

ILLINOIS POLLUTION CONTROL BOARD
October 6, 1994

IN THE MATTER OF:)
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IN THE MATTER OF: PETITION OF)
ILLINOIS WOOD ENERGY PARTNERS,) AS 94-1
L.P. FOR AN ADJUSTED STANDARD) (Adjusted Standard)
FROM 35 Ill. Adm. Code 807 OR,)
IN THE ALTERNATIVE, A FINDING)
OF INAPPLICABILITY)

INTERIM OPINION AND ORDER OF THE BOARD (by C. A. Manning):

This matter is before the Board on a Petition for Adjusted Standard filed by Illinois Wood Energy Partners, L.P. (Wood Energy) on February 8, 1994 pursuant to Section 28.1 of the Environmental Protection Act (Act) (415 ILCS 5/28.1) and Part 106 of the Board's rules (35 Ill. Adm. Code 106). Wood Energy seeks an adjusted standard from 35 Ill. Adm. Code Part 807 or, in the alternative, a Board finding of inapplicability of 807 to its proposed wood-to-energy incineration facility that it intends to build in unincorporated Cook County (Bloom Township) near Chicago Heights, Illinois. More specifically, Wood Energy seeks a Board determination that the wood which would be incinerated to produce energy at this at this facility is not a "solid waste" and therefore not subject to the requirements of Part 807.

In response to public requests for hearing, a hearing was held on May 11, 1994 at the Chicago Heights Public Library. Represented at the hearing were: Wood Energy by James P. O'Brien of Chapman and Cutler, Jack Burds of the Illinois Environmental Protection Agency (Agency), Stepan Noe of Citizens for a Better Environment (CBE), and Anna Hollingsworth of the Chicago Legal Clinic for Maureen Drankiewicz, Cathy Busto, and Jeff Tangel in his capacity as the Chairman of the South Cook County Environmental Action Coalition (Coalition). While many public participants both at the hearing and on the written record in this proceeding have voiced concerns regarding the potential environmental consequences to the air as a result of the operation of this facility, any questions concerning the ability of the facility in to meet federal and state air regulations are not before us in this matter.¹

¹ On October 8, 1993 the Illinois Environmental Protection Agency issued Wood Energy a Construction Permit-Federal New Source Performance Standard Permit (NSPS). A revised NSPS for the construction and operation of the incinerator, which is a new emission source, was then issued on February 28, 1994. The NSPS permit sets forth the limitation of the air emissions based on several conditions and guidelines stated in the permit. The Board has no authority in this proceeding to review the Agency's issuance of this NSPS permit. Issues concerning this permit and any alleged impact to the air quality as a

For the reasons discussed below, the Board finds that the wood fuel Wood Energy intends to incinerate is a solid waste, and hence that Wood Energy's intended facility is a solid waste management facility subject to Part 807.

LEGAL CONTEXT OF PROCEEDING

This matter is brought before the Board in a rather unique context. Wood Energy petitions for an adjusted standard pursuant to Section 28.1 of the Act or, in the alternative, a finding of inapplicability of Part 807.² Presumably, if the Board finds Part 807 inapplicable, an adjusted standard from any specific requirements contained in that part would not be necessary.³ A finding of inapplicability would result from a Board's determination that the wood which would be used to fuel the facility is not a "solid waste" within the meaning of the Act and the Board regulations. It is this applicability which the Board examines in this interim opinion and order.

Prior to bringing this matter to the Board, Wood Energy brought several related issues to our sister state adjudicatory body, the Illinois Commerce Commission (ICC), when it filed, on May 7, 1993, a petition for an ICC finding that Wood Energy qualified as a Qualified Solid Waste Energy Facility (QSWEF) as defined by Section 8-403.1 of the Public Utilities Act. (220

result of its issuance are therefore not before the Board.

² Part 807 contains regulations adopted pursuant to Section 22 of the Act that monitor and regulate the operations of solid waste management facilities through Agency permits. Part 807 also contains requirements for the proper closure of facilities to insure protection of the environment after their operations cease.

