ILLINOIS POLLUTION CONTROL BOARD
December 14, 1994

AMERICAN TREE SERVICE, INC., an Illinois Corporation,	)	
Petitioner,	)	
v.	)	PCB 94-43 (Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

JAMES R. ENLOW OF SCOTT and SCOTT APPEARED ON BEHALF OF COMPLAINANT;

JOHN J. KIM and KYLE NASH DAVIS, ASSISTANT COUNSELS of the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT;

ERIC M. SCHWING OF SCHWING and SALUS, APPEARED ON BEHALF OF VAL-E-VUE IMPROVEMENT ASSOCIATION AS *AMICUS CURIAE*.

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

This matter is before the Board on a petition for review of an open burning permit with conditions issued by the Illinois Environmental Protection Agency (Agency) to American Tree Service, Inc., (American Tree) for its facility located in Sangamon County. The petition was filed by American Tree on January 25, 1994 and on February 3, 1994 an amended petition was filed. Specifically, American Tree objects to and requests the Board to review its open burning permit No. B9309040.

On March 28, 1994 the Val-E-Vue Improvement Association (Association) filed a motion to intervene as a respondent in this proceeding pursuant to 35 Ill. Adm. Code 103.142. On April 1, 1994 the Board denied the Association's motion but allowed the Association to file an amicus curiae brief at the close of the hearing pursuant to the briefing schedule as developed by the hearing officer. A hearing was held on August 18, 1994 in Springfield, Illinois. At hearing the parties agreed to file stipulated facts and cross motions for summary judgment. The stipulated facts were filed on September 15, 1994. The Agency's Motion for Summary Judgment was filed September 22, 1994 and American Tree's Motion for Summary Judgment was filed October 5, 1994. The Association's amicus curiae brief was filed October 11, 1994. Additionally, on September 13, 1994 the Springfield Airport Authority (Authority) filed a motion for limited appearance to submit a written statement. We grant such motion.

Issue Presented

The issue on appeal before the Board is whether an open burning permit can be issued without American Tree first having secured local siting approval pursuant to Section 39 of the Act. (415 ILCS 5/39 (1992).) The Agency argues that the following condition is necessary to take American Tree out of the requirement for local siting and insists on this condition in the permit:

> 7. Only landscape waste from American Tree Service Inc.'s own activities may be burned. Specifically, this is landscape waste generated or produced by American Tree Service Inc.'s own employees. However, for leaves to constitute landscape waste from America Tree Service Inc.'s own activity, leaves must be raked and gathered by American Tree Service Inc.'s employees. Further, American Tree Service Inc.'s activities do not include landscape materials produced or bagged by other individuals or subcontractors.

The specific issue before us is whether the permit can be issued without condition No. 7 (as American Tree desires) or with condition No. 7 (as the Agency proposes). The underlying issue is whether the landscape waste incinerated at American Tree's facility constitutes "waste" under Section 3.53 of the Illinois Environmental Protection Act (Act). (415 ILCS 5/3.53 (1992).)

Stipulated Facts

The parties have stipulated to all relevant facts, which are summarized as follows.

American Tree is a corporation, duly organized and existing under the laws of the State of Delaware, with its principle place of business located at 1701 Camp Lincoln Road, Springfield, Sangamon County, Illinois. American Tree's registered office is located at 1010 North Park, Springfield, Sangamon County, Illinois. American Tree conducts open burning of landscape waste with the use of an air curtain destructor. The facility is located in an area in which the unit of local government is Sangamon County, and the registered office is located in an area in which the unit of local government is the City of Springfield. American Tree has received three similar open burning permits from the Agency, the first dated October 26, 1988 and the last January 26, 1990.[1]

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[1] Open burning permit No. B8810034 was issued on October 26, 1988 and was valid from November 1, 1988, until November 1, 1989. Open burning permit No. B9001016 was issued on January 26, 1990 and was valid from January 26, 1990, until January 25, 1991. Both permits contained a special condition that only landscape waste may be burned.

