ILLINOIS POLLUTION CONTROL BOARD
January 10, 2008

PEORIA DISPOSAL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 08-25
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

BRIAN J. MEGINNES AND JANAKI NAIR OF ELIAS, MEGINNES, RIFFLE & SEGHETTI, P.C., AND CLAIRE A. MANNING OF BROWN HAY AND STEPHENS LLP APPEARED ON BEHALF OF PETITIONER PEORIA DISPOSAL COMPANY; and

MICHELLE M. RYAN, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT ILLINOIS ENVIORNMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

Peoria Disposal Company (PDC) applied to the Illinois Environmental Protection Agency (Agency or IEPA) for modification of its permit issued under the Resource Conservation and Recovery Act (RCRA). Specifically, PDC sought the permit modification to allow the expansion necessary to construct its proposed residual waste landfill (RWL). The Agency denied PDC's request on the basis that PDC had failed to submit proof of local siting approval. PDC timely filed a petition for review seeking a Board order reversing the Agency's determination and remanding its application to the Agency for review of its technical merits.

For the reasons stated below, the Board today finds that PDC's proposed RWL is not excluded from the definition of "pollution control facility" and must demonstrate proof of local siting approval. Accordingly, the Board affirms the Agency's determination that PDC's application for Class 3 modification of its RCRA Part B permit requires proof of local siting approval.

This opinion first reviews the procedural history of this case before providing the facts and the relevant statutory provisions. It then summarizes the post-hearing briefs filed by PDC and the Agency. After discussing the standard of review and burden of proof applicable to this case, the opinion analyzes those arguments and states its conclusion.

PROCEDURAL HISTORY

On September 17, 2007, PDC filed a "Petition for Review of Permit Denial" (Pet.). In an order dated September 20 2007, the Board accepted the petition for review. The Agency filed the administrative record (R.) on October 19, 2007.

Hearing Officer Carol Webb conducted a hearing (Tr.) on November 6, 2007, in the Peoria County Board Room. Mr. Ron Edwards testified on behalf of PDC (Tr. at 15-28), and Mr. Mark Crites testified on behalf of the Agency (Tr. at 29-41). Hearing Office Webb found both witnesses credible. Tr. at 83. The hearing officer admitted into the record a single joint exhibit, a stipulated statement of facts (Exh. 1). Tr. at 14. Fifteen persons at the hearing offered a public comment: Ms. Phyllis Pryde (Tr. at 42-46), Dr. Gary Zwicky (Tr. at 46-49), Ms. Joyce Blumenshine (Tr. at 50-52), Mr. Jay Meinrich (Tr. at 52-53), Ms. Tracy Fox (Tr. at 53-55), Ms. Chris Ozuma-Thonrton (Tr. at 55-60), Ms. Kathy Stevenson (Tr. at 60-61), Mr. Dan Pioletti (Tr. at 61-62), Ms. Jean Roach (Tr. at 62-63), Ms. Suzanne Gerard (Tr. at 63-64), Ms. Karen Raithel (Tr. at 64-67), Ms. Kim Converse (Tr. at 68-70), Ms. Tessie Bucklar (Tr. at 70-71), Mr. David Wentworth (Tr. at 72-76), and Mr. Tom Edwards (Tr. at 76-80).

On November 16, 2007, PDC filed its post-hearing brief (PDC Brief). On November 28, 2007, the Agency filed its post-hearing brief (Agency Brief). On December 3, 2007, PDC filed its reply (Reply).

The Board received 292 public comments in this proceeding. Specifically, the record includes 253 postcards, all of which appear to be identical to one another with the exception of the sender's name and address. PC #37-253, 257-92. These postcards state in part that "I am writing to ask the Illinois Pollution Control Board to uphold the Illinois EPA's denial of PDC's request for a Class 3 permit modification (case PCB 2008-025)." *E.g.*, PC #37. The Board also received 39 letters addressing various aspects of or issues pertaining to this proceeding. PC # 1-36, 254-56. In various terms, each of these letters opposes PDC's application for permit modification.[1] *E.g.*, PC #20 ("Please uphold IEPA's correct decision on this most important issue.")

FACTS

At hearing, the parties filed a Stipulated Statement of Facts, which the hearing officer admitted into the record as Exhibit 1 (Tr. at 14; *see* Exh. 1) and which the Board quotes below.

"On or about January 5, 2007, PDC submitted to the IEPA an application for modification of PDC's RCRA Part B Permit No. ILD000805812/1438120003, Log No. 24, which was issued to Petitioner by the IEPA's Bureau of Land on November 4, 1987 . . . ." Exh. 1 (¶1); *see* R. at 2-9. The application seeks "to allow the development and operation of a landfill unit known as the PDC No. 1 Residual Waste Landfill . . . for acceptance of residual waste from PDC's RCRA-permitted Waste Stabilization Facility [(WSF)]. . . . The RWL would be a dedicated landfill that would accept only waste residuals generated by PDC in its WSF." Exh. 1 (¶2); *see* R. at 12 (overview). Specifically, "[t]he Application relates to a proposed vertical expansion over the currently permitted 32.4 acre landfill ('Area C') plus an approximately 8.2

[1] The Board notes that PC #15 appears to be identical to PC #10, a fax transmission.

acre horizontal expansion adjacent to the southwestern portion of Area C." Exh. 1 (¶3); *see* R. at 12; R. at 38B (General Plan); R. at 1220 (Site Plan). "The RWL will provide approximately 2 million tons of disposal space to be used for residual waste from the PDC hazardous waste stabilization facility." Exh. 1 (¶5); *see* R. at 12; R. at 1324 (design capacity). "By letter dated August 30, 2007, the IEPA denied PDC's Application. The IEPA's stated rational[e] for the denial was that the Application was deficient because it did not show proof on local siting pursuant to Section 39.2 of the Illinois Environmental Protection Act . . . ." Exh. 1 (¶6), citing R. at 1369-70.

"PDC owns and operates a hazardous waste stabilization facility . . . in which PDC mixes metal-bearing hazardous wastes from various sources with chemical compounds ('reagents') to create a chemically stable product with dramatically reduced leachable concentrations." Exh. 1 (¶7). "PDC then disposes of the treated residue in PDC Landfill No. 1 (the 'Existing Landfill')." Exh. 1 (¶8). "PDC owns the Existing Landfill." Exh. 1 (¶9); *see* R. at 1131 (photo of WSF and portion of location of proposed RWL); R. at 1220 (site plan); R. at 1221-26 (deed and plat of survey).

"The WSF was approved in PDC's RCRA Part B Permit issued by the IEPA for operation in 1989." Exh. 1 (¶14); *see* Tr. at 19-20. "In 1995, PDC submitted a Class 2 permit modification request to the U.S. Environmental Protection Agency (the 'USEPA') to change the WSF from a waste pile to a containment building unit." Exh. 1 (¶15); *see* R. at 12-13, 1120. "This request was approved in a letter from the USEPA dated May 3, 1996." Exh. 1 (¶16); *see* R. at 1133-38 (permit section addressing containment building). "PDC receives waste at the WSF in accordance with PDC's issued RCRA Part B Permit." Exh. 1 (¶18); *see* R. at 13, 1120. "This issued permit authorizes PDC to accept the wastes for treatment at the WSF." Exh. 1 (¶19); *see* R. at 13, 1120. "PDC is not requesting any change to the WSF as a result of the Class 3 permit modification requested in the Application." Exh. 1 (¶20); *see* R. at 13, 1120.

"The WSF is currently authorized for storage and treatment of hazardous and non-hazardous wastes." Exh. 1 (¶21); *see* R. at 13, 1120. "The principal treatment activity currently conducted in the WSF is microencapsulation of RCRA hazardous wastes utilizing reagents designed to reduce the leachability of inorganic hazardous constituents in accordance with the Best Demonstrated Available Technology Standards prescribed by the USEPA and the IEPA." Exh. 1 (¶22); *see* R. at 13, 1120. "The chemical and physical makeup of the waste received into the WSF is changed by the treatment process." Exh. 1 (¶23); *see* R. at 13, 1120.

> Chemically, PDC's addition of proprietary chemical reagents converts metals within the untreated waste into relatively non-leachable hydroxides and silicates, rendering the treated residue compliant with the RCRA Land Disposal Restriction ("LDR") standards, which are in most cases below those concentrations allowed at RCRA Subtitle D, non-hazardous landfill facilities. Exh. 1 (¶24); *see* R. at 1120.

"Treatment is performed on a batch basis." Exh. 1 (¶25); *see* R. at 1120. "Generally, wastes from several producers are placed in a mixer." Exh. 1 (¶26); *see* R. at 1120.

> Physically, the untreated waste is commingled and blended with other wastes, the chemical reagents, and water used as a slurrying agent, resulting in an exothermic chemical reaction which produces a residue possessing much greater mass, stability, load bearing capacity, and cohesion relative to untreated waste. Exh. 1 (¶27); *see* R. at 38I, 1140 ("PDC 1 Stabilization Mixer"); R. at 1120.

"Samples of untreated wastes received at the WSF generally exceed the LDR standards for leachable metal compounds and are, therefore, prohibited from land disposal under RCRA." Exh. 1 (¶29); *see* R. at 13, 1121. "After treatment, samples of the treated residues from this process undergo TCLP analysis to demonstrate that they do not exceed applicable LDR standards prior to disposal." Exh. 1 (¶30); *see* R. at 13, 1121. "Sampling and analysis procedures are detailed in PDC's RCRA Part B Permit." Exh. 1 (¶31); *see* R. at 13, 1121; *see also* R. at 1142-44 (Sampling and Analysis Procedures).

"PDC also performs solidification of both hazardous and non-hazardous liquid waste in the WSF." Exh. 1 (¶32); *see* R. at 13, 1121. "This is accomplished through the use of pozzolanic reagents which convert liquids or semi-liquids into more stable solids." Exh. 1 (¶33); *see* R. at 13, 1121. "Samples of these residues are subjected to the paint filter and load bearing capacity tests prior to disposal." Exh. 1 (¶34); *see* R. at 13, 1121. "As with bulk treated wastes, these wastes change in physical and chemical form during the solidification process." Exh. 1 (¶35); *see* R. at 13, 1121.

"PDC is required by law and regulation to maintain a waste locator log which documents the location of all hazardous waste placed in to the Existing Landfill." Exh. 1 (¶36); *see* R. at 1123. "Pursuant to regulation, PDC is required to list in the log the generator of the waste being deposited into the Existing Landfill." Exh. 1 (¶37); *see* R. at 1123. "From its initial operation of the WSF, PDC has always documented PDC as the specific generator of the waste generated at the WSF and deposited into the Existing Landfill." Exh. 1 (¶38); *see* R. at 1123. "The locator logs have undergone numerous reviews by IEPA personnel during landfill inspections." Exh. 1 (¶39); *see* R. at 1123. "PDC was correctly identified as the generator of the treated residue deposited into the Existing Landfill in the locator logs." Exh. 1 (¶40); *see* R. at 1123, R. at 1146-47 (excerpts from waste locator logs); *see also* Tr. at 25-26.