³ An adjusted standard is one form of relief the Board may grant, upon the appropriate demonstration by petitioner, which allows a new standard that has been adjusted to replace the regulation of general applicability. The Agency argues in its Post-Hearing Brief at pages 4-6 that the Board does not have jurisdiction since the underlying adjusted standard petition is lacking information required by Section 28.1 of the Act and 35 Ill. Adm Code 106 and is therefore deficient. The Board's jurisdiction in this matter is the result of Wood Energy petitioning the Board for relief from Part 807 regulations, or in the alternative a determination that Part 807 is not applicable, whereby making the requested adjusted standard to be unnecessary. The Board in this order is making the limited determination of whether Part 807 applies to Wood Energy thus necessitating it to file an amended petition meeting the requirements of Section 28.1 of the Act and the Board's regulations at 35 Ill. Adm. Code 106.705. The Board is not premature in making the preliminary decision as to whether the regulations from which petitioner is requesting relief apply to its facility.

ILCS 5/8-403.1 (1992).)⁴ By order dated June 3, 1993 and supplemental order dated February 8, 1994, the ICC determined that Wood Energy is a QSWEF. (ICC 93-0160, June 3, 1993, ICC 930160, February 8, 1994.)

FACILITY DESCRIPTION

As set forth in its petition to this Board, Wood Energy is a partnership organized in Delaware which has its principal offices in Northbrook, Illinois. (Pet. at 2.)⁵ The general partners are PEC Bloom I, Inc. (a subsidiary of Polsky Energy Corporation) and KES Bloom, Inc. (a subsidiary of Kenetech Energy Systems, Inc.). Polsky Energy Corporation is in the business of developing, and operating independent power projects in North America. Kenetech Energy Systems develops, finances, and manages independent power plants which principally utilize biomass and gas.

Wood Energy intends to construct a power facility located at the northeast corner of the intersection of State Street and Highway 30 in Bloom Township, Cook County, Illinois. The power facility would burn wood to produce energy which it will sell to Commonwealth Edison (Tr. at 22). The waste wood will be collected from various sources ranging from industry to residential pollution control facilities and transfer stations. More specifically, Wood Energy anticipates receiving wood from all of the following waste streams: industry, construction, demolition, forest land management, general land clearing operations, sawmills, wood product manufacturers (including those who manufacture pallets, cable spools, railroad ties, and telephone poles) and other "urban waste wood". (ICC Pet. at 3.)

All of the waste wood collected would be put through a process designed by Wood Energy to produce wood chips which ultimately become what Wood Energy refers to as "produced wood fuel."⁶ The wood itself must comply with certain requirements

⁴ Section 8-403.1(b) defines a QSWEF as a facility determined by the ICC to both qualify as such under the Local Solid Waste Disposal Act (415 ILCS 10/1 et seq. (1992)) and to possess characteristics that would enable it to qualify as a co-generation or small power production facility under federal law. (220 ILCS 5/8-403.1(b) (1992).)

⁵ The transcript of the hearing held May 11, 1994 will be referenced as "Tr. at ", the post-hearing briefs will be referenced as "Brief at " preceded by the organization who filed, Wood Energy's adjusted standard petition before Board will be referenced as "Pet. at " and its petition before the ICC will be referenced as "ICC Pet. at ".

⁶ Wood fuel is defined by Wood Energy as all wood intended to be used as a fuel including but not limited to vegetative wood (e.g., trees, forestry slash, brush, slab wood, timber harvesting and/or landclearing operations), cord

set forth by Wood Energy and the Agency and the process must meet the requirements of Wood Energy's "Wood Fuel Procedure" (WFP). (Pet. Exh. C.) At the time of hearing, this procedure consisted of a nine page document, with ten attachments, which sets forth the requirements for wood handling and quality control at the off-site facilities. (Tr. at 44.) Petition Exhibit C is the draft form of this document which must be complied with by Wood Energy for it to meet the requirements of its NSPS (air) permit. All of the processing equipment utilized at the off-site units is owned by Wood Energy.