American Tree operated under these permits for those years without any requests for modification. However, on August 23, 1990, the Agency received a request from American Tree to approve a modification of American Tree's open burning permit to allow the burning of aged leaves and grass clippings in plastic bags from the City of Springfield's 1989 and 1990 landscape waste collection program. The request for permit modification was to burn 60,000 bags that had been delivered to the American Tree facility. In response, the Agency requested more information concerning the nature and quantities of landscape waste that American Tree proposed to incinerate and why alternatives were not being utilized. On September 22, 1990, American Tree responded to the Agency, stating that the City of Springfield's ban on burning was the reason why no alternatives existed to open burning. In its response, American Tree also included a letter sent by it to Ossie Langfelder, Mayor of Springfield, offering that American Tree would burn leaves and grass clippings accumulated during the 1990 calendar year for $36,000.

On October 16, 1990, the Agency denied this request for permit modification. As one of its denial reasons, the Agency stated that the application did not demonstrate that the burning of leaves and grass at this site would not constitute a regional pollution control facility. Documentation of siting approval in accordance with Sections 39(c) and 39.2 of the Act was not submitted, as is required for regional pollution control facilities.

On April 30, 1991, the Agency received an application for open burning permit from American Tree, wherein Roy F. Throop, Jr., of American Tree questioned whether American Tree could be permitted to burn landscape waste other than its own; he defined other than its own as waste generated by companies beside American Tree. In response, on July 29, 1991, the Agency denied the application submitted by American Tree for an open burning permit based upon the fact that the burning described may violate Sections 9(a), 9(c), 21(d), 39(d), and 39.2 of the Act. (415 ILCS 5/9(a), 5/9(c), 5/21(d), and 5/39.2 (1992).)

On July 30, 1991, American Tree sent a letter to the Agency regarding the permitting status of a landscape waste storage facility with an air curtain destructor treatment unit. On July 31, 1991, the Agency responded to American Tree, informing it that a permit from the Agency's Division of Land Pollution Control would be required for the development of the type of solid waste management facility described by American Tree. The Agency letter also stated that if the facility accepted waste from outside a general purpose unit of government, the facility would be required to obtain siting as a regional pollution control facility.

On October 22, 1991, an open burning permit was issued by

the Agency to American Tree following review of open burning permit application No. B9110097. This permit was valid from October 22, 1991, until October 21, 1992, and it allowed American Tree to open burn with the aid of an air curtain destructor. Unlike the previous permits, this permit contained the following special condition:

> "Only landscape waste generated by ATS Service's own activities may be burned."

The permit was also accompanied by a letter from Delbert Haschemeyer, then Associate Director of the Agency, which stated in part:

> *** "Landscape Waste" which is picked up or otherwise removed from premises on which it originated and transported by ATS Service Inc., to its facility at 1701 Camp Lincoln Road, Springfield, [sic] waste generated by ATS Service Inc.'s own activity and may be burned under the terms and conditions from the permit reached by the Agency on October 22, 1991. ***

On December 17, 1991, and again on October 19, 1992 open burning permits were issued by the Agency to American Tree. The last open burning permit was valid from December 17, 1991, until December 17, 1993. In addition to the above-referenced condition, it contained the following special condition: "[o]nly landscape waste may be burned."

On November 3, 1993, the Agency sent a letter to American Tree indicating the Agency's intent to review the information contained in open burning permit application No. B9309040. The Agency also stated in the letter that site inspections indicated violations of Section 9(b) and 39.2 of the Act (415 ILCS 5/9(b) and 5/39.2), as well as special condition No. 7 of open burning permit No. B911097.[2]

On December 21, 1993, an open burning permit was issued by the Agency to American Tree following review of open burning permit application No. B9309040. This permit was valid from December 21, 1993, until December 20, 1994, and it also allowed American Tree to open burn with the aid of an air curtain destructor. The open burning permit issued on December 21, 1993, contained, inter alia, the following special conditions:

> 7. Only landscape waste from American Tree

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2 The alleged violations that are discussed in the Agency's letter are not before the Board in this matter.