"On January 13, 1989, the IEPA issued supplemental permit number 881046 to PDC for the disposal of stabilization residues-K061 which designated PDC as the generator of the treated residue for K061 from the WSF and authorized PDC to deposit the treated residue into the Existing Landfill." Exh. 1 (¶42); *see* R. at 1123, R. at 1149-50 (supplemental permit 881046). "In accordance with supplemental permit 881046, PDC deposited treated K061 residue in the Existing Landfill beginning on January 17, 1989." Exh. 1 (¶43); *see* R. at 1123.

"On February 10, 1989, the IEPA issued supplemental permit number 890106 to PDC for non-hazardous stabilization regarding waste class 80 non-hazardous which designated PDC as the generator of the treated residues." Exh. 1 (¶45); *see* R. at 1123, R. at 1152 (supplemental permit 890106).

"On March 20, 1989, the IEPA issued supplemental permit number 890105 to Clinton Landfill, Inc. for non-hazardous stabilization regarding waste class 80 non-hazardous which designated PDC as the generator of the treated residue." Exh. 1 (¶47); *see* R. at 1123, R. at 1154-57 (supplemental permit 890105).

"On August 2, 1989, the IEPA issued supplemental permit number 890800 to Peoria City/County Landfill, Inc. for non-hazardous stabilization regarding waste class 80 non-hazardous which designated PDC as the generator of the treated residue." Exh. 1 (¶49); *see* R. at 1123, R. at 1159-60 (supplemental permit 890800).

"PDC is required to submit a Facility Annual Hazardous Waste Report to the IEPA each calendar year." Exh. 1 (¶51); *see* R. at 1124. "In the annual report, PDC is required to identify (by USEPA ID Number) the generators who deposited waste at the Existing Landfill for that year, the type of waste and the volume deposited." Exh. 1 (¶52); *see* R. at 1124. "In the annual reports, PDC has always been listed as the generator of the treated residue from the WSF." Exh. 1 (¶53); *see* R. at 1124, R. at 1162-1202 (excerpts from annual reports for calendar years 2004 to 2005); *see generally* Tr. at 26-27.

"In order to ensure that RCRA-hazardous wastes are properly managed at treatment, storage, and disposal facilities, 35 Ill. Adm. Code § 728.107 requires hazardous waste generators to make certain LDR notification and certification statements to the facilities that will receive and manage their waste." Exh. 1 (¶55); *see* R. at 1124. "After chemical stabilization and upon receipt of analytical data indicating LDR compliance, the WSF must make to the Existing Landfill the required LDR notification and certification statements daily for each treated batch." Exh. 1 (¶56); *see* R. at 1124. "On those statements, PDC has always been reported as the generator of the waste." Exh. 1 (¶57); *see* R. at 1124, R. at 1204-06 (PDC Landfill No. 1 LDR notifications and certifications).

"The WSF has occasionally opted and still may at its option ship treated residues off-site to landfill facilities other than the Existing Landfill." Exh. 1 (¶59); *see* R. at 1124. "When this occurs, the treated residue becomes subject to the waste manifest system requirements." Exh. 1 (¶60); *see* R. at 1124. "After the chemical and physical changes in the waste, PDC must assume ownership of the waste for manifesting purposes." Exh. 1 (¶61); *see* R. at 1124. "PDC has always been identified as the generator on waste manifests representing off-site shipments." Exh. 1 (¶62); *see* R. at 1124, R. at 1208-18 (waste manifests).

"On February 4, 1993, the Illinois Pollution Control Board (the "IPCB") granted to PDC an adjusted standard (delisting) for certain wastes generated at its WSF." Exh. 1 (¶64); *see* R. at 1124.

> In the Order of the IPCB granting the delisting, the IPCB specifically identifies PDC as the generator of the treated waste, stating, in pertinent part, as follows: Peoria Disposal Company's treated F006 residues generated by the PDC F0006 waste stabilization process described in their amended petition filed March 2, 1992 are non-hazardous as defined in 35 Ill. Adm. Code 721. Exh. 1 (¶65); *see* R. at 1124.

> Likewise, regarding PDC's delisting authorization in the Opinion of the IPCB dated March 11, 1993, the IPCB states, in pertinent part, as follows: The petition essentially seeks a hazardous waste delisting for certain listed hazardous wastes generated by PDC at its Peoria County facility. This opinion supports the Board's order of February 4, 1993 granting an adjusted standard on a joint motion for expedited decision, as explained below. Exh. 1 (¶66); *see* R. at 1124.

"Northwestern Steel and Wire Company ('Northwestern') operated a steel manufacturing facility located near Sterling, Illinois." Exh. 1 (¶67); *see* R. at 1125. "Northwestern received a RCRA Part B permit for a hazardous waste landfill in 1987, authorizing the disposal of non-hazardous and hazardous waste in Northwestern's hazardous waste landfill units which were initially developed prior to the SB-172 siting bill." Exh. 1 (¶68); *see* R. at 1125. "As its landfill was nearing capacity, Northwestern filed a Class 3 permit modification with the IEPA in 1992 to vertically expand its landfill." Exh. 1 (¶69); *see* R. at 1125. "Although the SB-172 siting bill, now incorporated into Section 39.2 of the Act, applied during the time of the referenced expansion, Northwestern determined that the expansion was exempt from the siting law pursuant to Section 3.330(a) of the Act." Exh. 1 (¶70); *see* R. at 1125. "The IEPA concurred with this exemption as Northwestern was allowed to expand without having to submit proof of siting." Exh. 1 (¶71); *see* R. at 1125. "In 1993, the IEPA issued a permit to Northwestern to operate a hazardous waste landfill at its facility for the disposal of K061 treatment residue from its on-site waste stabilization facility." Exh. 1 (¶72); *see* R. at 1125, R. at 1228-97 (Northwestern documents).

"Envirite Corporation ('Envirite') owns and operates a hazardous waste treatment facility in Harvey, Illinois." Exh. 1 (¶74); *see* R. at 1125. "On April 29, 1992, the IEPA issued a permit to Envirite to operate a pollution control facility near Pontiac, Illinois, for disposal of residual sludge generated by Envirite in its hazardous waste treatment process." Exh. 1 (¶75); *see* R. at 1125; R. at 1299-1303 ("Envirite Permit"). "The residual sludge was generated at its waste treatment plant in Harvey, Illinois, and then transported approximately ninety (90) miles away to the pollution control facility in Livingston County, near Pontiac, Illinois." Exh. 1 (¶77); *see* R. at 1125.

> The IEPA determined that local siting approval was not required for the pollution control facility that was sought to be located in Livingston County and the landfill was permitted without such siting, as the landfill was subject to exclusion from the definition of "pollution control facility" pursuant to Section 3.330(a)(3). Exh. 1 (¶78); *see* R. at 1305-18 (Envirite documents), R. at 1320-21 (IEPA letter dated April 2, 1990).

"Envirite and PDC both operate hazardous waste treatment plants which generate treatment residues, which treatment residue is to be deposited into a landfill owned respectively by Envirite and PDC dedicated solely for the disposal of their respective treatment residues." Exh. 1 (¶80); *see* R. at 1126.

"Previously, in November 9, 2005, PDC filed a request for siting approval with the County of Peoria, requesting siting for a horizontal and vertical expansion of the Existing Landfill." Exh. 1 (¶81). "In that siting request, PDC sought to extend the life of the Existing Landfill by fifteen years, at the current operating levels." Exh. 1 (¶82). "The expansion siting request, if approved, would have resulted in an expansion of approximately 2 million tons." Exh. 1 (¶83). "Approximately 60-65% of the waste currently deposited at the Existing Landfill is treated residue from the WSF." Exh. 1 (¶84). "While the RWL will provide approximately 2 million tons of disposal space, that space is proposed to be permitted solely to accept treated residue from the WSF." Exh. 1 (¶85).

STATUTORY PROVISIONS

Section 3.205 of the Environmental Protection Act (Act) provides that "generator" means "any person whose act or process produces waste." 415 ILCS 5/3.205 (2006).

Section 3.330(a) of the Act provides in pertinent part that "pollution control facility" is

> any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act.
>
> The following are not 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. 415 ILCS 5/3.330(a) (2006).

Section 39(c) of the Act provides in pertinent part that

> Except for those facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act, no permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of this Act. For purposes of this subsection (c), and for purposes of Section 39.2 of this Act, the appropriate county board or governing body of the municipality shall be the county board of the county or the governing body of the municipality in which the

> facility is to be located as of the date when the application for siting approval is filed. 415 ILCS 5/39(c) (2006).

Section 39(h) of the Act, addressing hazardous waste stream authorization, provides in pertinent part that,

> [f]or purposes of this subsection (h), the term "generator" has the meaning given in Section 3.205 of this Act, unless: (1) the hazardous waste is treated, incinerated, or partially recycled for reuse prior to disposal, in which case the last person who treats, incinerates, or partially recycles the hazardous waste prior to disposal is the generator; or (2) the hazardous waste is from a response action, in which case the person performing the response action is the generator. 415 ILCS 5/39(h) (2006).

PDC BRIEF

PDC argues that "[l]ocal siting is a condition precedent to the issuance of permits only for new pollution control facilities." PDC Brief at 13; *see generally* 415 ILCS 5/39.2 (2006). Although PDC acknowledges that courts have determined that this condition may apply to expansion of an existing facility, PDC argues that "the Act specifically defines what is and is not a pollution control facility for purposes of siting." PDC Brief at 13, citing M.I.G. Investments, Inc. v. IEPA, 523 N.E.2d 1 (1988). PDC further argues that that definition excludes "a facility where the owner stores, manages, transfers or disposes of waste that it generated." PDC Brief at 13, citing 415 ILCS 5/3.330(a)(3) (2006).

PDC refers to its original application for expansion of its existing hazardous waste landfill. PDC Brief at 13; *see* Peoria Disposal Co. v. Peoria County Board, PCB 06-184 (June 21, 2007) (affirming county board decision to deny siting approval), *appeal docketed*, No. 3-07-0345 (3rd Dist. June 29, 2007). PDC argues that the application at issue in this matter is distinct from its original expansion application and is fashioned specifically to meet the terms of the exception provided in Section 3.330(a)(3) of the Act. PDC Brief at 13; *see* 415 ILCS 5/3.330(a)(3) (2006), Tr. at 7-8. Specifically, PDC notes that it has operated a Waste Stabilization Facility (WSF) at its existing landfill for more than 20 years. PDC Brief at 2; *see* Exh. 1 at ¶¶ 7, 9-10, 12-13. PDC claims that its application for permit modification is intended "solely to accommodate the treatment residues from the RCRA regulated material that is accepted for treatment at the WSF and commingled with reagents in such a manner that the material is transformed by PDC into a new and different material, of which PDC is the generator." PDC Brief at 13-14.

PDC requests that the Board reverse the Agency's denial of the requested permit modification. Pet. at 3, PDC Brief at 1. PDC further requests that the Board remand the application to the Agency for a review of its technical merits. PDC Brief at 1, 31. PDC also seeks from the Board a "determination as to whether the Application is otherwise in compliance with the comprehensive and strict statutory and regulatory scheme" of RCRA and regulations adopted under it. *Id*. at 1-2. Below, the Board separately analyzes the arguments raised in PDC's brief.

Section 3.330(a)(3) Exception

PDC argues that, "[i]n order for a facility to be excluded from the definition of 'new pollution control facility,' Section 3.330(a)(3) requires that the wastes be treated and disposed of within the site or facility owned, controlled or operated by the generator of the wastes." PDC Brief at 14, *see* 415 ILCS 5/3.330(a)(3) (2006). PDC claims that it seeks a permit modification falling under the terms of this exception and is therefore not required to obtain siting approval. *See* PDC Brief at 14-15.

