

ILLINOIS POLLUTION CONTROL BOARD
September 3, 1992

IN THE MATTER OF:)
)
PETITION OF WE-SHRED-IT, INC.,) AS92-2
FOR AN ADJUSTED STANDARD FROM) (Adjusted Standard)
35 ILL. ADM. CODE 848.101)
(WASTE TIRES))

THOMAS W. LACY, PROFFITT & LACY, APPEARED ON BEHALF OF
PETITIONER,

DANIEL P. MERRIMAN APPEARED ON BEHALF OF THE ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by J.C. Marlin):

This matter comes before the Board on a petition filed February 27, 1992, and on a second amended petition filed on July 13, 1992, by petitioner We-Shred-It, Inc., for an adjusted standard from the used and waste tire financial assurance requirement associated with 35 Ill. Adm. Code 848.101. The Illinois Environmental Protection Agency (Agency) filed a supplemental response at a hearing held in Pana, Christian County, on June 29, 1992. The Agency recommended that the adjusted standard be denied.

We-Shred-It owns a tire shredding operation at 500 North Hickory Street, Pana. As will be discussed below, We-Shred-It's equipment mainly produces "2-inch nominal"¹ shredded rubber. Section 848.Subpart D requires financial assurance for piles of used and waste tires. Section 848.101 provides an exemption from the financial assurance requirement (and the rest of Part 848) for "2-inch minus" shredded rubber, a smaller size. In this petition, We-Shred-It is requesting an adjusted standard to exempt it from the financial assurance requirement with respect to the "2-inch nominal" product.

PROCEDURAL HISTORY

The procedural history is somewhat confusing in that the Agency presented the operative response at the hearing. (R. 2.) We-Shred-It then amended its petition on the record. (R. 5.) The

¹To qualify for the "2-inch minus" exemption, tires must be altered by chipping, shredding or other processing such that individual dimensions of height, length and width of the tire product are two inches or less. "Two-inch nominal" tire product could have one dimension exceeding two inches.

hearing officer then directed We-Shred-It to file a written amended petition after the close of the hearing. (R. 4.) Thus the procedural history runs "hearing, response, petition", the exact opposite of the normal order.

The procedural history is further confused by the partial nature of the second amended petition. In response to the Board's more information order of March 12, 1992, We-Shred-It filed a "response to notice of deficiency", on April 10, 1992. The Board takes this to be the "[first] amended petition" referenced in the transcript. (R. 5.) While the first amended petition appears to be comprehensive, the second amended petition addresses only some areas, not even including all areas which were the subject of the discussion in the transcript. Thus, the operative petition appears to consist of the first amended petition (the "response"), as amended on the record, plus the second amended petition.

The amendments to the petition are summarized in the transcript. We-Shred-It originally overstated the quantity of partially shredded tires on hand by a factor of ten, resulting in a gross overstatement of the total tire products and estimate of financial assurance required. (R. 5.) Moreover, in the original and first amended petition, We-Shred-It stated that it was producing "3-inch nominal" rather than "2-inch nominal" shredded rubber. This was a typographical error. (R. 6.)

In the supplemental response filed at the hearing, the Agency recommended that the adjusted standard be denied. The Agency stated that the used tire regulations were promulgated to prevent the threat of fires and disease-carrying mosquitoes, and to provide for financial assurance for tires or tire products that might be abandoned due to non-existent markets. The Agency stated that it believed that, at the present time, the market for "3 inch nominal" tire-derived fuel (TDF) was non-existent, and, as such, presented the necessity for financial assurance.

The Agency's supplemental response specifically addresses the "3 inch nominal" product. As noted, We-Shred-It has amended the petition to correct a typographical error, so that the petition would read "2-inch". Consistent with that the Board construes the Agency response as also applying to the "2-inch nominal".

The hearing officer also ordered We-Shred-It to file an affidavit concerning petitioner's exhibit 1, a quotation (without price) for 280 tons of the "2-inch nominal" product for paving underlayment. (R. 86, 88.) No affidavit has been filed. The Board will therefore strike Exhibit 1.