Generally, in order for the produced wood fuel to be accepted at Wood Energy's facility it must meet all of the specifications contained in the WFP, and must be produced by the methods and tested by the protocols contained therein. (Tr. at 42, 44.) The Bloom Township facility itself would consist of tractor trailer discharge stations, a conveyor system, a processing building, a wood chip storage building, a power house, a bag house, and a condenser unit housing and a stack. (Pet. at 4-5.)

Upon arrival at the tractor trailer discharge stations, the wood would be inspected before being stored. (Tr. at 46.) If it fails to conform to the requirements, it can be shipped back or "made to conform." (Tr. at 47.) It would then be moved from the discharge stations to the processing building. (Pet. at 4.) The processing building will contain an electromagnetic separator, a disc scalping screen, a hammer mill, and screening equipment. The equipment is utilized, as necessary, to ensure that the wood chips conform to the produced wood fuel standards established by the Agency and Wood Energy. (Pet. at 4-5, Tr. at 46-47.) All non-wood particles will be removed. Usually scrap metal makes up the non-wood material, and it is separated and later sold. (Tr. at 47.) Mr. Sampson, Vice President of Development at Kenetech Energy testified that in these types of facilities, roughly 1/100th of a percent scrap metal by weight is generally removed. (Tr. at 48.) Anytime the produced wood fuel fails to meet the proper specifications, the shipment would be returned to the contracted supplier. (Tr. at 71-72.) Alternatively, the nonconforming wood chips would be made to conform and put back into the produced wood fuel stream. (Tr. at 47.)

The resulting produced wood fuel would then be transported to the storage building. (Pet. at 5.) From the storage

wood, logs, lumber, sawdust and wood from: manufacturing processes (e.g., wood pellets, buttofts, shavings, turnings, sander dust), commercial and industrial activities (e.g., slabs, bark, chips, waste pallets, boxes, railroad ties, and telephone poles), and wood from construction and demolition activities (e.g., structural timbers, and joists). This definition includes materials which are chemically treated with creosote and pentachlorophenol.

building, produced wood fuel would be conveyed to the power house using a "first-in and first-out" system. (Pet. at 5.) Once in the power house the produced wood fuel would be conveyed to a boiler system to generate electricity using a steam turbine. (Pet. at 5.) There would be fly ash and bottom ash generated from the combustion of the produced wood fuel that would be disposed of in landfills. (Tr. at 82,181-182.)

On September 15, 1993, the Agency, under signature of Lawrence W. Eastep, manager of the Land Permit Section, issued what is generally referred to as a "Solid Waste Determination Letter" to Wood Energy. (Pet. Exh. A.) The Agency concluded that, so long as the stated conditions were met, the Agency did not believe that the wood fuel would meet the definition of solid waste as defined by the Act and the Board's regulations. Subject to these conditions, then, the Agency letter concludes that Wood Energy is not a solid waste management facility and therefore does not require an operating permit for such. (Pet. Exh. B.)

ARGUMENTS

A. Wood Energy

Wood Energy argues that since the produced wood fuel is derived from otherwise unusable waste woods, it is not discarded material and therefore, pursuant to Section 3.53 of the Act, it is not a waste. Wood Energy cites several Board opinions which stand for the proposition that if a material is not being discarded it is not a waste.⁷ In addition, Wood Energy states that since the produced wood fuel will be used, it is not discarded material and thus not a waste. (Wood Energy's Brief at 20.)

Wood Energy compares its on-site handling of the wood to that which takes place on-site at other energy facilities that utilize solid fuels. (Wood Energy's Brief at 19.) It argues, therefore, that this final "processing" step is routine and is not significant enough to bring it into the definition of waste and the attendant requirements of Part 807. As to oversized produced wood fuel received from the suppliers, Wood Energy admits that the process will further reduce the wood pieces and also admits that any non-wood material (essentially metals) will be separated and discarded during processing at the incineration

⁷ See R.R. Donnelley Sons Co. v. Illinois Environmental Protection Agency, (Feb. 23, 1989), PCB 88-79, 96 PCB 161; S. California Chemical Co., Inc. v. Illinois Environmental Protection Agency, (Sept. 20, 1984), PCB 84-51, 60 PCB 103; and Safety-Kleen Corp. v. Illinois Environmental Protection Agency, (Feb. 7, 1980), PCB 80-12, 37 PCB 363.

facility. However, Wood Energy considers this final processing minimal and argues that at any time after inspection, if a load of produced wood fuel is rejected, it will be returned to the supplier. (See Wood Energy's Brief, generally at 19-20.)