PDC states that "[t]he waste brought to PDC by PDC's customers for treatment at the WSF cannot legally be disposed of in a landfill." PDC Brief at 15, citing T. at 24. PDC further states that the WSF can accept waste only for treatment and storage. PDC Brief at 15, citing R. at 1132-38 (WSF permit excerpt). PDC claims that its application for a permit modification requests no change to the WSF. PDC Brief at 15, citing Exh. 1 (¶20).

RWD claims that its WSF is fully permitted and "is currently authorized for storage and treatment of hazardous and non-hazardous wastes." PDC Brief at 15, citing Exh. 1 (¶19, ¶21). PDC states that its WSF "mixes metal-bearing wastes from various sources with chemical compounds or reagents to create a chemically stable new end-product with dramatically reduced leachable concentrations." PDC Brief at 15, citing Exh. 1 (¶7). PDC further states that this process alters "the chemical and physical makeup of the hazardous waste, so that the resultant (or "Residual") material is safe for disposal in the RCRA regulated landfill." PDC Brief at 15.

PDC states that it performs this treatment in batches that mix untreated waste from several producers. PDC Brief at 16, citing Exh. 1 (¶25, ¶26). PDC further states that "[p]hysically, the untreated waste is commingled and blended with other wastes, the chemical reagents, and water used as a slurrying agent, resulting in an exothermic chemical reaction." PDC Brief at 16, citing Exh. 1 (¶27). PDC states that, chemically, reagents convert "metals in the untreated waste into relatively non-leachable hydroxides and silicates." PDC Brief at 16, citing Exh. 1 (¶24). PDC claims that treated residues comply with RCRA Land Disposal Restriction (LDR) standards, "which are in most cases below those concentrations allowed at RCRA Subtitle D, non-hazardous landfill facilities." PDC Brief at 16, citing Exh. 1 (¶24). PDC argues that the "WSF process produces a waste which is distinct from the material sent to it for treatment from PDC's customers." PDC Brief at 15.

PDC states that, after this treatment process, it can dispose of this residual material in its existing landfill. PDC Brief at 15, citing T. at 24-25, Exh. 1 (¶8); *see also* Exh. 1 (¶29, ¶30) (testing of waste and residues). PDC further states that, "[p]ursuant to its application for permit modification, "the entirety of the waste to be disposed of in the RWL will originate at the WSF, located on the site." PDC Brief at 15, citing R. at 12, T. at 20-21.

PDC claims that the WSF also solidifies both hazardous and non-hazardous liquid wastes. PDC Brief at 16, citing Exh. 1 (¶32). PDC states that "[t]his is accomplished through the use of pozzolanic reagents which convert liquids or semi-liquids into more stable solids." PDC Brief at 16-17, citing Exh. 1 (¶33). PDC further states that it tests samples of these residues

before disposal. PDC Brief at 16, citing Exh. 1 (¶34). PDC argues that "these wastes change in physical and chemical form and, again, PDC becomes the generator of the specific waste prior to landfilling." PDC Brief at 17, citing Exh. 1 (¶35).

PDC claims that there is no dispute that it owns, controls, and operates and will continue to own, control and operate the RWL. PDC Brief at 14, citing Exh. 1 (¶9, ¶13). PDC further claims that "[t]he WSF and RWL are adjacent to and contiguous with each other." PDC Brief at 14, citing Exh. 1 (¶12), R. at 1219-20, T. at 18-19. PDC further claims that off-road trucks will transport treatment residue between the WSF and RWL. PDC Brief at 14, citing R. at 12. PDC argues that the Act defines "generator" as "any person whose act or process produces waste." PD Brief at 17, citing 415 ILCS 5/3.205 (2006). PDC claims that its own activities generate treated residue. PDC Brief at 17. PDC further claims that this treated residue "is the sole material which will be allowed to be disposed pursuant to the requested permit." *Id*. PDC thus argues that its proposed permit modification satisfies the exemption at Section 3.330(a)(3) for waste treated and disposed of within the site or facility owned, controlled, and operated by he waste's generator and that it is therefore exempt from having to obtain local siting approval. PDC Brief at 14, 17; *see* 415 ILCS 5/3.330(a)(3) (2006).

Status as "Generator"

PDC argues that the Agency has recognized it as the generator of treatment residue under various state and federal authorities. PDC Brief at 17. PDC further argues that the Agency has contested this characterization as generator only under the exemption at Section 3.330(a)(3) of the Act. *Id*.; *see* 415 ILCS 5/3.330(a)(3) (2006). PDC claims that "[t]his distinction is without legal or factual basis, and is contrary to established laws, regulations and State and Federal public policies." PDC Brief at 17. The Board below separately summarizes PDC s arguments regarding those state and federal authorities and policies.

Caselaw

PDC claims that the Board and the Illinois Supreme Court have already reviewed PDC's waste stabilization process. PDC Brief at 17. Before the Board, the Envirite Corporation (Envirite), a competitor of PDC's, claimed that PDC had violated the Act by receiving material from a customer that was not an authorized hazardous waste generator. *Id*.; *see* Envirite Corp. v. IEPA and Peoria Disposal Co., PCB 91-152, slip op. at 1-3 (Dec. 19, 1991). PDC states that it and the Agency as respondents had argued that PDC was both the generator and the owner and operator of the disposal site for the purposes of Section 39(h) of the Act because PDC "disposes of the waste residue after chemical stabilization." PDC Brief at 18, citing Envirite, PCB 91-152, slip op. at 6. PDC further states that the Board concluded, as a matter of law, that PDC "is both the 'generator' of the specific hazardous waste stream and the owner and operator of the disposal site for purposes of Section 39(h)." PDC Brief at 18, citing Envirite, PCB 91-152, slip op. at 7.

PDC argues that the Illinois Supreme Court has affirmed the Board's determination. PDC Brief at 18; *see* Envirite Corp. v. IEPA, 158 Ill.2d 210, 632 N.E.2d 1035 (1994). PDC claims that the court agreed with the Board that PDC generated the waste stream, which it deposited in its landfill. PDC further claims that

> the Court determined that, in law and fact, (1) PDC is the generator of the treatment residue, (2) customers who ship hazardous waste to PDC for treatment are not generators of the treatment residue, and (3) accordingly, customers who ship hazardous waste to PDC for treatment do not need to obtain special authorization as 'generator' of hazardous waste pursuant to Section 39(h) of the Act. PDC Brief at 17-18.

PDC argues that the court reached this determination "because, for purposes of disposal under RCRA, PDC is itself the generator." *Id*. at 18.

PDC acknowledges that Envirite concerned Section 39(h) of the Act and also notes the Agency's suggestion that the term "generator" may have a different meaning for purposes of siting. PDC Brief at 19; *see* 415 ILCS 5/39(h) (2006). PDC suggests that "there is no valid distinction to be made under the law" between the definition of "generator" with regard to Section 39(h) and with regard to siting. PDC Brief at 19. PDC argues that the court in Envirite "applied the very same definition of 'generator' that is relevant here: 'any person whose act or process produces waste.'" PDC Brief at 19, citing Envirite, 158 Ill.2d at 215, 632 N.E.2d at 1037. PDC argues that, although Section 39(h) supplements the Act's general definition of "generator," the supplemental definition "takes nothing away from that broader definition for purposes of analysis of this Application." PDC Brief at 19; *see* 415 ILCS 5/3.205, 39(h) (2006).

Definition of "Generator" in Act

PDC argues that "[i]t is a 'general rule of statutory construction that when the same words appear in different parts of the same statute, they should be given the same meaning absent some contextual indication that the legislature intended otherwise.'" PDC Brief at 19-20 (citations omitted). PDC further argues that the case lacks contextual indication "that the legislature intended 'generate' to mean anything different in Section 39(h) of the Act than it does in Section 3.330(a)(3) of the Act." *Id*. at 20. PDC claims that, although the Agency has suggested that "generator" has a separate definition for the purposes of siting, no such separate definition appears in the Act. *Id*. at 19. PDC further claims that "generator" should have the same meaning under both Section 3.330(a)(3) and under Section 39(h). *Id*. at 20. PDC argues that, for either section, "generator" should have the meaning provided in Section 3.205 of the Act: "any person whose act or process produces waste." *Id*.; *see* 415 ILCS 5/3.205 (2006).

Definition under RCRA

PDC characterizes RCRA as "a comprehensive Federal regulatory program which regulates hazardous waste 'from cradle to grave.'" PDC Brief at 20. PDC states that Illinois' hazardous waste regulations must be identical-in-substance to federal regulations. *Id*. PDC further states that it contemplates that its proposed RWL would be subject to these identical-in-substance hazardous waste regulations rather than regulations governing municipal solid waste landfills. *Id*., citing City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331, 114 S.Ct. 1588, 1590 (1994).

PDC argues that, when its customers generate hazardous waste, they depend upon PDC to treat that waste according to RCRA requirements. PDC Brief at 21. PDC further argues that the Agency's "sole witness at the hearing before the Board agreed that PDC is 'a generator for purposes of RCRA.'" *Id*., citing Tr. at 38. PDC claims that the Agency "is playing a dangerous game" with a RCRA-permitted facility if it claims that its own definitions of terms displace definitions of identical terms under RCRA. PDC Brief at 21. PDC suggests that, if the Agency succeeds in applying a more limited or restrictive definition of "generator," it will have a direct affect upon RCRA as the national plan for hazardous waste regulation. *Id*.

Administrative Treatment

PDC argues that, for administrative purposes, it "has always been considered the 'generator' of the treatment residue" from its WSF. PDC Brief at 21. First, PDC claims that it "is required by law and regulation to maintain a waste locator log which documents the location of all hazardous waste placed into the Existing Landfill." *Id*. at 21, citing Exh. 1 (¶36). Under these authorities, PDC states that its logs must list the generator of waste placed there. PDC Brief at 21-22, citing Exh. 1 (¶37). PDC further states that, "[f]rom its initial operation of the WSF, PDC has always documented PDC as the specific generator of the waste generated at the WSF and deposited into the Existing Landfill." PDC Brief at 22, citing Exh. 1 (¶38); *see* R. at 1145-47 (Excerpts from Waste Locator Logs). PDC claims that the logs do not identify the wastes treated to create these residues "[b]ecause the treatment residue is a new, homogeneous waste." PDC Brief at 22. PDC further claims that, in the course of landfill inspection, Agency personnel have reviewed these logs on numerous occasions. *Id*.

Second, PDC claims that the Agency has since 1989 issued a number of permits "acknowledging that PDC is the generator of the treatment residue created at the WSF." PDC Brief at 22. PDC states that, on January 13, 1989, the Agency issued PDC supplemental permit number 881046 for disposal of stabilization residues – K061. *Id*., citing Exh. 1 (¶42); *see* R. at 1149-50 (permit). PDC stresses that this supplemental permit lists PDC as the waste generator and allows it to deposit those residues in its on-site landfill. PDC Brief at 22, citing Exh. 1 (¶42); *see* R. at 1149-50 (permit). PDC claims that it began depositing residues under the terms of this permit on January 17, 1989. PDC Brief at 22, citing Exh. 1 (¶43).