The hearing officer granted We-Shred-It 14 days after the hearing in which to file closing arguments. The Agency was given

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14 days more to file its closing comments. (R. 89.) We-Shred-It filed its closing arguments on July 13, 1992. The Agency has filed none.

DISCUSSION

The used and waste tire rules, as Part 848, were adopted in R90-9A, on April 25, 1991. They appeared on May 24, 1991, at 15 Ill. Reg. 7959. The rules were amended in R90-9B, on February 6, 1992. The amendments, including the "2-inch minus" exemption, appeared on February 21, 1992, at 16 Ill. Reg. 2880.

The Environmental Protection Act (Act) and Part 848 regulate used and waste tires in order to assure proper disposal and to protect the public from disease-carrying insects and the danger of air and water pollution from fires associated with large accumulations of used and waste tires. (Section 53(a) of the Act.) Subpart D requires financial assurance for the removal of tires in order to protect the public by providing funds for the removal of tires if the owner or operator abandons a site or is otherwise unable to properly terminate operations. (R90-9A, p. 19.) The amount of required financial assurance is based on a removal cost estimate prepared by the owner or operator under Section 848.404. The owner or operator may use a combination of trust funds, letters of credit and self-insurance to meet the requirement.

Once tires have been shredded, much of the disease and fire hazard has been eliminated. Moreover, the potential disposal costs are greatly reduced, since shredded tires are much easier to handle and dispose of, and may be marketable. It would be very unlikely that an operator would abandon a site with marketable inventory. In R90-9B, the Board determined that the "2-inch minus" product was more marketable in Illinois, and that shredders were already moving toward that standard. The Board therefore exempted the "2-inch minus" product from the financial assurance requirement (R90-9B, p. 2 - 5.)

Although the disease and fire hazard is greatly reduced, there is still some hazard, and potential disposal problems, associated with shredded tires. Removal would be necessary following abandonment. To the extent the shreds are not marketable, at a price exceeding the removal cost, a source of revenue would be needed to fund the removal. Financial assurance is therefore still needed. (R90-9B, p. 3, 4.) However, it should be in a lower amount than for whole tires, with the reduced handling and disposal costs reflected in the cost estimate under Section 848.404.

Section 28.1 of the Act allows the Board to grant an "adjusted standard" modifying the effect of general rules in specific cases. 35 Ill. Adm. Code 106.Subpart G contains

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procedures to be followed in adjusted standards matters. The procedures were adopted in R88-5A, on June 8, 1989.

There are two types of adjusted standards petitions. If the Board specified a "level of justification" at the time it adopted the rule of general applicability, then that level of justification controls any adjusted standards filed pursuant to that rule. Otherwise, the level of justification is that specified in Section 28.1(c) of the Act:

[T]he Board may grant individual adjusted standards whenever the Board determines, upon adequate proof by petitioner, that:

1. factors relating to petitioner are substantially and significantly different from factors relied upon by the Board in adopting the regulation applicable to that petitioner;
2. the existence of those factors justifies an adjusted standard;
3. the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
4. the adjusted standard is consistent with any applicable federal law.

In that Part 848 does not specify a "level of justification", the above language controls the level of justification required in this matter.

REQUESTED RELIEF

We-Shred-It has requested an adjusted standard from Section 848.101. However, this is the exemption language. What We-Shred-It needs is an adjusted standard from the Subpart D financial assurance requirements, because it needs to present proof in accordance with Section 28.1(c) of the Act as quoted above. The Board accepts the petition as a request for an adjusted standard from the Subpart D financial assurance requirements.

Section 848.101 also exempts the "2-inch minus" product from all requirements of the Part. The Board construes the instant request as being from the Subpart D financial assurance requirements only. This would be consistent with the discussion in the first amended petition (the "response"), at p. 6.