Furthermore, Wood Energy sees no contradiction between the argument it makes before us and the argument it made before the ICC in search of its determination that Wood Energy is a Qualified Solid Waste Energy Facility (QSWEF). Wood Energy argues that the ICC determination was made pursuant to a different statute and was based upon the partnership as a whole (the incineration facility, plus all the off-site contracting facilities which feed into it). The Board's focus, it argues, should be limited to a simple determination of whether the wood fuel as it exists at the incineration facility is a "solid waste." Indeed, it appears that Wood Energy sought to clarify this distinction before the ICC itself when it sought the February ICC Supplemental Opinion which reads in relevant part:

Illinois Wood Energy Partner's Supplemental Petition and Request for Clarification is granted and the electric generating facility described above which will be owned by IWEP and fueled by wood chips processed from waste wood will continue to meet the criteria for Qualifying Solid Waste Energy Facilities pursuant to Section 8-403.1 of the Act when the Facility consumes wood chip fuel chipped from waste wood procured directly from generators of waste wood and processes the waste wood into wood chip fuel at the site where the waste wood is generated. (ICC 93-0160 June 3, 1993, at 3.)

Therefore, Wood Energy would have us conclude that the location of the produced wood fuel generation is not a factor in the ICC ruling because the ICC may consider all facets of its operations in finding that it is a QSWEF. Such location is indeed relevant in our determination of applicability of the definition of "solid waste" at the energy/incinerator facility itself because we are deciding whether the energy/incineration facility itself is a solid waste management facility. Therefore, it argues that the legal issues are distinct and the positions are not contradictory. (See, generally, Wood Energy's Brief at 12.)

B. The Environmental Action Coalition (Coalition) and the Citizens for a Better Environment (CBE)

The Coalition argues that the produced wood fuel is a solid waste. It cites United States v. ILCO, 996 F.2d 1126 (11th Cir. 1993) where the Eleventh District federal court found that spent car and truck batteries once discarded by the original owner remain a solid waste and do not change just because they are purchased as raw materials for the purpose of recovering the lead

values of the batteries. (Coalition Brief at 2.) The Coalition also cites American Mining Congress v. U.S. EPA, 824 F.2d 1177 (D.C. Cir. 1987), American Mining Congress v. U.S. EPA, 907 F.2d 1179 (D.C. Cir. 1990), American Petroleum Institute v. U.S. EPA, 906 F.2d 729 (D.C. Cir. 1990), Shell Oil Company v. U.S. EPA, and 950 F.2d 741 (D.C. Cir. 1991), United States v. ILCO, Inc., 996 F.2d 1126 (11th Cir. 1993) to support the proposition that the produced wood fuel is a solid waste even though it later may be used as a fuel because it has been generated from discarded material.

CBE argues that the hazardous waste operating requirements of 35 Ill. Adm. Code 721 apply to the Wood Energy's facility and that Wood Energy has failed to meet the burden of proof for a grant of an adjusted standard because the record is void of any factual information for the Board to make a determination as to the applicability of those regulations. (CBE's Brief at 3-4.) CBE argues that since up to fifty (50) percent by weight of the volume of produced wood fuel may contain creosote and pentachlorophenol, which is a hazardous waste, Section 721.102 applies.⁸ (CBE's Brief at 3.)

Also, CBE argues that Wood Energy is judicially estopped from arguing before the Board that the facility is not a solid waste management facility in accordance with the Illinois Environmental Protection Act because it has represented to the ICC that it was a solid waste management facility pursuant to the Illinois Local Waste Disposal Act. (CBE's Brief at 6-13.)

