Agency*, 1997 Ill. ENV LEXIS 46, PCB Nos. 97-37, 97-36 (January 23, 1997). **[*5]** The Board held, "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." *Illinois Power*, PCB Nos. 97-37, 97-36. The Board noted that the material was "no longer" waste within the meaning of the Act. *Illinois Power*, PCB Nos. 97-37, 97-36. Therefore, Illinois Power was not a "pollution control facility," as defined by section 3.32(a) of the Act, and therefore not required to obtain local siting approval. *Illinois Power*, PCB Nos. 97-37, 97-36.

Soon after the Board's decision, Edwin Bakowski, a manager of an Agency permit section, prepared a memorandum concerning solid waste n1 permitting requirements for alternative fuel processing facilities. The memorandum noted that the Board's decision did not address the regulatory status of the alternate fuel prior to receipt by Illinois Power. The memorandum raised concerns about "the nuisances and speculative accumulation which may occur at alternative fuel processing facilities. The market for waste plastics is not very well established and in some instances these materials could even have a negative market value. The acceptance of unrinsed **[*6]** plastics could also result in the manufacture of unacceptable alternative fuel, onsite nuisances or contamination." The memorandum then noted that the "alternative fuel processing facilities do not appear to be recycling centers" and that the burning of alternative fuel was not recycling. The "proposed options" were to "require permits for alternative fuel processing facilities as solid waste treatment and transfer station facilities" or "require no [Bureau of Land] permits for facilities that only process alternative fuels and address problems with these facilities through enforcement."

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n1 Under the Act "solid waste" means waste. 415 ILCS 5/3.82 (West 1994).

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The memorandum recommended the first option because "the permit requirements will provide a proactive approach to eliminate environmental problems before they occur by prescribing operating conditions for the facility. It should also be noted that it is difficult to enforce against permit exempt facilities that have nuisance **[*7]** or speculative accumulation problems."

Also after the Board's decision, Illinois Power and AFI, formerly REI, entered into a contract for the sale of alternate fuel, which consisted of the chips from the plastic containers with

scrap wood as an additional component. AFI also began contracting with suppliers. Included in the record is an unsigned, undated form contract between AFI and a generic supplier. Under the agreement, the suppliers would make arrangements and bear all costs of transporting nonhazardous fuel-grade material, including wood and plastic, to AFI's facility. AFI would bill the supplier for receipt of the materials based on varying unit prices for the differing materials. Additionally, AFI warranted that it would comply with all laws and regulations and "in the event that the regulatory conditions under which any of the aforesaid requirements or permits change during the terms of this Agreement, and are beyond the control of AFI, AFI shall be released from its obligation to receive the volumes of Supplier's material *** [and] that AFI shall rigorously pursue the necessary modifications to its permit status so that it may continue to perform its obligations under **[*8]** this Agreement."

Four agency representatives inspected AFI's facility on May 7, 1998, and May 22, 1998, including Bakowski and Kenneth Mensing, an Agency manager who formerly supervised Wieties at the Agency. According to Bakowski, the facility was "not a nuisance" and Wieties "appeared to have done his homework. He related a lot of this to hazardous waste and what he thought U.S.E.P.A. meant and things like that." A May 8, 1998, inspection report described the facility as "clean and orderly" and "mainly an area to store plastic materials before and after granulation." An additional inspection on May 22, 1998, yielded similar results.

In his deposition, Mensing described AFI's facility as a "big metal warehouse building" with a "relatively small piece of equipment that was a granulator or a shredder which was the only piece of equipment there to process the incoming material." The facility was a "clean looking area" with various piles or boxes of materials segregated by supplier or plastic type. Mensing prepared a memorandum of the visit, but his observations "didn't quite fit into, you know, a prepared type of checklist that we had." Mensing explained, "We don't really have a non-hazardous **[*9]** waste storage checklist." He did not mention any permitting violation in his memo. According to Mensing's memorandum, Wieties was "not opposed to a 'recycling permit' and would like to work with the Agency to develop and implement a new recycling permit system." Mensing stated, "If the health and safety *** were a non-issue, that a permit would still be required simply by the verbiage of the statute, that if this is a facility that's storing-you know, treating, storing, or disposing of it, then, you know, a permit should be obtained" regardless of whether the facility poses any sort of environmental threat. Mensing stated that he did not see "anything operationally that caused me any problem."

On July 8, 1998, the Agency issued a violation notice to AFI pursuant to section 31(a)(1) of the Act (415 ILCS 5/31(a)(1) (West 1998)). Under section 31 of the Act, an alleged violator may work with the Agency to correct violations without the involvement of a prosecuting authority such as the Attorney General or a State's Attorney. 415 ILCS 5/31 *et seq.* (West 1998). Within 180 days of discovery of an alleged violation, the Agency shall **[*10]** serve a violation notice upon the alleged violator and a written response shall be required. 415 ILCS 5/31(a) (West 1998). This notice of violation initiates a series of opportunities for the alleged violator to meet with the Agency and resolve the issue. 415 ILCS 5/31(a) (West 1998). If the parties do not resolve the issue, section 31(b) requires that the Agency provide the alleged violator with notice of its intention to pursue legal action and an opportunity to meet prior to referral to the Attorney General or a State's Attorney. 415 ILCS 5/31(b) (West 1998). If disagreements remain, the Attorney General or a State's Attorney shall serve a formal complaint upon the alleged violator. 415 ILCS 5/31(c) (West 1998).