> Service Inc.'s own activities may be burned. Specifically, this is landscape waste generated or produced by American Tree Service Inc.'s own employees. However, for leaves to constitute landscape waste from America Tree Service Inc.'s own activity, leaves must be raked and gathered by American Tree Service Inc.'s employees. Further, American Tree Service Inc.'s activities do not include landscape materials produced or bagged by other individuals or subcontractors.
>
> 8. Only landscape waste may be burned.

The open burning permit issued on December 21, 1993, also denied a request by American Tree to reissue the open burning permit such that condition No. 7 would read as found in the open burning permit issued on October 26, 1988.

Additionally, the parties stipulated that if a hearing in this matter were held, the Agency would present testimony that other facilities which open burn landscape waste were required to obtain local siting approval prior to the issuance of the air permit, e. g. JKS Ventures, Inc., located in Melrose Park, Illinois. Also, the Agency would present testimony that in open burning permit applications submitted by the City of Monticello, Illinois, and Modern Environmental Facilities, Inc.(located in Pana, Illinois), both of which concerned the open burning of landscape waste, the Agency had determined that the facilities in question were not regional pollution control facilities so long as they only accepted landscape waste generated within the city limits of Monticello and Pana, respectively.[3] Finally the parties stipulate that unless otherwise specified, any information contained in the administrative record is admissible.

Applicable Law

This proceeding is before the Board on cross motions for summary judgment.[4] We find that summary judgment is appropriate here because there are no genuine issues of fact remaining and only issues of law remain to be decided by the Board.

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3 The decision in TENNSV v. Gade, (1994), Nos. 92-502 and 92-503, was decided subsequent to the Agency's determination in these matters.

4 Summary judgment is appropriate when there are no genuine issues of fact to be considered by the trier of fact and the movant is entitled to judgment under the law. (Williamson Adhesives, Inc. v. EPA, No. PCB 91-112 (Aug. 22, 1991), Caruthers v. B.C. Christopher & Co., 57 Ill. 2d 376, 380, 313 N.e. 2d 457, 459 (1974).)

In a proceeding for review of permit denial authorized by Section 40(a)(1) of the Act [415 ILCS 5/40 (a)(1)] and 35 Ill. Adm. Code Section 105.102(a), the statute provides that the burden of proof shall be on the petitioner. The petitioner bears the burden of proving that operating pursuant to the permit, as requested from the Agency, as submitted, would not violate the Act or the Board's regulations. This standard of review was discussed in Browning-Ferris Industries of Illinois, Inc. v. Pollution Control board, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (Second District 1989) and reiterated in John Sexton Contractors Company v. Illinois (Sexton), PCB 88-139, February 23, 1989. In Sexton the Board held:

> . . . that the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued.

Therefore, a petitioner must establish to the Board that issuance of the permit as requested would not violate the Act or the Board's rules. In this case, American Tree has the burden of demonstrating that condition No. 7 is not reasonably required and that the permit can be issued without the necessary local siting approval pursuant to Section 39.2 of the Act. (415 ILCS 5/39.2 (1991).)

Section 9(c) of the Act provides that no person shall:

> Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board under this Act; except that the Board may adopt regulations permitting open burning of refuse in certain cases upon a finding that no harm will result from such burning, or that any alternative method of disposing of such refuse would create a safety hazard so extreme as to justify the pollution that would result from such burning;

Section 9(f) of the Act provides, in relevant part, that Section 9:

> ". . . shall not limit the burning of landscape waste upon the premises where it is produced or at sites provided and supervised by any unit of local government, except within any county having a population of more than 400,000."

The following definitions, relevant to this issue, are

contained in Section 3 of the Act:

> Sec. 3.08. **"Disposal" means the discharge**, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well **so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air** or discharged into any waters, including ground waters. (Emphasis added.)
>
> Sec. 3.20. "Landscape waste" means all accumulations of grass or shrubbery cuttings, leaves, tree limbs and other materials accumulated as the result of the care of lawns, shrubbery, vines and trees.
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> Sec. 3.21. "Municipal waste" means garbage, general household and commercial waste, industrial lunchroom or office waste, landscape waste, and construction or demolition debris.
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> Sec. 3.24. "Open dumping" means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. (Source: P.A. 84-1308.)
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> Sec. 3.32. (a) "Regional pollution control facility" is any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility or **waste incinerator that accepts waste from or that serves an area that exceeds or extends over the boundaries of any local general purpose unit of government.** This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act. (Emphasis added.)

