ILLINOIS POLLUTION CONTROL BOARD
February 23, 1989

R.R. DONNELLEY & SONS CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 88-79
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MS. NANCY J. RICH, SIDLEY AND AUSTIN, APPEARED ON BEHALF OF PETITIONER:

MR. CHARLES V. MIKALIAN, STAFF ATTORNEY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon a Petition for Variance filed May 3, 1988 by R.R. Donnelley & Sons, Co. ("Donnelley"). Donnelley also filed a Supplemental Petition for Variance on December 28, 1988; per Donnelley's request, its Motion for Leave to Supplement Petition for Variance is granted. A Variance Recommendation was filed by the Illinois Environmental Protection Agency ("Agency") on January 20, 1989.

Hearing was held January 20, 1989, at which time Donnelley and the Agency submitted a signed Stipulation of Facts and Proposed Settlement Agreement ("Stipulation"). The Stipulation addresses the agreed-upon facts in this matter. Additionally, the Stipulation presents certain settlement provisions between the parties, and requests that these provisions be "approved" by the Board pursuant to 35 Ill. Adm. Code Section 103.180.

This matter presents several issues. One issue is the merits of the matter at hand and the proper disposition which follows. Other issues include the validity of specific provisions within the Stipulation as presented and the validity of stipulations and settlement agreements within variance proceedings generally.

Merits and Disposition

Donnelley and the Agency request the Board find that a particular material of Donnelley's is not a waste, and therefore is not subject to regulations which would otherwise flow.

The material in question is an oil, called MMT oil, which is produced by Donnelley in the course of operations at Donnelley's Dwight, Illinois, printing facility. Donnelley generated approximately 36,000 gallons of MMT oil in 1987, and all of the oil was sold to oil companies at an average of over 25 cents/ gallon. The parties describe the origin and subsequent disposition of the oil as follows:

> Donnelley's Dwight plant uses the web offset printing process. During printing, the web is passed through a natural gas-fired heat set ink dryer. Ink oils which vaporize from the paper during drying are collected by a device called an MMT unit. (The MMT unit derives it name from MMT Environmental Co., the firm that designed and manufactures these devices). The MMT unit is a condensation-filter system that uses the indirect contact of ambient air to cool vaporized ink oils. Both ink oil and water vapors from the ink dryer are condensed into droplets in the MMT unit. The resulting liquid is then sent through an oil/water separator. After separation, Donnelley collects the MMT oil in a 10,000 gallon holding tank. Donnelley subsequently sells the MMT oil to fuel or oil companies. The current purchaser of Donnelley's MMT oil is Mohr Oil Company ("Mohr"), which is located in Forest Park, Illinois. Mohr is in the business of buying and selling oils and fuels.
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> Mohr buys the MMT oil and picks it up at the Donnelley facility. Mohr then sells and delivers the oil directly to an industrial facility in Chicago. The MMT oil is not delivered to, or stored, blended or treated at, any other facility prior to its delivery to the industrial facility. The facility uses the MMT oil as a fuel in its industrial furnances.
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> Stipulation, para. 2, 3.

Among characterizations of MMT oil are that it is similar in composition to standard No. 2 fuel oil (Stipulation, para. 4), that it has a high heat value (Pet. for Variance, para.5), that in its industrial use it is used in place of virgin fuel oil (Amended Petition, para. 3), and that it has a lower sulfur content than does virgin fuel oil (Id.).

Additionally, based upon laboratory tests, the Agency has determined that the MMT oil is not a hazardous waste (Agency Rec., para. 3), even if was otherwise identified as a waste, and that the oil presents a relatively small potential for environmental harm as currently handled (Id., para. 12). These Agency tests are in accord with with two prior tests done by independent laboratories at Donnelley's initiative. (Pet. Ex. B).

In determining whether Donnelley's MMT oil is or is not a waste, the Board first notes the definition of "waste" found in relevant Board regulations:

> "WASTE" means any garbage, refuse, 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.... "Waste as here defined is intended to be consistent with the definition of "solid waste" set forth in Section 1004(27) of Resource Conservation and Recovery Act of 1976, 42 U.S.C., par. 6901 et seq.
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> 35 Ill. Adm. Code 809.103 (emphasis added).

The first, and pertinent section of this definition is identical to that in the Illinois Environmental Protection Act ("Act"), with the exception that the word "refuse" is absent in the Act definition Ill Rev. Stat. 1987 ch. 111 1/2, para. 1003.53.

The definition of "solid waste" in the federal Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. 6903(5) was analyzed in American Mining Congress v. U.S. EPA, 824 F.2d 1177 (D.C. Cir. 1987). Specifically, the court was presented with the same question presented before the Board; namely, what is meant by "discarded material" in defining what is waste?

The federal court conducted a thorough analysis to determine congressional intent of what is "discarded". The court concluded that Congress intended that "discarded" retain its ordinary, plain-English meaning of "disposed of", "thrown away" or "abandoned" (Id. at 1193). In doing so, it rejected U.S. EPA's argument of what discarded meant in its own statutory language.

In its analysis, inter alia, the court scrutinized legislative history of RCRA, including comments made by the House Committee regarding the disposal problem RCRA is meant to address. Specifically, in discussing its choice of the words "discarded materials" to define "solid waste," the House Committee stated:

> Not only solid waste, but also liquid and contained gaseous wastes, semi-solid waste and sludges are the subjects of this legislation. Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is

> reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses.
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> Id. 824 F.2d at 1192.