The instant section 31(a) notice alleged a violation of section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (West 1998)) because "waste was stored and treated without a permit granted by the Illinois EPA." It also alleged a violation of section 21(e) of the Act (415 ILCS 5/21(e) (West 1998)) because "waste was stored **[*11]** and treated at [AFI's] facility which does not meet the requirements of the Act and regulations thereunder." The notice stated, "Due to the nature and seriousness of the violations cited, please be advised that resolution of the

violations may require the involvement of a prosecutorial authority for purposes that may include, among others, the imposition of statutory penalties." The suggested resolution was the submission of a permit application for a waste storage and waste treatment operation to the Agency's Bureau of Land Permit Section by September 30, 1998. To obtain a permit, AFI was required to obtain local siting approval pursuant to the Act. 415 ILCS 5/39.2 (West 1998).

According to Wieties' affidavit, due to the issuance of the violation notice, AFI's primary investors withdrew their support, and its primary supplier withdrew from the agreement in July 1998. AFI thereafter halted its manufacturing operations.

The parties subsequently met on September 15, 1998. The Agency advised Wieties it deemed the alternate fuel materials as "waste" under section 3.53 of the Act (415 ILCS 5/3.53 (West 1998)). The Act defines **[*12]** "waste," in pertinent part, as follows: " 'Waste' means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material ***." 415 ILCS 5/3.53 (West 1998). The Agency interpreted "discarded material" to refer to any material "which is not being utilized for its original purpose." As AFI was not utilizing the alternate fuel material in a manner which was consistent with its original use by the supplier, it was the Agency's position that such material had been "discarded" and was, therefore, a "waste." Wieties and the Agency were not able to resolve the matter.

AFI filed a two-count complaint on November 2, 1998, naming as defendants Mary A. Gade, Director of the Agency, and the Agency. n2 In count I, plaintiff requested a declaration that the materials used by AFI in its manufacturing process were not "wastes" because the materials were not discarded. Count II alleged that AFI was statutorily entitled to recoup all reasonable costs, including attorney fees, because the Agency's interpretation of "discarded material" constituted unauthorized rulemaking under the Illinois Administrative **[*13]** Procedure Act (5 ILCS 100/1-1 *et seq.* (West 1998)). The complaint also alleged that an actual controversy existed and that the declaratory judgment statute vested the court with the power to hear the dispute. 735 ILCS 5/2-701 (West 1998). The Agency moved to dismiss, arguing that there was no actual controversy ripe for determination because AFI failed to exhaust all administrative remedies. The circuit court denied the motion to dismiss. The Agency then filed an answer, along with affirmative defenses in which it denied that the trial court had jurisdiction to hear the claim and that the complaint failed to state a claim upon which relief could be granted.

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n2 Plaintiff also named St. Clair County as a defendant. Summary judgment was entered against St. Clair County, but it is not part of this appeal.

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AFI filed a motion for summary judgment against the Director and the Agency on count I. The trial court ruled that there were no genuine issues of **[*14]** material fact and granted AFI's motion, finding that the materials were not "wastes" because they were not discarded. Thereafter, the parties filed cross-motions for summary judgment on count II. The trial court granted the Agency's motion as to count II and denied plaintiff's motion. Both parties appealed, and the appellate court affirmed the rulings of the trial court. 337 Ill. App. 3d 857, 786 N.E.2d 1063, 272 Ill. Dec. 229 (2003). We granted the Agency's petition for leave to appeal on count I. 177 Ill. 2d R. 315. In its brief, AFI requested cross-relief, requesting that

we reverse the appellate court and the trial court on count II. 155 Ill. 2d Rs. 315(g), 318(a). Because this appeal from a summary judgment ruling solely presents issues of law, our review is *de novo*. *First Bank of America, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 176, 651 N.E.2d 1105, 209 Ill. Dec. 657 (1995).

ANALYSIS

The Agency raises two issues on appeal: (1) this case was not justiciable because the declaratory judgment action was not ripe for review until the Agency had concluded its investigatory process, and (2) the Agency properly defined the materials processed by AFI as "discarded materials" which constituted "waste, **[*15]** " thus requiring AFI to secure a permit before producing the alternate fuel. In its cross- appeal, AFI contends that the Agency's interpretation of "waste" and its subsequent application of the Act constituted impermissible rulemaking, thus making the state liable for AFI's reasonable costs in the instant action, including attorney fees.

Justiciability

The Agency argues that AFI's claim for declaratory judgment is not justiciable. The Agency specifically contends that because the Agency had not yet finished its investigative process under section 31 of the Act (415 ILCS 5/31 (West 2002)) the matter was not ripe for review. AFI responds that the matter is ripe for review because the Agency had completed its investigation, while AFI was forced to halt its operations and was left with no other avenue to resolve the dispute. We agree with AFI.

" 'Concepts of justiciability have been developed to identify appropriate occasions for judicial action. *** The central concepts often are elaborated into more specific categories of justiciability-advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions. **[*16]** ' " Black's Law Dictionary 882 (8th ed. 2004), quoting 13 C. Wright, Federal Practice & Procedure § 3529, at 278-79 (2d ed. 1984). Section 2-701 of the Code of Civil Procedure (735 ILCS 5/2-701 (West 2002)) sets forth the general requirements of a justiciable declaratory action under Illinois law. This section provides that a court

> "may, in cases of actual controversy, making binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any statute *** or other governmental regulation *** and a declaration of the rights of the parties interested. *** The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding." 735 ILCS 5/2-701(a) (West 2002).