The following are not regional pollution control facilities:

> (3) sites or facilities used by any person conducting a waste storage, waste treatment, waste disposal, waste transfer or waste incineration operation, or a combination thereof, for **wastes generated by such person's own activities, when such wastes are stored, treated, disposed of, transferred or incinerated within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person;** (Emphasis added.)
>
> (6) Sites or facilities used by any person to

specifically conduct a landscape composting operation;

Section 3.53. "Waste" means 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**, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

Section 3.69. "Compost" is defined as the humus-like product of the process of composting waste, which may be used as a soil conditioner.

Section 3.70. "Composting" means the biological treatment process by which microorganisms decompose the organic fraction of waste, producing compost. (Source: P.A. 85-1429.)

Section 22.22(e) of the Act provides:

> (c) Beginning July 1, 1990, no owner or operator of a sanitary landfill shall accept landscape waste for final disposal, except that landscape waste separated from municipal waste may be accepted by a sanitary landfill if (1) the landfill provides and maintains for that purpose separate landscape waste composting facilities and composts all landscape waste, and (2) the composted waste is utilized, by the operators of the landfill or by any other person, as part of the final vegetative cover for the landfill or for such other uses as soil conditioning material.

Arguments of the Parties

Each party argues that summary judgment should issue in its favor. Since there are no facts in dispute, the parties argue only their interpretations of the relevant law. A recitation of each of their positions follows:

A. The Illinois Environmental Protection Agency

The Agency believes that condition No. 7 is a necessary condition to the issuance of the air permit because, it argues, without this condition American Tree would constitute a "regional pollution control facility," hereinafter referred to as RPCF, (415 ILCS 5/3.32 (1992)) and therefore would require local siting approval, pursuant to Sections 39 and 39.2 of the Act, and various other waste handling land permits prior to its issuance. The Agency believes that condition No. 7 keeps American Tree out of the realm of RPCFs because it is drafted so as to mandate that any landscape waste incinerated by American Tree must be produced and generated by American Trees' own activities and employees. The Agency obviously believes that this condition would put American Tree into the exclusion from the definition of a RPCF pursuant to Section 3.32(a)(3) of the Act. Section 3.32(a)(3) provides an exception for facilities that store, treat, incinerate wastes generated by its own activities.

According to the Agency, "landscape waste" is generally the same thing as "waste" as defined in Section 3.53 and 3.21 of the Act. Under Section 3.53, the definition of "waste" itself, it argues that the portion of the definition which includes "other discarded material.... from community activities..." clearly includes the landscape waste which American Tree plans to purchase from individuals and communities and incinerate at its facility.

It argues that the Appellate Court's decision in City of Lake Forest v. Pollution Control Board, (1986), 497 N.E.2d 181, does not prevent the Board from determining that the landscape waste proposed to be incinerated at American Tree is a waste. In that case, the Second District Appellate Court reversed a June 13, 1985 Board cease and desist order against Lake Forest, concerning that city's passage of a municipal ordinance permitting and regulated leaf burning within its jurisdiction. The Board had found that Lake Forest's ordinance unlawfully allowed open burning of "refuse" or "waste." Among other things, the court disagreed problems with the Board's conclusion that the leaves being burned on people's own properties constituted "waste" under the Act.

The Agency would distinguish Lake Forest on the basis that "(t)here is significant distinction between whether a person can lawfully burn their own leaves on their own property under Section 9 of the Act... and whether a company can commercially have landscape waste collected, and then store and subsequently burn such landscape waste without a permit under Section 21 and without proof of siting approval under Section 39(c) of the Act from the unit of local government it operates within." (Agency's

Mot. at 20.)[5]

Further, the Agency questions whether the 1986 decision in Lake Forest is still "good law today in light of subsequent amendments by the drafters of the Act." (Agency's Mot. at 20.) Specifically, the Agency argues that several amendments of the Act subsequent to the Lake Forest decision tend to demonstrate that the legislature intends that the definition of "waste" generally includes "landscape waste."