PDC further states that, on February 10, 1989, the Agency issued PDC supplemental permit number 890106 regarding non-hazardous stabilization. PDC Brief at 22, citing Exh. 1 (¶45); *see* R. at 1151-52 (permit). PDC stresses that this permit lists PDC as generator of the treated residues. PDC Brief at 22, citing Exh. 1 (¶45); *see* R. at 1152.

PDC further states that, on March 20, 1989, the Agency issued to Clinton Landfill, Inc. supplemental permit number 890105 regarding non-hazardous stabilization. PDC Brief at 22, citing Exh. 1 (¶46); *see* Exh. 1 (¶47), R. at 1153-54 (permit). PDC stresses that this permit lists PDC as generator of the treated residues. PDC Brief at 22, citing Exh. 1 (¶46); *see* R. at 1154.

PDC further states that, on August 2, 1989, the Agency issued to Peoria City/County Landfill, Inc. supplemental permit number 890800 regarding non-hazardous waste stabilization. PDC Brief at 22-23, citing Exh. 1 (¶49); *see* R. at 1158-60 (permit). PDC stresses that this

permit lists PDC as generator of the treated residues. PDC Brief at 22, citing Exh. 1 (¶49); *see* R. at 1159-60.

Third, PDC states that, in each calendar year, it must file with the Agency a Facility Annual Hazardous Waste Report. PDC Brief at 23, citing Exh. 1 (¶51). PDC further states that those annual reports must "identify (by ID Number) the generators who deposited waste at the Existing Landfill for that year, the type of waste and the volume deposited." PDC Brief at 23, citing Exh. 1 (¶52); *see* R. at 1161-1202 (excerpts from annual reports). PDC claims that it has always been listed in these annual reports "as the sole generator of the treated residue from the WSF." PDC Brief at 23, citing Exh. 1 (¶53).

Fourth, PDC states that "[h]azardous waste generators are required to make certain LDR notification and certification statements to the facilities that will receive and manage their waste." PDC Brief at 23, citing Exh. 1 (¶55). PDC further states that these statements are intended to ensure that hazardous wastes are properly managed under RCRA. PDC Brief at 23, citing Exh. 1 (¶55). PDC claims that federal and state laws require it to provide these statements on a daily basis for each batch of treatment residue. PDC Brief at 23, citing Exh. 1 (¶56). PDC further claims that these statements "always" list PDC as generator of the waste. PDC Brief at 23, citing Exh. 1 (¶57); *see* R. at 1203-06 (LDR notifications and certifications).

Fifth, PDC states that it has occasionally shipped treated residues from the WSF to other landfills. PDC Brief at 23, citing Exh. 1 (¶59). PDC further states that, when it does so, "the treated residues become subject to the waste manifest system requirements." PDC Brief at 23, citing Exh. 1 (¶60). PDC argues that it "must assume ownership of the waste for manifesting purposes" and that it has "always" identified itself as the generator on manifests for off-site shipment. PDC Brief at 23, citing Exh. 1 (¶61, ¶62); *see* R. at 1207-18 (Waste Manifests).

Finally, PDC claims that, in an adjusted standard proceeding, the Board has granted PDC a hazardous waste delisting for wastes generated by the WSF. PDC Brief at 23, citing Exh. 1 (¶64). PDC argues that the Board order granting that delisting "specifically identifies PDC as the generator of the treated waste." PDC Brief at 23-24, citing Petition of Peoria Disposal Company for Adjusted Standard from 35 Ill. Adm. Code 721 Subpart D, AS 91-3, slip op. at 1 (Feb. 4, 1993), Exh. 1 (¶65). PDC further argues that the Board's supporting opinion also identifies PDC as the generator. PDC Brief at 24, citing Petition of Peoria Disposal Company for Adjusted Standard from 35 Ill. Adm. Code 721 Subpart D, AS 91-3, slip op. at 1 (Mar. 11, 1993), Exh. 1 (¶66).

Agency Application of Section 3.330(a)(3) Exception

Envirite

PDC describes Envirite as its competitor and as owner and operator of a hazardous waste treatment facility in Harvey, Illinois. PDC Brief at 24, citing Exh. 1 (¶74). PDC argues that "[o]n April 29, 1992, without requiring siting, the IEPA issued a permit to Envirite to operate a pollution control facility in Livingston County, near Pontiac, Illinois, for disposal of residual sludge generated by Envirite in its waste treatment process." PDC Brief at 24, citing Exh. 1

(¶75, ¶78). PDC states that this sludge resulted from the treatment of wastes transported from other locations to Envirite's Harvey facility. PDC Brief at 25, citing Exh. 1 (¶77). PDC further states at, after generating the sludge in Harvey, Envirite was the allowed to transport it to the Livingston County pollution control facility, which it developed without having to obtain siting approval. PDC Brief at 25, citing Exh. 1 (¶77).

PDC claims that Envirite and the Agency discussed whether the Livingston County facility required local siting approval. PDC Brief at 25; *see* R. at 1304-18. PDC argues that the Agency's determination with regard to Envirite "was opposite to that" reached by the Agency in this case. PDC Brief at 25, citing R. at 1319-21 (Agency letter), Exh. 1 (¶78, ¶79). PDC further argues that "[i]t is hard to fathom how the IEPA can justify treating two competitors diametrically different, on the basis of the very same provisions of the Act." PDC Brief at 26; *see* 415 ILCS 5/3.330(a)(3) (2006). PDC argues that, although personnel within the Agency discussed whether to grant PDC's permit application without siting, the Agency "redacted key portions of documents from the record prior to transmitting PDC's record to the Board. PDC Brief at 26 n.4, citing R. at 1372-75 (invoking exemption from public disclosure). Specifically, PDC claims that the Agency redacted the opinions of Agency attorney Mark Wight. PDC Brief at 26 n.4, citing Tr. at 40.[2]

Northwestern Steel and Wire

PDC argues that Northwestern Steel and Wire Company (Northwestern) operated a steel manufacturing facility near Sterling, Illinois and in 1987 obtained a RCRA Part B permit for a hazardous waste landfill. PDC Brief at 27, citing Exh. 1 (¶67, ¶68). PDC claims that "[t]his permit authorized the disposal of non-hazardous and hazardous waste in Northwestern's hazardous waste landfill units," which Northwestern developed before the enactment of Section 39.2 of the Act. PDC Brief at 27, citing Exh. 1 (¶68); *see* 415 ILCS 5/39.2 (2006). PDC further claims that Northwestern in 1992 requested a permit modification to allow vertical expansion of its landfill in order to accommodate treatment residue from its on-site waste stabilization facility. PDC Brief at 27, citing Exh. 1 (¶69). PDC argues that the Agency apparently applied the exception at Section 3.330(a) of the Act to grant the requested modification without first requiring siting approval. PDC Brief at 27, citing Exh. 1 (¶¶70-72); *see* R. at 1227-97 ("Northwestern Documents").

Response to Agency Application of Exception

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[2] At hearing, PDC requested that the hearing officer order the Agency to submit "all redacted information," and the Agency responded that the redacted information was privileged on the basis of attorney-client privilege and as attorney work product. Tr. at 81-82. The hearing officer denied PDC's request. *Id*. at 82. PDC has not appealed the hearing officer's ruling on this issue. In West Suburban Recycling and Energy Center v. IEPA, PCB 95-119, 95-125, slip op. at 6 (Oct. 17, 1996), the Board addressed the Agency's claim that an Agency employee's memorandum on the petitioner's permit applications should not have been discoverable: "[t]he only official decision of the Agency is the decision recorded in the denial letters . . . . It is accordingly irrelevant whether any Agency personnel, at any time prior to the issuance of the letters, may have personally believed that a different outcome was appropriate."

PDC argues that Mr. Crites' testimony on behalf of the Agency admits that the Agency changed its position on siting since granting Envirite's and Northwestern's permit applications because of "a sense that local siting has assumed a more important role in recent years." PDC Brief at 27-28, citing Tr. at 36. PDC further argues that "the specific provisions of the Act relevant to the question before the Board have not changed, as key lawyers at the IEPA recognize." PDC Brief at 28, citing Tr. at 39-40. PDC claims that the Agency's permitting decisions must apply the Act as written and that it "has no authority to legislate a new or tortured definition of terms that are legislatively defined." PDC Brief at 28 (citation omitted). PDC argues that the Agency's earlier determinations to grant permit applications from Envirite and Northwestern are "consistent with the Act," although the determination to deny PDC's request "may be more publicly and politically acceptable." *Id*. at 27. PDC further argues that the Board need not defer to the Agency's determinations on permits, "especially when those permit decisions are based, as they are here, on a question of law." *Id*.

Original Production of Hazardous Waste

PDC claims that the exception at Section 3.330(a)(3) properly focuses on the treatment residues proposed for disposal in the RWL. PDC Brief at 28. PDC argues that "under every legal, regulatory, and administrative definition available, those treatment residues are generated by PDC through its treatment activities at the WSF." *Id*. PDC disputes the Agency's claim that the exception does not apply because "[t]he treatment residues are derived from wastes that were initially generated by off-site generators. . . ." *Id*., citing R. at 1370. PDC claims that the identity of the original producer of the waste is essentially *irrelevant* to determining the identity of the generator. PDC Brief at 30 (emphasis in original). PDC argues that it "bears sole responsibility for the treatment residue it generates in its WSF and, for purposes of siting, ought to be allowed to continue to dispose of such treatment residue onsite without siting, as the relevant exemption allows." *Id*.

PDC argues that, even if one accepts the Agency's argument that the original production of materials received by the PDC is relevant in identifying the generator of treatment residues, at least one Illinois case does not accept that argument. PDC Brief at 28-29. PDC claims that, in Northern Trust Co. v. County of Lake, 353 Ill. App. 3d 268, 818 N.E.2d 389 (2nd Dist. 2004), *appeal denied* 213 Ill. 2d 562, 829 N.E.2d 789 (2005), the court found that the exception in Section 3.330(a)(3) applied to a new wastewater treatment plant if the owner, controller, or operator is not also its sole user and if wastes would not be treated completely by the facility. PDC Brief at 29, citing Northern Trust Co., 353 Ill. App. 3d at 280-81, 818 N.E.2d at 712. Although PDC acknowledges that Northern Trust is not a siting case, PDC claims that "it is clear from the Court's analysis" that the correct focus under Section 3.330(a)(3) is not the original production of material accepted for treatment but is instead "on the ownership and management of the treatment residues which are subject to disposal in the proposed RWL." PDC Brief at 29; *see* 415 ILCS 5/3.330(a)(3) (2006).

PDC further argues that, even if one applied the Agency's analysis, then "almost no applicant could ever be a 'generator' of waste." PDC Brief at 30. PDC notes that, in City of Chicago v. Envtl. Def. Fund, "the Supreme Court stated that 'RCRA defines 'generation' as 'the

act or process of producing hazardous waste.' 42 U.S.C. § 6903(6). There can be no question that the creation of ash by incinerating municipal waste constitutes 'generation' of hazardous waste . . . ." PDC Brief at 30, citing City of Chicago, 511 U.S. at 336, 114 S. Ct. at 1592. PDC suggests that the City of Chicago's waste stream, involving thousands of manufacturers and consumers, consists largely of off-site generators. *See* PDC Brief at 30.