SHREDDED TIRES AND USES

Several methods of reusing tires depend on shredding or grinding the tires. Several types of material are discussed in the transcript:

1. 3- to 4-inch. (R. 45.)
2. 2-inch nominal. (R. 6, 35, 41, 45, 56, 57, 61, 66, 75, 78, 82.)
3. 2-inch minus. (R. 28, 34, 35, 45, 48, 61, 64, 66, 70, 71, 72, 75, 79.)
4. 1-inch minus. (R. 45, 53, 55.)
5. Crumb rubber. (R. 36, 72.)

The difference between the "nominal" and "minus" grades lies in the third dimension. While the "2-inch nominal" is two inches or less in two dimensions, the third dimension could be larger. The record does not contain information on the range of sizes in the third dimension. On the other hand, each piece of the "2-inch minus" material could occupy a two inch cube. Although it is evidently more difficult to produce the 2-inch minus material, its smaller size and greater uniformity allow more potential applications.

The current main market for shredded tires is tire-derived fuel (TDF), in which shredded tires are mixed with coal for burning in large boilers with proper air pollution control equipment. (R. 24, 35, 45, 61, 64, 67, 77.) The 2-inch nominal material tends to jam coal moving equipment. (R. 35, 67.) At present, users of TDF cannot accept the 2-inch nominal product. One potential user whose equipment appears to accept the 2-inch nominal material failed the air pollution control tests when burning the TDF. (R. 46.)

Shredded tires have a number of other uses. These include: landscape material (R. 51, 72, 79); playground turf (R. 65); landfill road stabilizer (R. 56); and, road base. (R. 57, 67, 70, 77.) The latter two appear to be potential uses for the 2-inch nominal material. (R. 56, 57.)

Although the first amended petition had broad claims of marketability, petitioner abruptly dropped most of its claims at hearing, after it became apparent that these related to sales of smaller size product, some of which was produced off-site. (R. 64, 66, 72, 81.) Most sales have been for experimental purposes. (R. 35, 45, 61, 67.)

The We-Shred-It plant manager was unable to quote a price to a large potential buyer. Moreover, sales would require the approval of the board of directors of We-Shred-It. (R. 59, 60).

SHREDDING AND SORTING EQUIPMENT

We-Shred-It bought its tire shredder for \$242,000 in January, 1991. (second amended petition, par. 3, R. 33.) At the time it purchased the shredder, it acted in good faith, in expectation that a market would develop for the 2-inch nominal product. (R. 41, 67, 76.) Indeed, We-Shred-It suggests that the Agency misled it into purchasing what turned out to be the wrong size of equipment, such that the State should be estopped from denying the adjusted standard (second amended petition and argument.) Moreover, We-Shred-It questions why the Agency did not award grants to make the 2-inch nominal product work in the coal moving equipment. (R. 75.)

It would be possible for We-Shred-It to convert its shredder to make the 2-inch minus product, by installing new knives and spacers, at a cost in the vicinity of \$30,000, plus four-days labor. (R. 68, 69.) We-Shred-It intends to purchase equipment which would process the 2-inch nominal to crumb rubber. (R. 55, 70, 72.) We-Shred-It does not give a time schedule for these conversions. Moreover, We-Shred-It has machinery which is capable of processing the 2-inch nominal to 2-inch minus product. (R. 61, 78.)

COMPLIANCE COSTS

As discussed above, cost information was presented in the April 10, 1992, first amended petition (the "response to claim of deficiency".) Although this information was amended in the transcript (R. 5), the revised figures were not included in the second amended petition. Moreover, the figures presented in the transcript were not complete. Although the revised tonnages were given, petitioner left off with: "Following that, of course -- and this serially relates to the first amendment -- a lot of numbers will change". (R. 5.) The Board believes that the following represents the costs, as amended:

Partially shredded tires	1716 tons
2-inch nominal material	1752
Total tires	3468 tons
Loading (\$10/ton)	\$34,680
Transportation (173 trips at \$46)	7,960
Landfill tipping (\$15/ton)	52,020

Total cost \$94,660

If We-Shred-It were to meet the financial assurance requirement through the use of a trust fund, it would be obliged to deposit² at least 20% of this amount, \$18,930/year, over the next five years.