The declaratory judgment statute must be liberally construed and should not be restricted by unduly technical interpretations. *Netsch*, 166 Ill. 2d at 174. **[*17]** This remedy is used to afford security and relief to the parties so as to avoid potential litigation. See, *e.g.*, *Netsch*, 166 Ill. 2d at 174. "Our courts have recognized that 'the mere existence of a claim, assertion or challenge to plaintiff's legal interests, *** which casts doubt, insecurity, and uncertainty upon plaintiff's rights or status, damages plaintiff's pecuniary or material interests and establishes a condition of justiciability.' " *Netsch*, 166 Ill. 2d at 175, quoting *Roberts v. Roberts*, 90 Ill. App. 2d 184, 187, 234 N.E.2d 372 (1967).

Here, in the context of a challenge to an administrative action, we specifically consider ripeness, a component of justiciability. The ripeness doctrine is designed " ' "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in arbitrary disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." ' " *National Marine, Inc. v. Illinois Environmental Protection Agency*, 159 Ill. 2d 381, 388, 639 N.E.2d 571, 203 Ill. Dec. 251 (1994), **[*18]** quoting *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 546, 370 N.E.2d 223, 12 Ill. Dec. 600 (1977), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 691, 87 S. Ct. 1507, 1515 (1967); see also *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 808, 155 L. Ed. 2d 1017, 1024, 123 S. Ct. 2026, 2030 (2003). It is well settled that " 'the problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' " *National Marine*, 159 Ill. 2d at 389, quoting *Abbott Laboratories*, 387 U.S. at 149, 18 L. Ed. 2d at 691, 87 S. Ct. at 1515; see also *National Park Hospitality Ass'n*, 538 U.S. at 808, 155 L. Ed. 2d at 1024, 123 S. Ct. at 2030.

As to the first factor, the issue presented is fit for a judicial decision at this time. In contention is the correct interpretation of "discarded material" in section 3.535 of the Act (415 ILCS 5/3.535 (West 2002)). Both sides have approached this matter in terms **[*19]** of statutory construction, and there is no dispute over the facts. Wieties' discussions with the Agency began in 1994 and involved a number of Agency employees over time. The record clearly demonstrates that the Agency had finished its investigation and had decided AFI stored and treated waste, requiring local siting approval and a waste permit, a stance that has not changed. The Agency performed two inspections of the facility in May 1998. Agency personnel continued their internal discussions regarding AFI and the waste issue, which then culminated in a violation notice. After the Agency issued the violation notice, Wieties responded to and met with the Agency in an unsuccessful attempt at resolving the stalemate concerning the definition of waste. As applied specifically to AFI, the Agency has little incentive to change its definition of "waste" as AFI has closed shop, obviating the need for a permit and potential prosecution. Thus, there is no prospect for further factual development to aid judicial resolution.

As to the second factor, the hardship upon AFI is more than sufficient to render judicial review appropriate at this stage. The Agency's interpretation put AFI into a dilemma: **[*20]** secure an allegedly unnecessary permit with the requisite local siting approval, take a potentially more costly alternative of risking serious penalties by continuing and waiting for the ax of Agency prosecution to fall, or discontinue operations. When AFI chose the third option, the Agency had no incentive to refer the matter for prosecution because there was no longer a continuing violation. Indeed, the Agency has given no indication that it wished to issue a section 31(b) notice, much less prosecute the matter. We also note that AFI has not sought relief in this action to prevent the Agency from doing so. Thus, the practical effect upon AFI of failing to allow judicial review at this time would be to foreclose all access to the courts. The parties do not dispute that AFI is a viable business entity which was directly affected by Agency action. The Agency's decision affected AFI in a concrete way; the notice of violation caused AFI to lose financing, lose its suppliers, and halt operations, thereby ending AFI's agreement with Illinois Power. Thus, AFI has already felt a direct and palpable injury and has an immediate financial stake in the resolution of the instant action.

We find **[*21]** the primary authority proffered by the Agency, *National Marine, Inc. v. Illinois Environmental Protection Agency*, 159 Ill. 2d 381, 639 N.E.2d 571, 203 Ill. Dec. 251 (1994), distinguishable. In *National Marine*, the Agency issued a notice informing the plaintiff that it could be potentially liable for a "release or a substantial threat of a release of a hazardous substance on the property" pursuant to section 4(q) of the Act. *National Marine*, 159 Ill. 2d at 383; Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1004(q). This notice was based on the Agency finding "buried drums filled with unknown materials, buried tires and wood which

had apparently been used as fill material, black-stained soil near an underground storage tank riser *** and an abandoned well house." *National Marine*, 159 Ill. 2d at 384. Plaintiff sought a declaration that section 4(q) of the Act was unconstitutional, an injunction enjoining the Agency from enforcement arising from the section 4(q) notice or relying on the factual findings found in the notice, and the issuance of a writ of *certiorari* to review the Agency's record and reverse and quash the section 4(q) notice. *National Marine*, 159 Ill. 2d at 384. **[*22]**

This court noted that "the complaint, in essence, sought to obtain judicial review of the Agency's issuance of the 4(q) notice prior to the Agency's initiation of cost-recovery/enforcement proceedings before the Pollution Control Board (Board) or the circuit court." *National Marine*, 159 Ill. 2d at 385. We found, "at this preliminary stage in the administrative process, it is not clear whether the Agency will even initiate a cost-recovery/enforcement proceeding against plaintiff before one of these bodies. Clearly, under the circumstances, plaintiff's complaint is premature." *National Marine*, 159 Ill. 2d at 390-91. We reasoned:

> "To allow preenforcement judicial review of the Agency's mere issuance of the 4 (q) notice would undermine the statutory scheme of the Act. Affording plaintiff judicial review at this preliminary stage in the administrative process could potentially open the door and enable parties 'to litigate separately every alleged error committed by an agency in the course of the administrative proceedings.' [Citations.]
>
> In addition, preenforcement judicial review of the issuance of a 4(q) notice would substantially thwart the legislative **[*23]** purpose of providing expedient containment of environmental pollution. Allowing this type of judicial review prior to the final stage of the administrative process would substantially delay the quick, effective response action called for by the Act. The clean-up process could be delayed by months or even years at great cost to the environment and public health and safety. Such a result will not be countenanced by this court."