PDC Conclusion

PDC concludes by arguing that the Agency should have reviewed PDC's application for a permit modification to develop and operate the RWL without requiring siting approval. PDC Brief at 31. PDC seeks to have the Board "enter judgment in favor of PDC, reverse the IEPA's permit denial, and remand this matter to the IEPA for technical review of the Application." *Id*.

AGENCY BRIEF

The Agency notes that its August 30, 2007 denial letter (R. at 1369-70) determined that PDC was required to submit proof of local siting approval before receiving its requested permit modification. Agency Brief at 1. The Agency further notes that, because PDC did not submit proof of this approval, it did not conduct a technical review of PDC's application. *Id*., citing Tr. at 29-30.

Referring to the parties' joint filing of a Stipulated Statement of Facts as Exhibit 1, the Agency states that the parties "agree on all the material facts" but reach "opposite conclusions on the application of law to those facts." Agency Brief at 1-2. The Agency seeks a Board order denying PDC's petition for review and affirming the "determination that local siting approval is required for this application." *Id*. at 10.

PDC's Status as "Generator"

The Agency argues that a number of interrelated sections of the Act address the requirement of obtaining local siting approval. Agency Brief at 2. The Agency first claims that the Act limits its authority by providing that "no permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof that the location of the facility has been approved . . . in accordance with Section 39.2 of the Act." *Id*., citing 415 ILCS 5/39(c) (2006). The Agency further claims that the Act's definition of "new pollution control facility" encompasses PDC's application because it includes "the area of expansion beyond the boundary of a currently permitted pollution control facility." Agency Brief at 2, citing 415 ILCS 5/3.330(b)(2) (2006). The Agency argues that the parties have stipulated that "PDC operates a currently permitted pollution control facility, and that the proposed RWL would represent an expansion beyond the vertical, horizontal and capacity-related boundaries of that permitted facility." Agency Brief at 2, citing Exh. 1 (¶¶1, 3, 5).

The Agency claims that, to be defined as a "new pollution control facility," PDCs "site must logically first be defined as a 'pollution control facility.'" Agency Brief at 3, citing 415 ILCS 5/3.330(a) (2006). The Agency further claims that the Act defines a landfill as a "pollution control facility" unless it meets one of the statutory exemptions. Agency Brief at 3; *see* 415

ILCS 5/3.330(a) (2006). The Agency argues that PDC has sought to exempt itself only under Subsection (a)(3), which provides in pertinent part that

> The following are not pollution control facilities: . . . (3) sites or facilities used by any person conducting a . . . waste disposal . . . operation . . . *for wastes generated by such person's own activities*, when such wastes are . . . disposed of . . . 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." Agency Brief at 3 (emphasis in original), citing 415 ILCS 5/3.330(a)(3).

The Agency states that "[i]t is in the interpretation of the emphasized phrase 'for wastes generated by such person's own activities' that IEPA disagrees with Petitioner." Agency Brief at 3.

The Agency states that the Act defines a "generator" as "any person whose act or process *produces* waste." Agency Brief at 3 (emphasis in original), citing 415 ILCS 5/3.205 (2006). Although the Agency acknowledges that the Act does not define the term "produce," it cites a dictionary definition: "1. To bring forth; yield. 2. To create by mental or physical effort. 3. To manufacture. 4. To cause to occur or exist; give rise to . . . ." Agency Brief at 3, citing AMERICAN HERITAGE DICTIONARY 988 (2d College Ed. 1991). The Agency claims that this definition exposes "the flaw in Petitioner's analysis." Agency Brief at 3. The Agency argues that "PDC does not 'produce' waste by bringing it forth, creating it, manufacturing it, or causing it to exist." *Id*. The Agency further argues that "PDC *treats* the waste brought to its facility by the people who did 'produce' it." *Id*. (emphasis in original). Noting that the Act defines the term "treatment," the Agency claims that PDC's role in changing the character of the waste it receives defines it as a "treater" and not a "generator." *Id*., citing 415 ILCS 5/3.505 (2006).

The Agency also stresses that PDC claims an exemption "for waste generated *by such person's own activities*." Agency Brief at 3 (emphasis in original), citing 415 ILCS 5/3.330(a)(3) (2006). The Agency argues that this statutory language "implies that there is only one 'person' involved in the generation of this category of waste." Agency Brief at 3-4. The Agency claims that it is relevant to consider the off-site sources of waste entering the WSF in determining the person who generates the waste emerging from that treatment unit. *See id*. at 4. The Agency concludes by arguing that "PDC's 'own activities', which include adding reagents, serve to treat other people's waste, not to generate it." *Id*. at 4.

Application of Section 39(h)

The Agency argues that review of Section 39(h) demonstrates that its interpretation of the definition of "generator" is correct with regard to siting. Agency Brief at 5; *see* 415 ILCS 5/39(h) (2006). The Agency further argues that, under Section 39(h), "the standard definition in Section 3.205 of the Act applies for purposes of that subsection, unless an exemption is met." Agency Brief at 5. The Agency further argues that PDC claims an exemption applying when "the hazardous waste is treated . . . prior to disposal, in which case the last person who treats . . . the hazardous waste prior to disposal is the generator." *Id*., citing 415 ILCS 5/39(h) (2006). The

Agency states that it "has already conceded that PDC accurately meets this exemption for purposes of waste stream authorization." Agency Brief at 5. The Agency argues that, because this language in Section 39(h) provides an exemption from the general definition at Section 3.205, the exemption "is *not* otherwise a part of that original definition of 'generator.'" *Id*. (emphasis in original), *see* 415 ILCS 5/3.205 (2006). The Agency disputes any argument that the exemption is contained within that original definition by claiming that such an argument "would render the exemption in Section 39(h) meaningless." Agency Brief at 5. The Agency concludes that, while PDC may be exempt from the definition of "generator" in Section 39(h) for the purpose of waste stream authorizations, it does not become a "generator" under the standard definition for other purposes such as local siting approval. *Id*.

The Agency dismisses as "patently false" the claim that there is no distinction between the definitions of "generator" found in Sections 3.205 and 39(h) of the Act. Agency Brief at 5-6, citing PDC Brief at 19. The Agency similarly dismisses the claim that the legislature has provided no indication that it intends different meanings of "generate" in Sections 3.330(a)(3) and 39(h). Agency Brief at 5-6, citing PDC Brief at 20. Responding to PDC's claim that the Agency seeks to rewrite the statute, the Agency argues that it "merely advocates the precise interpretation and application of the actual language contained in the Act." Agency Brief at 6, citing PDC Brief at 14, 28. The Agency characterizes PDC's argument as "glossing over" defined terms. Agency Brief at 6.

The Agency argues that the definition of "generator" in Section 39(h) of the Act is limited: "*[f]or the purposes of this subsection (h)*, the term 'generator' has the meaning given to it in Section 3.205 of the Act, unless: (1) the hazardous waste is treated . . . prior to disposal, in which case the last person who treats . . . the hazardous waste prior to disposal is the generator." Agency Brief at 4 (emphasis in original), citing 415 ILCS 5/39(h) (2006). The Agency concludes that, under this statutory language, PDC can be considered the generator of treated waste "*only for purposes of waste stream authorizations*." Agency Brief at 4 (emphasis in original).

The Agency argues that this conclusion is consistent with the Board's holding in Envirite Corp. v. IEPA, PCB 91-152. Agency Brief at 4, citing PDC Brief at 17-18. The Agency claims that the Board held in that case, with regard to treated residue, that "PDC was the 'generator' of the specific hazardous waste stream and the owner and operator of the disposal site *for purposes of Section 39(h).*" Agency Brief at 4 (emphasis added), citing Envirite, PCB 91-152, slip. op. at 7 (Dec. 19, 1991). Although the Agency acknowledges that the Supreme Court did not unambiguously state that PDC was a "generator" only for the purposes of Section 39(h), the Agency argues that the Court upheld the Board and did not expand the definition of "generator." Agency Brief at 4, citing Envirite Corp. v. IEPA, 198 Ill. Dec. 424, 427 (1994). The Agency also seeks to distinguish Envirite by arguing that, although the Agency once handled waste stream authorizations as separate documents, "they are now incorporated into the permit for each facility." Agency Brief at 4-5, citing Tr. at 31. The Agency states that PDC refers in its brief to four permits that actually are waste stream authorizations from 1989. Agency Brief at 5 n.2, citing PDC Brief at 22-23. The Agency argues that "the precise issues raised in the Envirite case would no longer be raised under the current procedures." Agency Brief at 4; *see generally* Tr. at 30-31 (Crites testimony).

RCRA Definition of "Generator"

The Agency argues that the RCRA definition of "generator" is distinct from the definition of the same term in the Act and is "therefore completely irrelevant to the Act's requirements for local siting approval." Agency Brief at 6.; *see* 35 Ill. Adm. Code 720.110. The Agency further argues that these different definitions are not necessarily inconsistent with one another but instead reflect different statutes with different purposes. Agency Brief at 6.

The Agency characterizes RCRA as a "cradle-to-grave system to monitor and control hazardous waste." Agency Brief at 6. The Agency argues that a broad definition of "generator" under RCRA subjects more persons to regulation and manages hazardous waste more consistently on a nationwide basis. *Id*. The Agency characterizes the Act's siting requirements as a way "to give local communities input on the location of waste management facilities, both hazardous and non-hazardous." *Id*. The Agency argues that Section 39.2 of the Act addresses "strictly local concerns" such as traffic and waste management plans and suggests that these policy issues are distinct from those underlying RCRA. *Id*. at 6-7.

The Agency states that the Act defines a "generator" as "any person whose act or process produces a waste." Agency Brief at 7, citing 415 ILCS 5/3.205 (2006). Under RCRA, the Agency argues, the definition of the term adds any person "whose act first causes a hazardous waste to become subject to regulation." Agency Brief at 7, citing 35 Ill. Adm. Code 720.110. The Agency further argues that "other activities can make a non-generator subject to the RCRA generator requirements, such as when an owner or operator initiates a shipment of hazardous waste from a treatment, storage, or disposal facility." Agency Brief at 7. The Agency suggests that an entity such as PDC may be a generator under RCRA or may be subject to RCRA generator requirements without necessarily meeting the Act's definition of "generator." *Id*. The Agency argues that the General Assembly required siting in order to protect local interests and that it did so with a definition of "generator" already in place. *Id*., citing 415 ILCS 5/3.205 (2006). The Agency further argues that "it would thwart the intent of the legislature" to apply a definition from a federal program with a different purpose. Agency Brief at 7.

Prior Permit Decisions and Caselaw

The Agency notes that PDC's application refers to Northwestern's 1993 permit. Agency Brief at 7; *see* R. at 1227-97 (Northwestern Documents). The Agency seeks to distinguish Northwestern by characterizing it as "a good example of the proper application of the Section 3.330(a)(3) exemption from the definition of a pollution control facility." Agency Brief at 7. The Agency states that, in the course of it steel manufacturing operation, Northwestern created, treated, and disposed of hazardous and non-hazardous wastes on site. *Id*. at 7-8, citing Tr. at 33. After suggesting that Section 39.2 factors such as traffic patterns and the waste management needs of the area would tend to favor Northwestern's on-site disposal over off-site transport, the Agency claims that an application such as Northwestern's appears to reduce the need for local siting approval. Agency Brief at 8. Because PDC would bring wastes to Peoria County from off-site generators for treatment and disposal, the Agency argues that there would be a clear increase in local concern over those activities. *Id*.