In Public Act 85-1429, Section 22.2(c) of the Act (effective January 5, 1989), the legislature prohibited sanitary landfills from accepting most "landscape waste for final disposal" and expressed a preference for composting. The Agency argues that this section evidences a legislative intent that landscape waste is a waste since "the phrase 'landscape waste for final disposal' is meaningless unless 'landscape waste' is a 'waste'." Also, it argues that since "disposal" is an activity which by definition (415 ILCS 5/3.08 (1992)) only applies to waste or hazardous waste, the activity could not be considered disposal under the Act if the material in question were not a waste.

Further, the Agency argues that when the legislature added various sections concerning composting to the Act (415 ILCS 5/22.33 and 5/22.34 (1992)), it legislatively treated the word "waste" as if "waste" and "landscape waste" were one and the same thing when dealing with the concept of natural materials which decompose, such as leaves and other landscape "waste". For example, Section 3.70 of the Act defines composting as "the biological treatment process by which microorganisms decompose the organic fraction of waste, producing compost" and Section 3.69 defines "compost" as "the humus-like product of the process of composting waste, which may be used as soil conditioner." The Agency also argues that the legislature's exclusion of "landscape composting operation(s)" from the definition of Regional Pollution Control Facility evidences a legislative treatment of landscape waste as waste. Otherwise, it argues, such exclusion for composting operators would not have been necessary.

The Agency cites other sections of the Act in which amendments have been made that specifically exclude "landscape waste" from a general provision regarding waste such as:

> *Sections 14.4(a)* which requires groundwater regulations to be proposed for "waste which could cause contamination of groundwater and which are generated on the

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5 The Agency's Motion for Summary Judgment will be referenced as "Agency's Mot. at " and American Tree's Motion for Summary Judgment will be referenced as "American Tree's Mot. at ". The Association's Amicus Curiae Brief will be referenced as "Assoc. at".

site, other than...landscape waste";

Section 14.5(b)(1) which requires that "no on-site landfilling,...of waste, other than landscape waste or construction and demolition debris, has taken place" as a necessity for providing certification of minimal hazard to the Agency pursuant this section (415 ILCS 5/14.5(b)(1) (1992);

Section 22.15(c)(2) and *22.15(k)(5)* which limit permitted landfills to receiving only demolition or construction debris or landscape waste. (415 ILCS 5/22.15(c)(2) and 22.15(k)(5) (1992).)

The Agency also cites other sections of the Act which utilize the term "waste" for the general proposition that these terms, as used legislatively, are used interchangeably and are not mutually exclusive. (Agency Mot. at 12-19.)

Finally, the Agency argues that environmental policy considerations support the finding that "landscape waste" is a "waste" as defined in Section 3.53 of the Act. Generally, the Agency argues that a general treatment of landscape waste different from that of "waste", where not required by the legislature, would result in the loss of significant regulatory control. As examples, it argues that if landscape waste is not considered "waste", large landscape waste storage or transfer sites could develop without regard to the land and waste permit requirements and the local siting requirements, and that "landscape waste only" landfills might be developed and operated without regard to a permit otherwise required under Section 21 of the Act.

The Agency also responds to American Tree's argument that, even if landscape waste is a waste, condition No. 7 is unnecessary and unreasonable. The Agency argues that a facility accepting waste from outside a general purpose unit of government is a RPCF under Section 3.32 of the Act and as such is required to obtain local siting approval pursuant to Section 39(c) of the Act prior to the Agency issuing a permit for such activity. The Agency argues that the definition of a RPCF excludes facilities that only accept wastes generated by such person's activities and that condition No. 7 is necessary for American Tree to fit into that exclusion.[6] The Agency argues that condition No. 7 reflects

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6 The Act excludes from the definition of RPCF and concomitant requirements for local siting approval facilities which accept "wastes generated by such person's own activities, when such wastes are stored, treated, disposed of, transferred or incinerated within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person" (415 ILCS 5/3.32(a)(3) (1992).)

the courts' interpretation of "generated by the operator's own activities" in the cases of Pielet Bros. Trading, Inc., v. Pollution Control Board, et al., (1982), 110 Ill. App.3d 752 and Wasteland, Inc., et al. v. Pollution Control Board, et al., (1983), 118 Ill. App. 3d 1041. The Agency states that without condition No. 7 American Tree will need to obtain local siting approval in order for the Agency to issue an open burning permit.