This same logic is in accord with prior Board rulings. Specifically, in Safety-Kleen Corp. v. IEPA, PCB 80-12, 37 PCB 363 (Feb. 7, 1980), the Board looked at the issue of whether spent solvent derived from industrial washing equipment and later recycled to produce clean solvent was waste[1] The Board held:

> Since it [the solvent] was destined to be reused, rather than discarded, it is not waste.... The Board does not seek in Chapter 9 to regulate the movement of materials in general, but only waste.... Section 20 of the Environmental Protection Act provides that a purpose of the Act is to promote the conservation of natural resources by encouraging the recycling and reuse of waste materials. It would tend to defeat this purpose of the Act if the Board were to impose the expenses of compliance with requirements of Chapter 9 on persons who are engaged in recycling and reuse of materials which would otherwise be wasted.
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> Id. at 37 PCB 364.

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[1] The Board recognizes a second Board Order issued pursuant to a motion for reconsideration, PCB 80-12, 39 PCB 38 (July 10, 1980) which provides in part:

> The decision of the Board is not based on a finding that the solvent in question is recyclable. Under the facts alleged in the petition, Safety-Kleen maintains control over the solvent at all stages. It is able to state that the solvent is in fact recycled. This situation is clearly distinguishable from the case in which a generator delivers material to a third person with no knowledge or control over its subsequent disposition.

Our situation is not like this "clearly distinquishable" situation because the generator, Donnelley, does have knowledge and at least partial control over its subsequent disposition. For Donnelley knows exactly to whom it is selling the oil, Mohr Company, and the oil is subsequently sent directly to the burner without treatment or storage. Furthermore, it is the language in the Board's first order which the appellate court relies upon in its affirmance of the Board's decision that the spent solvent was not waste.

On appeal, the second district affirmed the Board's Safety-Kleen finding that waste is "discarded material" and that since Safety-Kleen's solvents were not intended to be discarded, they were not wastes. Futhermore, the court noted that the Board found Part 809 waste handling regulations were not applicable to solvent recycling since one of the purposes of the Act is to encourage recycling and reuse, which was what Safety-Kleen was doing with its spent solvent. Illinois Environmental Protection Agency v. Illinois Pollution Control Board and Safety-Kleen Corp., No. 80-650 (Sept. 18, 1981) (no opinion).

The Board again used similar reasoning in Southern California Chemical Co., Inc., v. IEPA, PCB 84-51, 60 PCB 103 (Sept. 20, 1984). There, the Board was presented with the issue of whether spent etching solvent that was eventually returned to SCC for recycling was "discarded" so as to make it a waste subject to regulation. Relying upon Safety-Kleen, the Board held it was not "discarded", and thus not a waste.

Application of the above interpretations to the Board's own statutory language of "discarded" in defining waste, the Board finds that the particular circumstances under which Donnelley currently handles its MMT oil, the MMT oil is not "discarded material", and therefore is not a waste. Among persuasive aspects of these particular circumstances, the Board notes:

1) The oil does not have any characteristics of being discarded since it is used as a valuable energy product that is used in place of virgin oils and is preferable to other fuels due to its low sulfur content.

2) The method in which the oil is currently handled is environmentally appropriate because it is sent directly from the Donnelley facility to the burner without being treated or stored at some intermediate facility and the oil would not be classified as hazardous, even if in fact it were a waste.

In holding that Donnelley's current disposition of its MMT oil is such as to not characterize the oil as a waste, the Board emphasizes that this holding applies only under the particular circumstances here presented. The Board further notes that under other dispositions it can readily conceive that a contrary holding would follow.

Having found that Donnelley's MMT oil is not a waste, the Board finds that the variance relief originally requested by Donnelley in this variance matter is unnecessary. Accordingly, this matter will be dismissed.

Stipulation

The Board next turns to the issue of the Stipulation. The Board first notes that the Stipulation at paragraph 15 purports to bind Donnelley to a certain course of conduct in the event that the Board accepts and adopts the Stipulation. Further, paragraph 16 of the Stipulation states:

> This agreement is submitted to the Board for approval under Section 103.180 and the parties respectfully request the Board to enter its final order approving this settlement. If the Board should reject any portion hereof, the entire Agreement shall be terminated and be without legal effect, and the parties shall be restored to their prior position in this litigation, without any waiver of their opportunity to present testimony and other evidence at an evidentiary hearing, as if this agreement had not been executed, without prejudice to any party's position as to any issue or defense.

However, the Board is not able to accept all portions of the Stipulation. Among other matters, the Board is asked to impose conditions upon Petitioner in a manner which is parallel to the imposition of conditions when a variance request is granted. While it is apparent the the Board has authority to impose conditions when a variance is granted pursuant to Section 36 of the Act, it is not apparent that the Board has authority to impose conditions where, as here, a variance petition is dismissed. To the extent that the parties may wish to bind themselves in such agreement as they have here presented, it is therefore necessary that they do absent the Board's involvement.

As a general matter, the Board has held that stipulations and settlement agreements have only limited propriety in variance proceedings, being appropriate only to the extent that they may serve to convey to the Board those facts upon which the parties find agreement (e.g., Rowe Foundry & Machine Company v. IEPA, PCB 81-49, 51 PCB 89). Conversely, stipulations to issues which are the sole province of the trier of fact (the Board) are not appropriate (e.g., Olin Corporation v. IEPA, PCB 81-117, 45 PCB 415). Such issues include findings of arbitrary and unreasonable hardship (Id.) and, as is the case here, findings of whether Board rules are applicable to the particular circumstances faced by a petitioner (See Container Corporation of America v. IEPA, PCB 87-183, Interim Order, June 2, 1988).

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

ORDER

This matter is dismissed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 23rd day of February, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board