The above costs are similar to the numbers in the Agency's supplemental response, which arrived at a cost estimate of \$79,000. The difference is that, although the Agency assumed a slightly larger quantity of tire material (4000 tons), it used a smaller loading charge: \$50 per load, or, for a 20-ton load, \$2.50 per ton. Using the Agency's loading cost for 3468 tons, the cost estimate would be as follows:

Partially shredded tires	1716 tons
2-inch nominal material	1752
Total tires	3468 tons
Loading (\$2.50/ton)	\$ 8,670
Transportation (173 trips at \$46)	7,960
Landfill tipping (\$15/ton)	52,020
Total cost	\$68,650

20% of this cost estimate would be \$13,730/year.

CONCLUSION

In order to obtain an adjusted standard, the petitioner must demonstrate that factors relating to petitioner are "substantially and significantly different" from factors relied upon by the Board in adopting the regulation applicable to that petitioner. [Section 28.1(c)(1) of the Act] We-Shred-It has not

²The annual contribution to the trust fund is not the same thing as the cost of compliance for two reasons. First, We-Shred-It might be able to obtain a letter of credit, under Section 848.413, for a small fraction of the cost estimate. Second, assuming the trust fund was used, We-Shred-It would be entitled to a release of that money up to the point of abandonment. Although there would be some cost associated with tying up this capital, it would not be the entire amount. Also, We-Shred-It would have the option of reducing the inventory of larger chips, thereby reducing the cost estimate, and potentially resulting in a refund from the trust fund (Section 848.404 and 848.410(f).)

demonstrated any factors which are "substantially and significantly different" than those considered in R90-9A or B. Indeed, the Board looked at this very facility when considering exempting the 2-inch minus product in R90-9B. In fact, We-Shred-It stated in R90-9B that it was getting equipment to make 2-inch minus product. (R90-9 Opinion, p. 4.) We-Shred-It has not argued that anything has changed.

The large discrepancies between the costs alleged in the petitions and the costs adduced at hearing leave the record insufficient to support the grant of an adjusted standard.

We-Shred-It has failed to establish that a market exists for the 2-inch nominal product. There appear to have been only a few sales, mostly for experimental purposes, rather than in the ordinary course of business. Individual sales are subject to approval by the board of directors. We-Shred-It was unable to quote a market price for the 2-inch nominal product.

Additionally, We-Shred-It has failed to explain or make clear its long-term plan. It has the ability to make 2-inch minus material, yet it remains unclear if future production will be in this form. Likewise, it is unclear whether or not converting the existing pile of 2-inch nominal to 2-inch minus product is viewed as a viable option.

We-Shred-It's claims of estoppel and good faith reliance on Agency advice are not relevant to the justification for an adjusted standard.

We-Shred-It has failed to sustain its burden of proof in this adjusted standard proceeding. The adjusted standard will therefore be denied. This denial does not preclude We-Shred-It from filing a new petition for adjusted standard, if circumstances should change. Moreover, petitioner is not precluded from filing a variance petition, to allow time to comply with the rules³.

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

ORDER

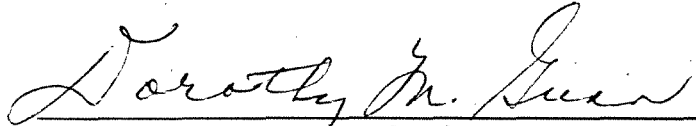
The adjusted standard from 35 Ill. Adm. Code 848.101, requested by petitioner, We-Shred-It, Inc., is hereby denied.

³Pursuant to Title IX and 35 Ill. Adm. Code 104, the Board may grant a temporary variance upon a showing of "arbitrary or unreasonable hardship". The petitioner must have a plan to come into compliance with the generally applicable rule. The Board may grant a variance for up to five years.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041, provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 3rd day of September, 1992 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

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