The Agency also seeks to distinguish the Envirite permit. Agency Brief at 8; *see* R. at 1304-21. The Agency argues that its decision with regard to Envirite "was consistent with other contemporary decisions, all of which occurred over 15 years ago." Agency Brief at 8, citing Tr. at 35. The Agency further argues that its review of permit applications since that time "has evolved to refocus consideration on the concerns of the local community." Agency Brief at 8. The Agency further argues that its 1990 decision on that permit application is not automatically binding on all future Agency decision-making. Agency Brief at 8. Although the Agency acknowledges that "the language of the statute may not have changed significantly," the Agency claims that "its current interpretation is more consistent with the defined terms of the statute, as well as the intent of the legislature in enacting the local siting law." *Id*. at 8-9.

The Agency also seeks to distinguish other cases cited by PDC in its brief. The Agency first claims that Northern Trust Co. v. County of Lake, 288 Ill. Dec. 701 (2nd Dist. 2004), affirmed dismissal of a zoning question. Agency Brief at 9. The Agency argues that, because the court provided only a brief analysis, "this case is particularly unhelpful in determining an appropriate interpretation of the law." *Id*. Second, the Agency claims that City of Chicago v. Envtl. Def. Fund, 511 U.S. 328 (1994), involved the RCRA definition of "generator" and exemptions therefrom. *Id*. The Agency dismisses this issue as "not relevant in this case." *Id*.

Agency Conclusion

The Agency argues that PDC "seeks to redefine itself as a generator to avoid the proven failure of its attempts at obtaining local siting approval." Agency Brief at 9. The Agency claims that, if the Board accepts PDC's argument that its treatment qualifies as generation, then "*any* disposal facility that takes in waste would only need to provide some treatment in order to be considered a 'generator' under the Act." *Id*. at 9-10 (emphasis in original). The Agency claims that such a system would be advantageous for some parties but would jeopardize human health and the environments and be "completely inconsistent with the purposes of the Act." *Id*. at 10. The Agency seeks a Board order upholding its determination that local siting approval is required for this application. *Id*.

PDC REPLY BRIEF

PDC argues that the Agency's brief "struggles to make some reasonable argument that PDC is not the generator of the treatment residue under Section 3.330(a)(3)." Reply at 1; *see* 415 ILCS 5/3.330(a)(3) (2006). PDC claims that the Agency isolates this exemption from the comprehensive regulation of hazardous waste in federal and state law. PDC suggests that the Agency has favored "purported public opinion" more heavily than siting requirements justify. *See* Reply at 1. PDC argues that the Agency's "overly broad application of the Illinois siting law" would effectively ignore RCRA and thwart the federal program for safe hazardous waste disposal. *See id*. at 1-2. PDC further argues that federal law "might well preempt the field when state and federal legislative goals are at odds." *Id*. at 2, citing Gade v. Nat'l. Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 112 S.Ct.2374, 120 L.Ed.2d 73 (1992).

PDC's Status as "Generator"

PDC argues that "[t]he sole question in this case is whether the *treatment residues* are generated by PDC or by someone else." Reply at 3 (emphasis in original). PDC dismisses as "fatally flawed" the Agency's argument that "PDC does not 'produce' *waste* by bringing it forth, creating it, manufacturing it, or causing it to exist." *Id*. at 2-3 (emphasis in original), citing Agency Brief at 3. PDC argues that, as a legal and practical matter, it "does in fact 'produce' *the treatment residue that is sought to be disposed of in the proposed RWL*." Reply at 2 (emphasis in original). PDC claims that these residues come into existence only through PDC's treatment and that it therefore qualifies for the statutory exemption from siting for "wastes generated by such person's own activities." *Id*., citing 415 ILCS 5/3.330(a)(3) (2006).

PDC argues that the Agency's citation to the definition of "produce" supports PDC's position. Reply at 2; *see* Agency Brief at 3, citing AMERICAN HERITAGE DICTIONARY 988 (2d College Ed. 1991). PDC cites an additional meaning of the term: "[t]o manufacture or create economic goods and services." Reply at 3, citing American Heritage Dictionary of the English Language (4th Ed. 2004), *available at* http://dictionary.reference.com/browse/produce (Nov. 29, 2007). PDC argues that, under this definition, it performs an economic service for its customers by transforming waste into a product safe for disposal under applicable law." Reply at 3.

PDC argues that the Agency relies upon a "nonsensical" hypothetical in order to minimize its treatment process. Reply at 4. PDC notes the Agency's argument that, if PDC's interpretation prevailed, then "[a]ny landfill in the State could take all the waste it receives, mix it with some of its own material, and be exempt from local siting approval for all waste in the landfill." *Id*., citing Agency Brief at 10. PDC first responds that, "if the hypothetical landfill were to begin treating waste, the new treatment business would be required to obtain a permit from the IEPA, and would obviously require siting as a new pollution control facility." Reply at 4, citing 415 ILCS 5/3.330(a) (2006). PDC also responds that its "process does not merely involve tossing together some waste and some other materials and dropping the mixture on the landfill." Reply at 4. PDC suggests that this is why its treatment process is required and why the Agency treats PDC as generator of the treatment residues "for all legal and regulatory purposes." *Id*.

PDC argues that the Agency "is wrong to label PDC the 'treater' and not the generator of the treatment residues." Reply at 4. Although it acknowledges that its WSF treats its customers' waste, PDC states that it seeks no change in the permit for the WSF. *Id*. PDC states that the RWL for which it seeks a permit modification "will only accept for disposal waste generated by PDC." *Id*.

Application of Section 39(h)

PDC also characterizes as "fatally flawed" the Agency's analysis of the relationship between Section 3.205 and Section 39(h) of the Act. Reply at 5, citing 415 ILCS 5/3.205, 39(h) (2006). PDC argues that Section 3.205 defines "generator" as "any person whose act or process produces waste." Reply at 5, citing 415 ILCS 5/3.205 (2006). PDC claims that this definition establishes the entire body of possible generators under the Act. Reply at 5. PDC further argues

that Section 39(h) limits that body of possible generators by providing that, if "'the hazardous waste is treated, incinerated, or partially recycled for reuse prior to disposal,' then only a generator that is *also* 'the last person who treats, incinerates, or partially recycles the hazardous waste prior to disposal' is classified as a generator under Section 39(h)." Reply at 5, citing 415 ILCS 5/39(h) (2006). PDC claims that, "if an entity is found to be a generator under Section 39(h), it is automatically a generator under Section 3.205." Reply at 5. PDC claims that the Agency's brief "mistakenly reversed this analysis." *Id*.

PDC argues that its analysis is reflected in the Illinois Supreme Court's Envirite decision. Reply at 5, citing Envirite Corp. v. IEPA, 158 Ill.2d 210, 217, 632 N.E.2d 1035, 1038, 198 Ill. Dec. 424, 427 (1994). Under this analysis, PDC argues that its treatment resulted in new residue, making PDC the generator of that residue. Reply at 5-6. PDC concludes that this brings it within the definition of "generator" as "any person whose act or process produces waste" in both Section 3.205 and Section 39(h) by express incorporation. *Id*. at 6, citing 415 ILCS 5/3.205, 39(h) (2006).

RCRA Definition of "Generator"

PDC argues that "RCRA provides two possible definitions of the term 'generator.'" Reply at 6. PDC claims that the first echoes Section 3.205 of the Act: "any person, by site, whose act or process produces hazardous waste." *Id*., citing 35 Ill. Adm. Code 720.110; *see* 415 ILCS5/3.205 (2006). PDC further claims that RCRA provides a second and separate definition: "any person . . . whose act first causes a hazardous waste to become subject to regulation." Reply at 6, citing 35 Ill. Adm. Code 720.110. PDC questions whether this second definition can apply to its WSF, as "[t]here is presumably no argument to be made that the waste received by PDC at the WSF is not already 'subject to regulation' at the time it is so received." Reply at 6.

Under the first definition "essentially identical" to Section 3.205 of the Act, however, PDC argues that it is "clearly" the generator of the treatment residue. *Id*., citing 415 ICLS 5/3.205 (2006). Because it meets this first definition, PDC argues that the Agency's analysis is "irrelevant." Reply at 6. In response to the Agency's argument that an entity may be a "generator" or subject to generator requirements under RCRA without meeting the Act's definition of "generator," PDC argues that the Agency "dangerously ignores and misapplies the carefully crafted RCRA." Reply at 6. PDC further argues that "[t]he Board simply cannot condone a strained application of the local siting law, and relevant exemptions thereto, in a fashion that redefines RCRA." *Id*. at 6-7.

PDC claims that the Agency's discussion of Envirite reveals the Agency's "struggle to isolate Section 3.330(a)(3) from the rest of the Act and the entire body of State and Federal environmental law." Reply at 7. PDC argues that the Agency concedes that, pursuant to the exemption in Section 3.330(a)(3), it permitted Envirite without requiring siting approval. *Id*., citing R. at 1319-21. PDC claims that this determination is "in direct conflict" with the Agency's determination on PDC's application for a permit modification. Reply at 7.

PDC argues that the Agency "in this case has redacted the portion of this permit record which contains the legal opinion of IEPA Attorney Mark Wight." Reply at 8. PDC further

argues that, if Mr. Wight's opinion supported the Agency's position, then the Agency would presumably not have redacted that opinion from the record. *Id*., *see* R. at 1373. PDC notes that the Agency at hearing presented its legal opinion through its only witness, who trained as an engineer. Reply at 8.

PDC claims that the Agency distinguishes the Envirite and PDC applications only on the basis that the Agency's "interpretation has evolved to refocus consideration on the concerns of the local community." Reply at 8, citing Agency Brief at 8. PDC claims that the Agency "can only act in a manner consistent with the statute it is charged to apply and enforce." Reply at 8, citing Alternate Fuels, Inc. v. Director of IEPA, 215 Ill. 2d 219, 238, 830 N.E.2d 444, 455, 294 Ill. Dec. 32, 43 (2004), *as modified on denial of rehearing*, 2005 Ill. LEXIS 953 (2005). PDC argues that "[n]either RCRA nor the siting law has changed in any way relevant here." Reply at 8. PDC concludes that "the Board simply cannot allow purported public opinion to trump the well-crafted provisions of the Act and the comprehensive environmental regulatory scheme it sets forth." *Id*. at 8-9.

PDC Conclusion

On the basis of the arguments in its brief and reply, PDC argues that the Agency should have reviewed PDC's application for modification of its permit to develop and operate its proposed RWL without requiring proof of local siting approval. Reply at 9. PDC again requests that the Board remand the application to the Agency for technical review of that application. *Id*.; *see* Tr. at 6.

BURDEN OF PROOF AND STANDARD OF REVIEW

"The question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued." ESG Watts, Inc. v. IEPA, PCB 01-63, 01-64, slip op. at 5 (April 4, 2002) (citations omitted). "[T]he Agency's denial letter frames the issues on appeal." ESG Watts, Inc. v. IPCB, 286 Ill. App. 3d 325, 676 N.E. 2d 299 (3rd Dist. 1997). The Board's review is limited to the record before the Agency and is not based on information developed after the Agency's determination. ESG Watts, Inc. v. IEPA, PCB 01-63, 01-64, slip op. at 5 (April 4, 2002), citing Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist 1987). "[T]he Board is not required to apply the manifest-weight test to its review of the Agency's decision denying a permit." IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986). The Act places the burden of proof on PDC as the petitioner. 415 ILCS 5/40(a)(1) (2006); *see* 35 Ill. Adm. Code 105.112(a).