B. American Tree Service

American Tree Service argues some of the same statutory provisions as the Agency, but it does so toward the conclusion that the terms "landscape waste" and "waste" are mutually exclusive. It argues that if the legislature intended to consider landscape waste as "other discarded material", it should have done so and should have included it after the word "including". It further argues that since "landscape waste" is particularly included in the definitions of Municipal waste (Section 3.21) and Organic waste (Section 22.34), the legislature's failure to specially include it in the general definition of "waste" shows an intent not to consider it "waste."

American Tree believes that the Lake Forest decision is still good law and that it calls for the conclusion that landscape waste is not a waste. It cites the court's conclusion that "...the legislature specifically included leaves in its definition of 'landscape waste' in the Act {citation omitted] as a separate category of waste, indicating a legislative intent that leaves do not come within the general definition of waste under the Act." (American Tree Mot. at 11.) It argues that if the legislature wanted "landscape waste" to be treated as general "waste," it should have specifically so stated in the public acts that have been enacted subsequent to the Lake Forest decision. Although the Agency argues that these acts evidence an intent to include landscape waste, American Tree argues that "the Agency cannot, and will not find the five (5) words it needs: 'landscape waste is a waste'." (American Tree Mot. at 6.) American Tree analyzes each of the four amendments analyzed by the IEPA and urges the opposite result. (American Tree Mot. at 7-11.)

Finally, American Tree argues that even if the Board determines that "landscape waste" is a "waste" under the Act, there is no reasonable basis for condition No. 7 in the requested permit. It considers condition No. 7 a restrictive condition which has no justifiable basis and which is confusing in that it contains terminology not elsewhere defined in the Act: "activities", "generated", and "produced". It further argues that the Agency's permit has become more restrictive over time and that condition No. 7 will adversely affect its ability to conduct business and is wholly arbitrary since "there has been no open burn permit issued in the State of Illinois since January 1,

1991 which contains the same or even a similar condition." American Tree rather, while not agreeing with the general position, cites Haschemeyer's letter in pertinent part as follows: "{It} is the actual pick up and removal from the premises which constitute the activities which makes leaves a discarded material..." (American Tree at 12.)

C. Statements of Non-Parties

(i) Springfield Airport Authority

The Authority asserts that if American Tree's air permit allows it to accept waste from across boundaries of a general purpose unit of government, without first obtaining local siting approval pursuant to Section 39 and 39.2 of the Act, the air permit would be in violation of the Act. The Authority is opposed to the issuance of the permit, without at least condition No. 7, because of safety concerns at the airport. The Authority states that American Tree's activities take place approximately 4500 feet from the nearest runway and 2500 feet from its property. The Authority's concerns arise from the possible increase of smoke and the attraction of wildlife, specifically birds, that could impede a pilot's vision.

(ii) Val-E-Vue Association

The Association states in its amicus brief that the definition of waste at Section 3.53 of the Act is written broadly with only certain exclusions, and landscape waste is not one of them. The Association believes that to interpret the section otherwise would mean that all the other defined wastes, such as hazardous waste, industrial process waste, and municipal waste, would also be excluded as non-waste. The Association believes that the only reasonable construction of the Act would be to include all terms that include the word "waste" in their titles, as waste defined by Section 3.53 of the Act.

The Association also believes that the definition of industrial process waste that excludes landscape waste does not mean that landscape waste is not a waste, but is evidence that it is a type of waste because if it was not a waste the exclusion would not be necessary. Furthermore, the Association states that American Tree's arguments concerning Section 22.15 of the Act do not tend to show that the legislature intended that landscape waste is not a waste, but only that it meant to exclude landscape waste from the tipping fees associated with that section.