National Marine, 159 Ill. 2d at 392-93.

The concerns of *National Marine* are not evident in the record. The instant case does not "substantially delay the quick, effective response called for by the Act." The record contains no allegations of any environmental contamination. The salient hazard to the environment caused by the plastics exists only in the actual burning of the plastics, for which Illinois Power has received a permit, and the nonbiodegradable character of the agricultural containers, which AFI is potentially alleviating by processing the containers into alternate fuel. Furthermore, the accumulation of materials was only "speculative." After the Agency issued the notice of violations, AFI discontinued its operations and all **[*24]** further manufacturing of the alternate fuel ceased. This is a case where, as Mensing stated, the environmental hazard is a nonissue. Instead it involves only the "verbiage" of the statute. Indeed, by issuing a violation notice which led to the subsequent halting of operations, the Agency has been successful in abating any potential nuisance. It is difficult to conceive of a benefit to the environment of a continued investigation of a facility where inspections revealed no danger to the environment and where all operations had ceased. Thus, there was no thwarting of the Act's purpose to provide expedient containment of environmental risks.

Additionally, the present relief sought is not similar to that sought in *National Marine*. AFI did

not seek the issuance of a writ of *certiorari* to review the Agency's record or to quash the section 31(a) notice. AFI sought nothing precluding the Agency from continuing its investigation, issuing a notice under section 31(b), or referring the matter to a prosecutorial authority under section 31(c). Nevertheless, nothing in the record demonstrates that the Agency sought to further pursue its investigation of AFI. Additionally, nothing prevented **[*25]** the Agency from continuing its investigation under the Act which could have culminated in a counterclaim in the present action. AFI alleges that the only error the Agency committed was in its interpretation of the Act. Thus, the present action is not "preenforcement," as there is no allegation that AFI sought to evade Agency action, nor is there any indication that the Agency wished to refer a matter concerning a discontinued operation to a prosecutorial authority.

Further, unlike in *National Marine*, the Agency's action here constituted more than a merely preliminary step prior to an eventual final Agency action. As stated, once AFI discontinued its operations, there was no further incentive for the Agency to refer the matter for enforcement over a dispute concerning only statutory interpretation. Unlike in *National Marine*, there was not any alleged environmental contamination. Conceivably, there being no continuing production, AFI would have to wait until the Agency filed a complaint based upon a facility that was no longer in operation. As Mensing stated, it was "speculation" that the Agency would have filed a complaint. As stated by the Agency in its brief, AFI's declaratory **[*26]** judgment action was filed "at a time when it was unclear whether the Agency, through a State's Attorney or the Attorney General, would ever initiate an enforcement proceeding." Furthermore, Mensing stated in his deposition that "if he had just stopped doing it, I don't know if we would have pursued any further enforcement." It is not necessary for AFI to expose itself to further liability by continuing the disputed operations for the Agency to pursue administrative remedies entirely in its control until the Agency had deemed it "final."

Under the circumstances of this case, where there are no allegations of environmental hazard presented in the record, where the Agency had essentially obtained compliance with the Act, where the declaratory action did not additionally seek to enjoin the Agency from pursuing further action, where AFI had no further administrative recourse but to wait for prosecution on its halted operations, and where the resolution of the case depends entirely on a statutory interpretation, the concerns addressed in *National Marine* are not present. We therefore find that the record reveals an actual controversy resting on the parties' conflicting interpretations **[*27]** of the Act which affected plaintiff's pecuniary interest. This matter is ripe for review and thus justiciable.

Definition of "Discarded Material"

The Agency contends on appeal that AFI was receiving and processing "discarded material" within the plain meaning of the definition of "waste" within section 3.535 of the Act (415 ILCS 5/3.535 (West 2002)), thus requiring AFI to secure a permit. The Agency further argues that the term "discarded" should be construed from the perspective of the supplier, such that a material is considered discarded if it is used for purpose other than that originally intended by the generator of the material. AFI responds that when the phrase "discarded material" is read in conjunction with section 3.380 of the Act (415 ILCS 5/3.380 (West 2002)), it is apparent that the materials it receives are not "discarded" and, therefore, are not "waste" requiring a permit. The parties agree the Act does not define the term "discarded." n3

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n3 We note revisions to the Illinois Administrative Code (35 Ill. Adm. Code 721 (2003)), pertaining solely to identification and listing of *hazardous* waste. 27 Ill. Reg. 12760 (adopted June 5, 2003). Under the regulations, a solid waste is defined as discarded material. 27 Ill. Reg. 12769 (adopted June 5, 2003). Discarded material is further defined as a solid waste if

"it is abandoned in one of the following ways *** it is accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." 27 Ill. Reg. 12770 (adopted June 5, 2003). Other definitions of solid waste include: "a material is considered a solid waste if it is recycled-or accumulated, stored, or treated before recycling *** if one of the following occurs with regard to the material *** 2) the material is burned for energy recovery." 27 Ill. Reg. 12770-71 (adopted June 5, 2003). The present material does not constitute hazardous waste, nor do the parties argue that this provision could apply to this matter.