DISCUSSION

Section 39(c) of the Act restricts the Agency's authority by providing in pertinent part that

> no permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency

> that the location of the facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of the Act. 415 ILCS 5/39(c) (2006); *see* 415 ILCS 5/39.2 (2006) (local siting review).

Section 3.330(b) of the Act includes three specific types of sites in its definition of a "new pollution control facility," including "the area of expansion beyond the boundary of a currently permitted pollution control facility. 415 ILCS 5/3.330(b)(2) (2006). The parties' joint stipulated statement of facts establishes that PDC operates a RCRA-permitted landfill and WSF. Exh. 1 (¶¶1, 2); *see* R. at 12. The joint stipulation also establishes that PDC's application seeks to expand the waste disposal capacity and the horizontal and vertical dimensions of that permitted facility. Exh. 1 ¶¶3, 5); *see* R. at 12.

In order to be defined as a "new pollution control facility," a site must first be defined as a "pollution control facility." Section 3.330(a) of the Act includes various sites and operations in its definition of "pollution control facility" but also excludes various categories of sites and operations from that definition. *See* 415 ILCS 5.3.330(a) (2006). Section 3.330(a)(3) specifically excludes

> 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[.] 415 ILCS 5/3.330(a)(3) (2006).

Although Section 3.205 of the Act provides that "'[g]enerator' means any person whose act or process produces waste" (415 ILCS 5/3.205 (2006)), the Act does not include a definition of "produce."

The parties disagree strenuously in their interpretation of the language "wastes generated by such person's own activities." Generally, PDC argues that its WSF process produces a waste for disposal on its own site, exempting it from the definition of "pollution control facility" and from the Act's siting requirements. *See* PDC Brief at 14-24; *see also* 415 ILCS 5/3.330(a)(3), 39(c) (2006). Generally, the Agency argues that PDC's WSF process does not constitute the generation of waste and that PDC's proposed RWL is a "new pollution control facility" that must demonstrate siting approval. *See* Agency Brief at 2-4.

"The Board's primary task in construing a statutory provision is to ascertain and give effect to the intent of the legislature." Sutter Sanitation, Inc. v. IEPA, PCB 04-187, slip op. at 16 (Sept. 16, 2004), citing Vicencio v. Lincoln-Way Builders, Inc., 204 Ill. 2d 295, 301, 789 N.E. 2d 290, 294 (2003). "The best indication of legislative intent is the statutory language, given its plain and ordinary meaning." Sutter Sanitation, PCB 04-187, slip op. at 16, citing Krohe v. City of Bloomington, 204 Ill. 2d 392, 395, 789 N.E.2d 1211, 12121 (2003). "If the statutory language

if 'clear and unambiguous,' then the Board 'must apply the statute without resort to further aids of statutory construction." Sutter Sanitation, PCB 04-187, slip op. at 16, citing Krohe, 204 Ill. 2d at 395, 789 N.E.2d at 1212.

PDC is a "Generator" Under Section 3.205

Section 3.205 of the Act provides that "'[g]enerator' means any person whose act or process produces waste." 415 ILCS 5/3.205 (2006). On the basis of the record in this proceeding, the Board finds that PDC's treatment process constitutes the production of waste. This finding, however, does not conclude the Board's analysis. The exemption from the definition of "pollution control facility" at Section 3.330(a)(3) of the Act encompasses persons conducting the storage, disposal, and treatment of "*wastes generated by such person's own activities*." 415 ILCS 5/3.330(a)(3) (2006) (emphasis added). The record shows that materials accepted by PDC at the WSF are received from various sources as "wastes" and do not become "wastes" through action on the part of PDC, which treatment itself generates waste. *E.g.*, Exh. 1 (¶¶7, 22, 27); R. at 13 (General WSF Operations); R. at 1120 (Description of Waste Stabilization Facility). This finding is fully consistent with the Board's holding in Petition of Peoria Disposal Company for Adjusted Standard from 35 Ill. Adm. Code 721 Subpart D, AS 91-3, slip op. at 1 (Mar. 11, 1993).

In this regard, the Board finds instructive Section 3.505 of the Act, which provides that

> '[t]reatment' means any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any waste so as to neutralize it or render it nonhazardous, safer for transport, amendable for recovery, amendable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous. 415 ILCS 5/3.505 (2006).

The parties have stipulated that the treatment process conducted in the WSF changes the chemical and physical makeup of hazardous wastes. Exh. 1 (¶¶22, 23). The parties have also stipulated that, while "[s]amples of untreated wastes received at the WSF generally exceed the LDR standards for leachable metal compounds and are, therefore prohibited from land disposal under RCRA," samples of treated residues are tested for compliance with those standards prior to disposal. Exh. 1 (¶¶ 29, 30). The Board need not and does not determine that production of waste and treatment of waste are necessarily performed by separate entities. On the basis of this record, the Board can only conclude that PDC performs treatment upon wastes produced by various other sources.

The Board is not persuaded that the case of Envirite Corp. v. IEPA and Peoria Disposal Co., PCB 91-152 (Dec. 19, 1991), supports PDC's arguments. Under Section 39(h) of the Act, a hazardous waste generator and disposal site owner and operator may seek a hazardous waste stream authorization from the Agency. *See* 415 ILCS 5/39(h) (2006). Significantly, Subsection 39(h) provides in pertinent part that

> "*[f]or the purposes of this subsection (h)*, the term 'generator' has the meaning given in Section 3.205 of this Act, unless: (1) the hazardous waste is treated, incinerated or partially recycled for reuse prior to disposal, in which case the last person who treats, incinerates, or partially recycles the hazardous waste prior to disposal is the generator. *Id*. (emphasis added).

This definition is limited by its explicit terms to the purposes of subsection (h) hazardous waste stream authorizations, which are not at issue in this proceeding. Where it seeks a permit modification for development and operation of the RWL, PDC cannot avail itself of this definition. The Board's decision in Envirite recognizes the proper application of this definition. In that case, the Board concluded that, "as a matter of law, Peoria [PDC] is both the 'generator' of the specific hazardous waste stream and the owner and operator of the disposal site *for purposes of Section 39(h)*." Envirite Corp. v. IEPA and Peoria Disposal Co., PCB 91-152, slip op. at 7 (Dec. 19, 1991) (emphasis added). The Illinois Supreme Court confirmed the Board's decision without extending application of the Section 39(h) definition of "generator." *See* Envirite Corp. v. IEPA, 158 Ill.2d 210, 215-17, 632 N.E.2d 1035, 1037-38 (1994).

Section 3.330(a)(3) Exception for Wastes Generated "By Such Person's Own Activities"

While the parties' briefs extensively analyzed the definition of "generator" at Section 3.205 of the Act, they contain little analysis of the meaning of the Section 3.330(a)(3) siting exemption for on-site disposal of wastes generated as a result of "such person's own activities." There does not appear to be a substantial body of caselaw interpreting Section 3.330(a)(3). However, there are a number of cases interpreting a companion section of the Act: the Section 21(d) exemption from permitting requirements for on-site disposal of wastes generated by a person's own activities. The Section 21(d) permit exemption is entirely relevant to the issue presented here, as the Section 3.330(a)(3) siting exemption flows from the Section 21(d) exemption.

Link Between Permit Exemption Under Section 21(d) and Siting Exemption under Sections 3.330 and 39.2

When the Act became effective, it provided in pertinent part that "[n]o person shall . . . conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency upon such conditions . . . as may be necessary to assure compliance with this Act and with regulations adopted thereunder . . ." P.A. 76-2429; Ill. Rev. Stat. 1970, ch. 111 1/2, par. 1021(d); *see also* 415 ILCS 5/21(d) (2006).

Public Act 82-380, effective September 3, 1981, amended the exception. It provided that

> no permit shall be required for any person conducting a waste-storage, waste-treatment, waste-disposal, or special waste-transportation operation for wastes generated by such person's own activities which are stored, treated, disposed or transported within the site where such wastes are generated. P.A. 83-380, eff.

> Sept. 3, 1981; Ill. Rev. Stat. 1981, ch. 111 1/2, par. 1021(d)(1); *see* 415 ILCS 5/21(d)(1) (2006).

When the legislature added the local siting requirements in Senate Bill 172, proof of siting approval was required before the Agency could issue a permit. *See* P.A. 82-682, eff. Nov. 12, 1981; Ill. Rev. Stat 1981, ch 111 1/2, new para. 1039.1. The definition of a "regional pollution control facility" that is required to obtain siting approval specifically exempted

> 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. Ill. Rev. Stat. 1981, ch. 111 ½, par. 1003; *see* 415 ILCS 5/3.330(a)(3) (2006).

Considering the similarity between the exemption from permitting in Section 21(d) of the Act (415 ILCS 5/21(d) (2006)) and the exemption from siting under the definition of "pollution control facility" in Section 3.330(a)(3) of the Act (415 ILCS 5/3.330(a)(3) (2006)), the Board concludes that the legislature intends them to be construed similarly. *See* Flynn v. Industrial Comm'n., 211 Ill. 2d 546, 555 813 N.E.2d 119, 125 (Ill. 2004) (citations omitted).

Scope of Section 21(d) Permitting Exemption Construed

Illinois courts and the Board have in a number of cases interpreted Section 21(d) and established the scope of its exemption from permitting requirements. As demonstrated below, the scope of the permitting exemption is not unlimited.

In IEPA v. City of Pontiac, Pontiac responded to the allegation that it had operated a solid waste management site without a permit by claiming that it deposited only refuse generated by its own activities and that it was therefore exempt from permitting requirements. IEPA v. City of Pontiac, PCB 74-396, slip op. at 3 (Aug. 7, 1975). Pontiac claimed that the site received only demolition debris and dirt from sites it owned. *Id*. at 1-3. In concluding that Pontiac did not qualify for the exemption, the Board stated that the Act's intent

> was to exempt minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated. There was no intent to create a gap in the permit system of the magnitude suggested by Pontiac. To interpret the exemption as allowing the municipality to dispose of any refuse it owns without a permit will mean that large quantities of varied materials could be indiscriminately deposited at a waste-disposal site. This obviously circumvents both the permit system and the purposes of the Act. *Id*. at 4.

In 2003, the Appellate Court noted that the Board decided IEPA v. City of Pontiac before the first amendment of the exception became effective. The Court stated that, if the legislature had

believed that the Board's interpretation of the exception was incorrect, that belief should have been reflected in a subsequent amendment. People v. Dixon-Marquette Cement, Inc., 343 Ill. App. 3d 163, 176, 796 N.E.2d 205, 214 (2nd Dist. 2003). The Court indicated that the legislature had acquiesced in the Board's determination of the scope of the exception. *See id*.