C. Illinois Environmental Protection Agency (Agency)

While the Agency does not repudiate its September 15, 1993 solid waste determination letter, the Agency now states that such letter was based solely upon the definition of wood fuel as stated in the solid waste determination request as a fuel to be used in a wood-fired power plant. (See Footnote Number 6 of this Order.) (Agency's Brief at 6.) The Agency further states that it did not contemplate Wood Energy's designation as a QSWEF pursuant to the Illinois Local Solid Waste Disposal Act, as determined by the ICC, when it issued the letter. (415 ILCS 10/2.5 (1992).) The Agency concludes that based upon Wood Energy's "designation as a qualified solid waste energy facility and the requirements of those facilities the Agency [now]

⁸ Although pentachlorophenol is listed as a hazardous waste in 35 Ill. Adm. Code 721 and has an EPA hazardous waste No. F027, Wood Energy is not seeking relief from the requirements of Part 721 which regulates hazardous waste facilities. The present issue before the Board is whether Part 807 applies to Wood Energy's facility, therefore the Board will not address the issue of whether Part 721 applies to its facility.

believes that a waste or solid waste must be burned at the facility to maintain that designation pursuant to 415 ILCS 10/2.5 and 10/3.1(1) and (2) and that Petitioner has acknowledged this." (Agency's Brief at 7.) The Agency further states that Wood Energy has "acknowledged that the combustion of the Wood Fuel at the wood-fired power plant will generate solid waste in the form of fly ash and bottom ash." (Agency's Brief at 7.)

ANALYSIS

When Wood Energy sought to become a QSWEF pursuant to Section 5/8-403.1 of the Utilities Act and Section 10/3.1 of the Local Solid Waste Disposal Act (Disposal Act), it obviously did so to obtain the legislatively mandated purchasing agreement with Commonwealth Edison pursuant to Section 5/8-403.1(c) that would as a result from such designation. (220 ILCS 5/8-403.1 and 415 ILCS 10/1 et seq.) In order to achieve such designation under Section 10/3.1 of the Disposal Act, Wood Energy had to certify to the ICC (and must continue to certify on an annual basis) that solid waste is the primary fuel and comprises 95% of the annual fuel loading at the facility. (415 ILCS 10/3.1(1) (1992).) In addition, Wood Energy must guarantee that the solid waste throughput volume is equal to at least 66% of the design capacity of the facility pursuant to Section 10/3.1(2). Therefore, our sister state agency has already determined that the facility is a QSWEF which is utilizing solid waste as a major part of its energy source in producing electricity. CBE argues that Wood Energy is estopped from now arguing before us that the produced wood fuel (the wood chips incinerated by Wood Energy) is not "waste" pursuant to the definition of waste contained in the Act at Section 3.53, which definition is identical to the one found in the Disposal Act.

Wood Energy seeks to distinguish the issue before us from the issue it raised and litigated before the ICC. Wood Energy argues that the ICC determination was made pursuant to a different statute and was based upon the partnership as a whole (the incineration facility, plus all the off-site contracting facilities which feed into it). The Board's focus, it argues, should be limited to a more simple determination of whether the wood fuel as it exists at the incineration facility is a "solid waste." Therefore, it argues it is not estopped because the legal issues are distinct and the positions are not contradictory.

The determination of the ICC under a different statutory scheme, although utilizing the same definition of solid waste, does not estop Wood Energy from making this argument before the Board pursuant to the Act and the regulations of 35 Ill. Adm. Code 807. The ICC determination is neither binding on the Board, nor dispositive of the issues before us. Nonetheless, in

reaching its determination the ICC used the definition of solid waste which is contained in the Illinois Local Solid Waste Disposal Act (415 ILCS 10/2(5)(1992)) and which definition is virtually identical to the one contained in the Illinois Environmental Protection Act (415 ILCS 5/3.82 and 5/3.53 (1992)) which we examine today. Therefore, while not binding, the ICC determination and underlying analysis is nonetheless quite related to the issues now before us.