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The fundamental principle of statutory construction is to ascertain and give effect to the legislature's intent. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 503-04, 732 N.E.2d 528, 247 Ill. Dec. 473 (2000). The language of the statute is the most reliable indicator of the legislature's objectives in enacting a particular law. *Hawes v. Luhr Brothers, Inc.*, 212 Ill. 2d 93, 816 N.E.2d 345, 2004 Ill. LEXIS 979 at *17-18, 287 Ill. Dec. 583, No. 96153 (June 4, 2004). We give statutory language its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction. *Michigan Avenue National Bank*, 191 Ill. 2d at 504. We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. *Hawes v. Luhr Brothers, Inc.*, 2004 Ill. LEXIS 979 at *18. Moreover, words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute. *Michigan Avenue National Bank*, 191 Ill. 2d at 504.

Section 21 of the Act lists prohibited acts, stating, in relevant part, "no person shall: **[*29]** *** (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 (West 2002).

The Agency issued a violation notice alleging a violation of section 21(d)(1) because "waste was stored and treated without a permit granted by the Illinois EPA." It also alleged a violation of section 21(e) of the Act because "waste was stored and treated at [AFI's] facility which does not meet the requirements of the Act and regulations thereunder."

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 solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities ***." (Emphasis added.) 415 ILCS 5/3.535 **[*30]** (West 2002).

In this section, the Act uses the term "discarded" only as a modifier to the term "material." The Act does not elaborate as to who or what subject exactly performed the discard action. Rather, the focus remains on the object: "material." Given that the Act does not specify the subject, the Agency's proposition-that the modifier "discarded" should be construed from the perspective of the supplier-is not unequivocally erroneous. However, a look at another

pertinent portion of the Act demonstrates that the Act retains its focus on the "material" itself as it passes between entities.

The Act uses the term "discarded" in section 3.380 of the Act (415 ILCS 5/3.380 (West 2002)), which 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 (West 2002). **[*31]**

Under this phrasing the legislature has categorized items that may be recycled, reclaimed, or reused into two main categories: (1) "waste" from which contaminants may be removed and (2) "materials." 415 ILCS 5/3.380 (West 2002). "Materials" are further subdivided into those that remain "discarded" and those "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." 415 ILCS 5/3.380 (West 2002). While the legislature has not defined "discarded materials," the legislature has mentioned what it is not: "materials that would otherwise be disposed of or discarded are *** returned to the economic mainstream in the form of raw materials and products." Thus, materials are "discarded" unless they are returned to the economic mainstream.

Here, AFI was not removing contaminants from the triple-rinsed containers or from wood. The contaminants had been removed by the triple-rinsing process before they arrived at AFI's facility and there is no indication in the record of proposed removal of contaminants **[*32]** from wood. Therefore, the solid at issue is a "material." We next consider whether this material remained discarded or if it was "collected separated or processed and returned to the economic mainstream in the form of raw materials or products." The parties do not dispute that AFI would process the plastic containers and return the materials as a "product" into the economic mainstream, as demonstrated by the contract with Illinois Power. The materials are, therefore, not discarded.

The comparison of AFI's facility to the statutory definitions for "recycling center" and "pollution control facility" reinforces this interpretation. Under the Act, " 'recycling center' means a site or facility that accepts only segregated, nonhazardous, nonspecial, homogenous, nonputrescible materials, such as dry paper, glass, cans or plastics, for subsequent use in the secondary materials market." 415 ILCS 5/3.375 (West 2002). AFI accepted nonputrescible materials such as plastic for subsequent use in the secondary materials market.

By contrast, a "pollution control facility" is "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste **[*33]** 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 Act." 415 ILCS 5/3.330 (West 2002). The aim of AFI was not to store, landfill, dispose, transfer, treat, or incinerate waste. Rather, it would be processing the materials for subsequent use in the marketplace. Thus, AFI's facility retained more characteristics of a "recycling center" than a "pollution control facility."

We therefore reject the Agency's contention that "discarded" is defined solely from the viewpoint of the supplier in that a material is putatively "discarded" as "any material which is not being utilized for its intended purpose" of the generator. There is nothing in the statute which would dictate this definition. Rather, the Act contemplates that materials that may otherwise be discarded by the supplier may be diverted from becoming waste and returned to the economic mainstream.

Since the materials are not "discarded" and therefore not "waste," we find that AFI was not a "pollution control facility" requiring a permit which **[*34]** would further require local siting approval.

Attorney Fees

In its cross-appeal, AFI contends that the Agency's interpretation of "waste" constituted impermissible rulemaking, thus making the state liable for AFI's attorney fees in the instant action. The Agency responds that it was merely interpreting the statute as it applied to this particular case, rather than engaging in any formal rulemaking. We agree with the Agency.

Section 10-55(c) of the Illinois Administrative Procedure Act (5 ILCS 100/10-55(c) (West 2002)) provides, in pertinent part, as follows:

> "In any case in which a party has any administrative rule invalidated by a court for any reason, including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees."

5 ILCS 100/10-55(c) (West 2002). The Administrative Procedure Act further includes the following definition of a "rule":

> " 'Rule' means each agency statement of general **[*35]** applicability that implements, applies, interprets, or prescribes law or policy, but does not include (I) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150, (iii) intra-agency memoranda, (iv) the prescription of standardized forms, or (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau Act.

5 ILCS 100/1-70 (West 2002).

AFI has failed to demonstrate that the Agency's interpretation of "discarded material" as "any material which is not being utilized for its intended purpose" is "a statement of general applicability." AFI cites intra-agency memoranda, and remarks taken from the depositions of Ed Bakowski and Kenneth Mensing that this interpretation was to provide "guidance" to the regulated community. Such statements do not affect private rights or procedures available to specific entities outside the Agency. 5 ILCS 100/1-70(I) (West 2002). AFI points only to the deposition **[*36]** testimony of Kenneth Mensing which states that a violation notice was issued to one business other than AFI, using the same interpretation of "discarded material."