Regarding the Lake Forest decision, the Association asserts that the decision is not applicable here, as it dealt with whether a city ordinance may allow leaf burning and is limited to a construction of the words "waste" and "refuse" as they apply to leaves found on one's own property. (Assoc. Brief at 6.) Like

the Agency it also questions whether the decision is still "good law" in light of the subsequent statutory amendments concerning landscape waste.

The Association concludes by stating that issuance of the permit, even with Agency condition No. 7, would violate the Act if American Tree does not first obtain local siting approval. The Association believes that since American Tree's is a landscape business which picks up landscape waste that has been discarded by homeowners and municipalities, and condition No. 7 does not allow for an appropriate exemption from to the siting law. The Association cites to Pielet and Joos Excavating v. Pollution Control Board, 58 Ill. App. 3d 309 (3rd Dist. 1978) for support that American Tree is not generating the waste from its own activities. Instead, the Association argues that American Tree is collecting waste generated by others and disposing of it at its facility. It believes that, even with permit condition 7, American Tree is a regional pollution control facility which needs local siting before the open burning permit in controversy is properly issued.

Discussion

Section 3.53 of the Act defines waste as "...any garbage, sludge from a waste treatment plant... **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.) We find that landscape waste, although separately defined, is nonetheless a waste. We find that the general definition at Section 3.53 of the Act includes all specifically-defined types of wastes, such as landscape waste and hazardous waste. To find otherwise would mean that all waste with specific definitions, such as municipal waste, industrial process waste and organic waste, would not be "waste" as defined by Section 3.53 of the Act. We agree with the Agency's and the Association's construction of legislative intent: that when construing the Act, "landscape waste" should be considered a subset of "waste" unless it has been specifically excluded as it is in Sections 3.17, 3.60(1), 14.5(a)(1) and 14.5(b)(1) of the Act. (415 ILCS 5/3.17, 5/3.60(1), 5/14.5(a)(1) and (b)(1) (1992).)

The First District decision in Lake Forest does not require otherwise. The decade-old decision, which preceded virtually all legislative treatment of the term "landscape waste", is easily distinguished from this case. In Lake Forest, the court reversed a Board decision that found that an ordinance which regulated leaf burning violated the open burning provisions of Sections 9(a) and (c) of the Act, since it, in effect, allowed for such burning. (415 ILCS 5/9(a) and (c) (1992).) The court quite simply was saying that leaves which fall naturally from the

trees do not constitute "refuse" pursuant to the open burning provisions of the Act and, since "refuse" is defined as "waste", a person's yard leaves do not constitute waste. Not surprisingly, the court rejected the former Board opinion and concluded that the legislature, by promulgating Section 9 of the Act, intended that the burning of leaves and other landscape wastes is quite permissible on the premises where it is produced by nature, or at sites provided and supervised by local governmental units. That holding is still good law.

Here, almost a decade and various legislative amendments later, the Board is confronting a wholly new and different factual situation and regulatory scheme than what the court confronted in Lake Forest. There is no unit of local government involved. The Board is not prohibiting the burning of landscape waste, nor is there any issue of the burning of landscape waste on the premises where it was generated. Finally, the decision in Lake Forest was not interpreting the Act in the context of a permit appeal in which the Agency has the authority to impose conditions in the permit necessary to accomplish the purposes of the Act.

Having decided that landscape waste is a "waste" for purposes of the local siting law, the Board must determine whether the Agency's proposed condition No. 7 brings American Tree out of the realm of regional pollution control facilities. It is well settled that the purpose of the local siting law is to place decisions regarding sites for waste disposal and waste incineration in the hands of local authorities. See E & E Hauling, Inc. v. Pollution Control Board, (1985), 107 Ill.2d 33, 89 Ill.Dec. 821, 481 N.E. 2d 664.