In Joos Excavating Co. v. PCB, 58 Ill. App. 3d 309, 374 N.E.2d 486 (3rd Dist. 1978), the Court stated that Joos Excavating principally performed excavating but also conducted land clearing, demolition, and trucking. Joos Excavating, 58 Ill. App. 3d at 310, 374 N.E.2d at 487. In the course of operating a sand and gravel pit, Joos excavated a large trench into which it dumped materials resulting from clearing operations at the site; dirt, sand, and silt from pit operations; and portions of demolished buildings. Joos Excavating, 58 Ill. App. 3d at 310, 374 N.E.2d at 488. Ultimately, "the only material deposited at the site was from Joos' excavation and demolition business." *Id*. On appeal from a finding that it had violated permitting requirements, Joos argued that, because the only material deposited at the site resulted from its own demolition and excavation business, it came within the meaning of the exception for wastes generated by the operator's own activities. Joos Excavating, 58 Ill. App. 3d at 311, 374 N.E.2d at 487. In holding that the exception applied only to wastes generated on the site at which it is to be disposed, the Court stated that adopting Joos' position

> would create serious gaps in the overall objectives sought to be attained by the legislature in enacting this Act. It would allow a property owner to utilize his land for waste disposal purposes without regard to any of the regulations . . . , so long as the refuse, whatever the quantities or character, was created by the actions of the property owner. The opportunity for wholesale evasion of the statutory scheme by landfill operators which such a construction would create should appear evident. Joos Excavating, 58 Ill. App. 3d at 312, 374 N.E.2d at 489.

In Reynolds Metals Co. v. PCB, 108 Ill. App. 3d 156, 157, 438 N.E.2d 1263, 1265 (1st Dist. 1982), the Court found that Reynolds owned and operated an aluminum fabrication plant and leased on the same site an abandoned quarry in which it disposed of solid waste generated by the plant. The Board had first noted that an on-site landfill such as Reynolds' "would ordinarily fall within the exception." Reynolds Metals, 108 Ill. App. 3d at 159, 438 N.E.2d at 1265. However, the Board determined that Reynolds' disposal activity at the quarry presented potential for serious environmental harm and "that it was not the type of activity envisioned by the legislature when it enacted this exception to its permit requirement." The Court affirmed the Board's finding that the potential harm made the Section 21(d) exception inapplicable to Reynolds' landfill. Reynolds Metal, 108 Ill. App. 3d at 161, 438 N.E.2d at 1267.

In Pielet Bros. Trading Co. v. PCB, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982), Pielet Brothers appealed the Board's finding that it had operated a solid waste management site or refuse disposal operation without a permit. Pielet Brothers argued that it was exempt from permitting because it accepted automobiles and appliances from others, shredded them on its premises, and then disposed of wastes on an adjacent site. Pielet Bros., 110 Ill. App. 3d at 753, 442 N.E.2d at 1376. In affirming the Board's finding, the Court stated that the legislature did not intend the exception for wastes generated by the operator's own activities "to dominate and defeat the other provisions of the Act." Pielet Bros., 110 Ill. App. 3d at 755, 442

N.E.2d at 1377. Considering the legislative findings expressed in the Act, the Court concluded that the exception "must be given a somewhat more restrictive construction than that suggested by a literal reading" of the provision in isolation. *Id*., citing Ill. Rev. State. 1981, ch. 111 1/2, par. 1020(a)(2); *see* 415 ILCS 5/20(a)(2) (2006).

The Pielet Brothers Court accepted the Board's position that the intent of that language is "to exempt minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated." Pielet Bros., 110 Ill. App. 3d at 757, 442 N.E.2d at 1378. Significantly, the Court agreed that Pielet Brothers' own activities did not generate waste from the shredder: "[a]lthough Pielet 'processes' junk cars and appliances, they are nonetheless other people's cars and appliances." *Id*., citing Joos Excavating Co. v. PCB, 58 Ill. App. 3d 309, 374 N.E.2d 486 (3rd Dist. 1978); *see also* Wasteland, Inc. v. PCB, 118 Ill App. 3d 1041, 1050-51, 456 N.E.2d 964, 973 (3rd Dist. 1983) (affirming Board conclusion that disposal of paper at recovery site did not qualify for Section 21(d) exception).

As recently as 2003, the courts have affirmed this interpretation. On property owned by Prairie Material, Dixon-Marquette operated a cement production business, generating the waste by-product of cement kiln dust. Since at least 1970, Dixon-Marquette deposited the cement kiln dust on the property in a pile that eventually covered 30 acres and reached a height of 70 feet. People v. Dixon-Marquette Cement, Inc., 343 Ill. App. 3d 163, 166, 796 N.E.2d 205, 206 (2nd Dist. 2003). The People appealed the trial court's dismissal of allegations based on failure to obtain a permit. On appeal, defendants argued that, because Dixon-Marquette generated cement kiln dust and disposed of it on the same site, it was exempt under Section 21(d) from having to obtain a permit. Dixon-Marquette Cement, Inc., 343 Ill. App. 3d at 167, 796 N.E.2d at 207. Rejecting that argument, the Court stated that

> [t]he intent of section 21(d)(1) of the Act was not to create a legislative loophole or gap in the permit system. To allow defendants' literal interpretation of Section 21(d)(1) would result in operators disposing their waste product or by-product indiscriminately, without regard for the amount or type of waste, and without accountability for the resulting pollution of our air, water, and other resources. This literal interpretation achieves nothing other than circumventing both the permit system and the purposes of the Act. Dixon-Marquette Cement, Inc., 343 Ill. App. 3d at 173-74, 796 N.E.2d at 212.

The Court continued by construing Section 21(d) to exempt "those on-site facilities that generate minor amounts of waste that can be disposed of without a significant threat of environmental harm." Dixon-Marquette Cement, Inc., 343 Ill. App. 3d at 175, 796 N.E.2d at 213-14. Based on the size of its operation and its suitability for a permit evaluation by the Agency, the Court found that the Section 21(d) exception did not apply to Dixon-Marquette. Dixon-Marquette Cement, Inc., 343 Ill. App. 3d at 175, 796 N.E.2d at 214.

Significantly, the Dixon-Marquette Court also rejected the claim that the decisions in Pielet Bros. and Reynolds Metals had been abrogated since 1982 by legislative amendments to Section 21(d). Dixon-Marquette Cement, Inc., 343 Ill. App. 3d at 176, 796 N.E.2d at 214. Although the Court acknowledged that the legislature had amended Section 21 "numerous times"

since 1982, "none of those amendments reflect a reconsideration or clarification in response to the decisions." Dixon-Marquette Cement, Inc., 343 Ill. App. 3d at 176, 796 N.E.2d at 214-15. The absence of a more specific legislative definition of the Section 21(d) exception indicated that the legislature had acquiesced in the Board's and the court's interpretation of that exception. *Id*.

In American Tree Service, Inc. v. IEPA, PCB 94-93 (Dec. 14, 1993), American Tree Service, Inc. (ATS) appealed an open burning permit including a seventh condition that

> [o]nly 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 American 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. *Id*., slip op. at 4-5.

The Act excluded from the definition of "regional pollution control facility" those

> 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 waste are transported within or between sites owned, controlled or operated by such person. *Id*., slip op. at 7.

The Agency argued that, without the seventh condition, ATS would need to obtain local siting approval in order for the Agency to issue an open burning permit. *Id*., slip op. at 11. Noting that ATS accepted landscape waste that "is not generated on-site, but which is discarded by individual homeowners and units of local government," the Board found that the condition did not limit waste at the site to that from ATS' own activities: "[a]s written, condition No.7 potentially allows American Trees to incinerate . . . landscape waste that is generated from anywhere in the State, or the world, as long as it is collected by American Tree employees. This would truly circumvent the purposes of the Act . . . . *Id*., slip op. at 15-16. Continuing its discussion, the Board stated that

> [t]he 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 [County] site, it is a regional pollution control facility

and is required to obtain local siting approval. *Id*., slip op. at 16.

PDC's Activities Here

Here, PDC treats wastes generated and shipped to it by customers. After treating the waste it receives, PDC disposes of the new waste it has produced. As in Pielet Brothers, here PDC processes wastes created by others, creating in that process a new waste. PDC does not create waste incidental to the process of manufacturing or creating a marketable commodity or product. Waste management is PDC's business at this site.

In this sense, then, the Board finds that PDC does not create waste as a result of "its own activities," any more than did the landscape business described in American Tree Service above. The distinction between PDC and a company such as Northwestern Steel and Wire is clear: as stipulated by the parties, the Agency found that Section 39.2 siting was not required for expansion of Northwestern's on-site waste stabilization facility.

Having reached this conclusion with regard to the exemption from siting for wastes generated by a facility's "own activities," the Board recognizes that the Agency may have interpreted the exemption differently in other situations. The courts have made clear that, when the Agency resolves a legal question such as interpretation of a statutory provision, the Agecny's determination is not binding upon the Board. *See* Village of Fox River Grove v. PCB, 299 Ill. App. 3d 869, 877, 702 N.E.2d 656, 662 (2nd Dist. 1998), citing Envirite Corp. v. PCB, 158 Ill. 2d 210, 214, 198 Ill. Dec. 424, 632 N.E.2d 1035 (1994).

The Board also is not persuaded that the permit issued to Envirite by the Agency on April 29, 1992 requires a judgment in favor of PDC. *See* R. at 1298-1304. The parties have stipulated that, on the basis of an exemption from the statutory definition of "pollution control facility," the Agency determined that local siting approval was not necessary for Envirite to develop a facility for disposal of residual sludge generated by Envirite's waste treatment process. Exh. 1 (¶¶75, 78). The Board notes, however, that the record in this proceeding does not appear to include the full Envirite permitting record. *See* R. at 1298-1321. In addition, that permit resulted in no appeal to the Board and no Board opinion regarding the exemption from the statutory definition of "pollution control facility" at issue in that permitting decision. Furthermore, as just stated, when the Agency has resolved a legal question such as interpretation of a statutory provision, the Agency's determination is not binding upon the Board. *See* Village of Fox River Grove, 299 Ill. App. 3d at 877, 702 N.E.2d at 662, citing Envirite, 158 Ill. 2d at 214, 198 Ill. Dec. 424, 632 N.E.2d 1035.

The Board also is not persuaded that the permit modification granted by the Agency in 1993 to Northwestern requires a judgment in favor of PDC. Northwestern sought a Class 3 RCRA permit modification in order to expand its on-site hazardous waste landfill. R. at 1230-34 (permit fact sheet). Northwestern sought to dispose of wastes produced on-site in the course of its own steel production. R. at 1230-34 (permit fact sheet), 1236-41 (excerpts of draft permit); *see also* Tr. at 33. No materials other than those wastes were to be deposited into the on-site landfill. R. at 1230-34 (permit fact sheet). These factors distinguish Northwestern's application from PDC's.

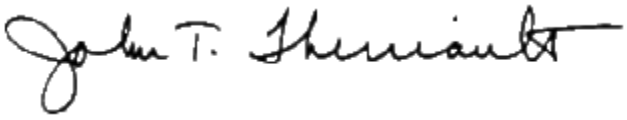
CONCLUSION

For the reasons provided in the opinion above, the Board finds that PDC's proposed RWL is not excluded from the definition of "pollution control facility" by Section 3.330(a)(3) of the Act. The Board finds that the Agency therefore correctly determined that PDC must demonstrate proof of local siting approval. In the absence of that proof, issuance of the requested permit would violate Section 39(c) of the Act. Accordingly, the Board affirms the Agency's denial of PDC's application for Class 3 modification of its RCRA Part B permitl.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); see also 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; see also 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 10, 2008, by a vote of 4-0.



John T. Therriault, Assistant, Clerk
Illinois Pollution Control Board