Mensing stated that this business elected to secure a permit rather than challenge the violation notice. However, further details of the Agency's application of this interpretation to this business are not available in the record. Given the paucity of information pertaining to the second business, as well as the lack of any information in the record concerning Agency action pertaining to the business community at large, we find the record is devoid of any indication that the Agency's interpretation of "discarded material" was a statement of general applicability.

Additionally, nowhere in the record has AFI demonstrated that the Agency exceeded its statutory authority in merely interpreting the Act and issuing a notice of violations premised upon that interpretation, nor could it. The Agency here was interpreting a statutory term, "discarded material," based on a particular set of facts, and it was entitled to do so. We further note that this interpretation was not manifestly erroneous, as the Board in the *Illinois Power* **[*37]** decision (*Illinois Power Co. v. Illinois Environmental Protection Agency*, PCB Nos. 97-37, 97-36 (January 23, 1997)) noted that the material was "no longer" waste by the time it arrived at the Baldwin Power Plant. While the Agency's interpretation of the Act was ultimately incorrect, no statutory provision prevents the Agency from making a mere interpretation.

CONCLUSION

We find that plaintiff's claim was justiciable, that AFI was not processing "waste" in the form of "discarded material," and that AFI is not entitled to attorney fees because the Agency's interpretation was not one of "general application." Accordingly, we affirm the appellate court's judgment affirming the trial court's granting of summary judgment for plaintiff on count I and for defendant on count II.

Appellate court judgment affirmed.

DISSENTBY: FREEMAN

DISSENT: JUSTICE FREEMAN, dissenting:

I express no opinion on the majority's resolution of the underlying issues of this case, because I do not agree with the threshold conclusion that we should be considering the case at all. Although the majority's reasoning to the contrary is not without some sympathetic appeal, I do not believe that the instant action is ripe. **[*38]**

The facts which I consider to be pertinent to the analysis may be stated succinctly. (1) AFI started up its operation. (2) The Illinois Environmental Protection Agency (Agency) issued AFI a "violation notice," under section 31(a) of the Act (415 ILCS 5/31(a) (West 1994)), in which the Agency alleged that AFI was treating and storing "waste" without a permit. (3) AFI *voluntarily* ceased its operations. (4) AFI filed the instant declaratory judgment action in the circuit court, arguing that the materials in question were not waste and requesting that the circuit court enter an order stating that "the allegation stated in the above-described violation notice issued to [AFI] are [*sic*] contrary to the law."

As the majority acknowledges, a section 31(a) violation notice carries no legal repercussions. For the Agency to have attempted to hold AFI liable for its alleged violation of law, the Agency would have had to issue AFI a notice of its intent to pursue legal action under section 31(b) (415 ILCS 5/31(b) (West 1994)) and thereafter referred the case to the Attorney General or State's Attorney under section 31(c) (415 ILCS 5/31(c) **[*39]** (West 1994)). The Attorney General or State's Attorney would have had to file a formal complaint against AFI. 415 ILCS 5/31(c) (West 1994). There would have followed a proceeding before the Pollution Control Board. Only if the Board ruled against AFI would any legal consequences have attached.

The section 31(a) notice is merely the first step in this process. It is designed to put the recipient on notice that there may be a problem, nothing more. It is not a final determination of culpability-indeed, it is not even a formal complaint. And as this court has previously stated, "an agency's preliminary, investigative action is not a final agency decision ripe for judicial review. [Citation.] Notifying a party that it is subject to an investigation which may potentially lead to the institution of an action against that party does not create a claim capable of judicial resolution." *National Marine, Inc. v. Illinois Environmental Protection Agency*, 159 Ill. 2d 381, 389, 639 N.E.2d 571, 203 Ill. Dec. 251 (1994). Thus it would seem that AFI's complaint in this case ought to have been dismissed. But the majority distinguishes *National Marine,* thus affirming **[*40]** the ripeness doctrine in theory, but determining that it should not forestall AFI's suit in the instant case.

I find *National Marine* indistinguishable with regard to the relevant facts. In both *National Marine* and the instant case, the Agency issued a preliminary notice of potential liability for an environmental violation. In each case, the party to whom the notice was issued brought suit in the circuit court. Both alleged violators claimed that they were harmed by the mere issuance of the preliminary notices. But in *National Marine*, as here, the notice was not a final adjudication, and moreover it was "not clear whether the Agency will even initiate a cost-recovery/enforcement proceeding against plaintiff." *National Marine*, 159 Ill. 2d at 390. Therefore, this court concluded that the dispute was not yet ripe because, I repeat, "an agency's preliminary, investigative action is not a final agency decision ripe for judicial review. [Citation.] Notifying a party that it is subject to an investigation which may potentially lead to the institution of an action against that party does not create a claim capable of judicial resolution." *National Marine*, 159 Ill. 2d at 389. **[*41]**

The majority raises several points in support of its conclusion that *National Marine* does not guide our result in the instant case. First, the majority contends that the "concerns" mentioned in *National Marine* are not implicated in the present case, because "the instant case does not 'substantially delay the quick, effective response called for by the Act.' " Slip op. at 11. This is because, according to the majority, there are "no allegations of any environmental contamination" in the record. Here the majority comes perilously close to assuming what AFI is trying to prove, *i.e.*, that AFI committed no environmental contamination. It is clear, however, that the section 31(a) notice charged AFI with, *inter alia*, storing "waste" without a permit. The fact that AFI voluntarily ceased its shredding operations does not permit us to conclude as a matter of law that the storage of waste has wholly ceased. n4 Thus, this allegation of environmental contamination might indeed be ongoing notwithstanding AFI's voluntary cessation of operations. The majority's speculation that the "salient hazard to the environment" consisted "only" of "the actual burning of the plastics" (slip **[*42]** op. at 11) ignores the fact that the Agency charged AFI with conduct unrelated to the burning of the plastics. Indeed, the majority appears to be telling the Agency, as a matter of law, what is and is not a "salient hazard to the environment." In my view, this is both extraordinary and unwarranted.