The issue before the Board is whether or not the wood being used to fuel the incinerator is a "solid waste" or "waste", as defined under the Act or the Board regulations. Section 3.82 of the Act defines "solid waste" to mean "waste" (415 ILCS 5/3.82 (1992)) and Section 3.53 of the Act, in relevant part, defines waste as:

any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or **other discarded material**, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities...(415 ILCS 5/3.53 (1992))
(Emphasis added.)

The Board has interpreted the meaning of "other discarded material" in connection with material that has been recovered and reused in decisions as to whether that material is governed by special waste hauling regulations. In those cases, Safety-Kleen Corp., Southern California Chemical Co., Inc., and R.R. Donnelley & Sons Co., we found that since the petitioners, the generators of the material, maintained control over the material in question, and the material was to be reused and not discarded, it was not a waste that required special waste hauling manifests. In R.R. Donnelley, on a motion to reconsider, the Board further concluded that even though R.R. Donnelley did not maintain complete control over the material (used oil) it was generating, it did have knowledge to whom it was selling the used oil, and the used oil was subsequently sent directly for reuse without further treatment, processing or storage.

These cases are distinguishable because the wood material being utilized here is not generated by Wood Energy as part of its manufacturing process. Here, the wood material is accepted from off-site generators, but then is further refined to conform to the specifications of produced wood fuel by Wood Energy and is not immediately used or stored to be used. In the above special waste cases the Board's decisions that the material was a waste or solid waste centered around the fact that the material was generated by the company using the material and was part of its ongoing process.

Here, Wood Energy is planning to incinerate approximately

220,000 tons of waste wood generated from industry, construction, demolition, forest land management, general land clearing operations, sawmills, wood product manufacturers (including those who manufacture pallets, cable spools, railroad ties, and telephone poles) and other "urban waste wood" at its facility. Wood Energy's produced wood fuel is nothing more than waste wood conforming to size requirements and air permitting requirements that would be necessary as part of any disposal system utilizing incineration. Incineration of the waste wood in this context is a waste treatment process. That energy is a by-product of this waste treatment process does not alter the character of the waste wood. Therefore, the produced wood fuel is and continues to be a solid waste and Wood Energy is a solid waste management facility which is governed by the Part 807 regulations.

Since Wood Energy is a solid waste management facility, the requirement of Section 21(d) of the Act would apply. The issue of adjusted standard relief from a requirement of the Act is still relevant based on the original petition filed by Wood Energy on February 8, 1994. However, Wood Energy seems to be limiting its request for relief pursuant to an adjusted standard as described in its post-hearing brief. As the Agency argues, this issue will require Wood Energy to file an amended petition identifying the regulations of general applicability from which it seeks adjusted standard from and to satisfy the statutory and regulatory informational requirements outlined in Section 28.1 of the Act and 35 Ill. Adm. Code 106.705. Therefore the Board will reserve ruling on the issue of availability of relief until Wood Energy files an amended petition outlining the specific relief requested and the required supporting documentation.

This interim opinion constitutes the Board's findings of fact and conclusions of law as to the issue discussed.

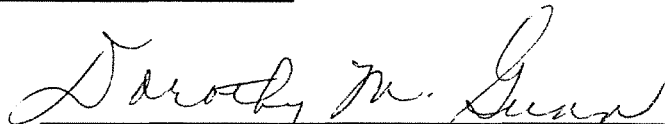
ORDER

For the reasons stated above, the Board finds that Wood Energy is a solid waste management facility as defined by the Act and the Board regulations. Having found previously that Wood Energy's petition is deficient Wood Energy is required to file an amended adjusted standard petition that satisfies the informational requirements set forth in Section 28.1 of the Act and 35 Ill. Adm. Code 106.705 before the matter may proceed. Such amended petition, or an otherwise appropriate motion, must be filed with the Clerk of the Board within 20 days of the date of this order. Failure to do so will subject this matter to dismissal.

IT IS SO ORDERED.

G. Tanner Girard Concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above opinion and order was adopted on the 6th day of October, 1994, by a vote of 6-0.



Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board