Several exceptions to local siting requirements are provided in the Act. As discussed earlier, we do not read the Act to exclude landscape waste from the definition of "waste" in the local siting law and, therefore, the fact that American Tree burns landscape waste provides them no exception. Further, we do not believe that the Agency's condition No. 7 sufficiently restricts the landscape waste American Tree can accept in order for it to be excluded as a RPCF. Clearly the condition attempts to bring American Tree within the exclusion for facilities which dispose of:

> "wastes generated by such person's own activities, when such wastes are stored, treated, disposed or, transferred or incinerated within the site or facility owned, controlled or operated by such person, or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person." (415 ILCS 5/3.32(a)(3) (1992).)

Thus, the condition purports to limit the landscape waste to that

from ATS' own activities, and thereby exclude the facility from the definition of an RPCF. We find that it does not.

Here we are confronted by a facility which incinerates landscape waste which is not generated on-site, but which is discarded by individual homeowners and units of local government. The condition still appears to allow for the collection of landscape waste which is generated off-site and on premises other than ATS', so long as it is raked and gathered by American Tree employees. While the last sentence of the condition seems to suggest that American Tree is prohibited from burning landscape materials which is "produced or bagged" by other individuals or subcontractors, we are not convinced that even that prohibition goes far enough to ensure that American Tree is not a RPCF as a result of its operation. As written, condition No. 7 potentially allows American Tree to incinerate, at its facility in Sangamon County, landscape waste that is generated from anywhere in the State, or the world, as long as it is being collected by American Tree employees. This would truly circumvent the purposes of the Act as set forth in Sections 3.32, 39 and 39.2.

In a similar set of circumstances dealing with refuse collection pursuant to then Section 1021(e) of the Act (Ill.Rev.Stat. 1975, ch. 111 1/2, par. 1021(e)) the court in R.E. Joos Excavating v. Environmental Protection Agency, (3rd Dist. 1978), 58 Ill.App.3d 309, 374 N.E. 2d 486, interpreted the phrase "[c]onduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities,..." to be applicable to "...refuse generated on the site where it is to be disposed of." (Id. at 489.) We agree with the court's reasoning. The words "own activities" must be connected to something more than "activities" of a company's employees such as what is set forth in condition No. 7. Rather, those words must have some connection to the waste that is generated by the facility itself. In that American Tree burns landscape waste that it, as a company, does not "generate" on its own Sangamon site, it is a regional pollution control facility. It does not fit the stated exemption, even given the rather strained requirements of condition No. 7. In sum, under the definition of the Act and case precedent, American Tree would be considered a regional pollution control facility that is required to obtain local siting approval pursuant to Section 39.2 of the Act prior to Agency issuance of an operating permit if it accepts landscape waste for incineration at its facility that is generated by others.

For these reasons we find that, since "landscape waste" is a "waste" for purposes of Section 39 of the Act and since condition No. 7 fails to sufficiently limit American Tree as a RPCF, the open burning permit at issue before us cannot be granted without American Tree first obtaining local siting approval. Absent such approval, this permit, even with condition No. 7, would violate

the Act.

In summary the Board finds that "landscape waste" is a "waste" as defined by Section 3.53 of the Act. (415 ILCS 5/3.53 (1992).) American Tree would be a "regional pollution control facility" as defined by Section 3.32 of the Act if it accepts landscape waste for incineration that is from outside the boundaries of the general purpose unit of government where its facility is located. Therefore, American Tree is required to obtain local siting pursuant to Sections 39 and 39.2 of the Act in order for the Agency to issue an operating permit without condition No. 7 so that the Agency permit would not violate the provisions of the Act. The Board also finds that issuance of permit No. B9309040 as written, including condition No. 7, violates the Act since local siting approval has not been sought and given pursuant to Section 39 of the Act. Therefore, the Board invalidates American Tree's open burning permit No. B9309040 as issued by the Agency.

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

Order

For the reasons expressed in the foregoing opinion, the Board hereby grants the Illinois Environmental Protection Agency's motion for summary judgment in that landscape waste is "waste" and local siting approval for American Tree Service Inc.'s (American Tree) facility is required. However, for the reasons stated in this opinion, permit No. B9309040 as issued to American Tree with condition No. 7 is invalid.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders 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.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 14th day of December, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board