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n4 The majority cannot justify such a conclusion by citing to its determination on the merits that the matter in question was not "waste." This would be equivalent to saying that the case is ripe simply because we decided the underlying issue against the agency. This would eviscerate the ripeness doctrine, as any litigant seeking to challenge any administrative agency's initial notice could argue that they should win as a matter of law. This court would be placed in the absurd position of having to decide the merits of a case in order to determine whether the case was ripe for adjudication.

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The majority also argues that this case is distinguishable from *National Marine* because

> "AFI sought nothing precluding **[*43]** the Agency from continuing its investigation, issuing a notice under section 31(b), or referring the matter to a prosecutorial authority under 31(c). *** Thus, the present action is not 'preenforcement,' as there is no allegation that AFI sought to evade Agency action, nor is there any indication that the Agency wished to refer a matter concerning a discontinued operation to a prosecutorial authority." Slip op. at 12.

See also slip op. at 10 ("We also note that AFI has not sought relief in this action to prevent the Agency from" issuing a 31(b) notice or prosecuting AFI).

This argument is also unconvincing. Contrary to the majority's characterization, the instant action is clearly an attempt by AFI to evade Agency action. If not, what would be the point of their filing the declaratory judgment action? This point is underscored by the very relief AFI sought in its complaint: that the circuit court enter an order stating that "the allegation stated in the above-described violation notice issued to [AFI] are [*sic*] contrary to the law." Clearly, such an order-that the allegations in the section 31(a) notice are *contrary to law*-would indeed preclude the Agency from **[*44]** attempting to prosecute AFI for the conduct alleged therein, now or ever. Indeed, as the Agency warns in its brief to this court, declaring the very allegations "contrary to law" could effectively insulate from prosecution not just AFI, but the entire industry of which AFI is a part-a possibility that this court ought not to ignore.

Finally, the majority contends that "unlike in *National Marine*, the Agency's action here constituted more than a merely preliminary step prior to an eventual final Agency action." Slip op. at 12. I must disagree. From the Agency's point of view, that is indeed all that it had done. The fact that AFI voluntarily ceased its operations does not somehow convert the Agency's action from a preliminary step to a final adjudication. As the majority itself noted in the paragraph immediately preceding, the Agency had yet to "continue its investigation, issue a notice under section 31(b), or refer[] the matter to a prosecutorial authority under section 31(c)." Slip op. at 12. The section 31(a) notice is clearly a mere preliminary step in the statutory scheme. The fact that the Agency might not ever have taken these subsequent steps does not distinguish this **[*45]** case from *National Marine*. See *National Marine*, 159 Ill. 2d at 390 ("it is not clear whether the Agency will even initiate a cost-recovery/enforcement proceeding against plaintiff").

Thus, I conclude that the majority's attempted distinctions of *National Marine* are without a difference as far as the legal principles involved.

Moreover, even if I agreed with the majority that *National Marine* was distinguishable, and analyzed the case from first principles, I still would not join its conclusion. The majority's underlying concern is that a party who is the target of an administrative action must be allowed to have its day in court. I agree with the majority that a party must *at some point* be able to seek redress in the courts for any administrative action against it. However, the ripeness doctrine does not deprive a litigant of access to the courts. Rather, it controls the *timing* of that access so as to avoid premature litigation and to avoid unnecessary abstract disagreements and entanglement by the courts in agency proceedings. See *National Marine*, 159 Ill. 2d at 388, quoting *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 546, 370 N.E.2d 223, 12 Ill. Dec. 600 (1977), **[*46]** quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 691, 87 S. Ct. 1507, 1515 (1967) (" 'The basic rationale of the ripeness doctrine *** "is to prevent the courts, through avoidance of adjudication, from entangling themselves in abstract disagreements over administrative policies, and also

to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" ' ").

The majority is concerned that if the ripeness doctrine were invoked to preclude the instant suit it might truly operate to bar AFI from court, however, because the Agency might never take the subsequent steps necessary to institute enforcement proceedings based on the violation notice. See slip op. at 10. This argument is not without some intuitive force. But in the end it proves too much, as the same argument could be made by *any* litigant to challenge an initial notification that an agency might institute proceedings against that litigant. It is never a foregone conclusion that an agency will seek to hold an offender accountable. Thus to accept this concern as a general **[*47]** exception to the ripeness doctrine would swallow that rule.

The majority suggests that this case is different from most, however, because "the Agency had no incentive to refer the matter for prosecution because there was no longer a continuing violation." Slip op. at 10. First, as I previously noted, I do not believe that it is possible to conclude as a matter of law that there was no continuing violation, in that among the allegations in the section 31(a) notice was *storage* of waste without a permit. But even assuming, *arguendo*, that we could conclude as a matter of law there was no continuing violation, I would question the significance which the majority attaches to this fact. According to the majority's reasoning, a party who will never have a final agency decision entered against it may utilize Illinois courts to challenge the basis of the abortive investigation against it-even though a party which is *actually* facing the possibility of legal action cannot. Such a result is incongruous. In addition to the question of ripeness, it is far from clear to me that a party would have *standing* to attack the content of a preliminary notice-which is, again, not even a formal **[*48]** complaint (see 415 ILCS 5/31(c) (West 2002))-in an investigation which has gone nowhere and never will go anywhere. I believe it is unwise to allow a party to use the courts of this state to challenge allegations in the investigative process of a proceeding which will never move forward to impose liability.

Notwithstanding the above, AFI is in a somewhat sympathetic position because even though the section 31(a) notice carried no *legal* consequences, there were real-world implications associated with its issuance. At least some of AFI's investors "pulled out," as did its primary supplier. AFI subsequently made the voluntary decision to terminate operations. However, the United States Supreme Court has specifically stated that such by-products of the institution of proceedings do not obviate the ripeness doctrine.

> "The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. **[*49]** As a result the defendant can be arrested and held for trial. [Citations.] The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. *The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.*
> * * *
>
> The determination of probable cause in and of itself had no binding legal consequence ***. It took the exercise of discretion on the part of the Attorney

> General, as we have pointed out above, to bring it into play against appellee's business. Judicial review of such a preliminary step in a judicial proceeding is so unique that we are not willing easily to **[*50]** infer that it exists."

(Emphasis added.) *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-602, 94 L. Ed. 1088, 1093-95, 70 S. Ct. 870, 872-74 (1950).

The majority notes that upon receipt of the section 31(a) notice, AFI was forced to choose between (a) getting a permit, (b) operating without a permit, or (c) shutting down. n5 Slip op. at 10. I believe that there is no question that if AFI had chosen option (b), and were still operating its business-even if investors and its main supplier had pulled out-this court would find *National Marine* indistinguishable and we would rule that the instant suit was unripe. The only difference between that case and the case at bar is the majority's guess that in this case the Agency will probably not advance the proceedings. It is certainly not impossible that the proceedings could continue in this case, however, just as there was no guarantee that they would continue in *National Marine*. In both cases, whether the suit would proceed would depend on the exercise of officials' discretion. But in the instant case, because of the majority's prognostication about the *likelihood* that the officials will exercise their **[*51]** discretion in favor of prosecution, the doctrine of ripeness is overridden. I do not agree, and accordingly I respectfully dissent.

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n5 The implication that it was unfair to require AFI either to incur the expense of obtaining a permit or to "risk[] serious penalties by continuing and waiting for the ax of Agency prosecution to fall" (slip op. at 10) is ameliorated by noting that even if the "ax" had indeed fallen, and the Agency had succeeded in proving that AFI had violated the permit requirement, AFI still would have had the opportunity to "show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship." 415 ILCS 5/31(e) (West 2002).

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CHIEF JUSTICE McMORROW and JUSTICE KILBRIDE join in this dissent.

Default Prices					Final Costs	
Charge Per Truck Load :	$100.00	@ 10	Ton(s)	Tons of Shingles =	0.000	Tons
Lbs Per Sq. Ft. :	6.6666666	@ 1	Inch Thickness	Price of Shingles =	$0.00	
Installation Charge :	$0.200	Per Sq. Ft.		Number of Truck Loads =	0	
Price Per Sq. Ft. :	$0.100	@ 1	Inch Thickness	Trucking Cost =	$0.00	
	$32.40	Per Cubic Yard		Installation Cost =	$0.00	

Dimensions		
Shingle Thickness :	2	Inch(es)
Square Yards :		
Or Square Feet :		

Total = $0.00

EXHIBIT

tabbies

M

HC 2400-B Portable Heavy Duty Waste Recycler

SPECIFICATIONS

Engine/Drive System

Caterpillar Model C-15, 450 hp engine
Fuel tank capacity: 194 U.S. gallons (734 liters)
Heavy-duty clutch
Hydraulic reversing fan with waffle screen
Integral multi-cooler

Feed System

Speed sensing, automatic reversing feed system
Powered compression roller
Feed throat: 58 in. (147 cm) wide x 34.5 in. (88 cm) high
Feed chain: WD-110 wide series, welded steel
Loading height: 92 in. (234 cm)
Water spray system

Hammer Mill Hog

24 fixed hammers with replaceable tips

Trailer/Frame

Machine weight: approx. 51,200 lbs. (23,235 kg)
Overall travel length: 41 ft. 6 in. (12.65 meters)
Travel width: 8 ft. 6 in. (2.59 meters)
Travel height: 12 ft. 7 in. (3.84 meters)
Double channel frame
Hopper dimensions: 58 in. wide x 15 ft. 9 in. long (1.5m x 4.8m)
Suspension: Dual axle
Tire size: 385/65R 22.5

Output Production*

Green waste: up to 240 cu. yds./70 U.S. tons, (183 cu. m/63.5 metric tons) per hour
Scrap dry wood: up to 270 cu. yds./41 U.S. tons, (206 cu. m/37 metric tons) per hour
** actual output may vary due to moisture content, material density, material size, support equipment, and grate size.*

Hydraulic System

Tank capacity: 83 U.S. gallons (314 liters)
Pumps: vane and variable displacement pumps
Filter system: Six micron return filter, ten micron breather
Hydraulic cooler

Safety Mechanisms

Three emergency shutdown buttons
High heat automatic engine shutdown
Low oil pressure automatic engine shutdown
Non-crushable material release/shutdown system
Break-away anvil/grate system

Options

Multi-function radio remote control
- Feed reverse/stop/forward
- Compression roller raise/lower and forward/reverse
- Emergency stop

Magnetic head pulley
Radial stacking conveyor
Hydraulic Power Take Off (HPTO) clutch
Wide variety of grate configurations available

Specifications subject to change without notice

Peterson Pacific Corp.

Find out more about the entire Peterson Pacific Corp. product line at:

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