

BEFORE THE POLLUTION CONTROL BOARD **RECEIVED**  
OF THE STATE OF ILLINOIS CLERK'S OFFICE

FEB 03 2005

IN THE MATTER OF: )  
)  
PETITION OF JO'LYN CORPORATION )  
and FALCON WASTE AND RECYCLING )  
for an ADJUSTED STANDARD from )  
35 ILL. ADM. CODE PART 807 or, )  
in the alternative, A FINDING OF )  
INAPPLICABILITY. )

STATE OF ILLINOIS  
Pollution Control Board

AS 04-02  
(Adjusted Standard - Land)

NOTICE

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601


Bradley P. Halloran, Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

Elizabeth S. Harvey  
Swanson, Martin & Bell  
One IBM Plaza, Suite 3300  
330 North Wabash Avenue  
Chicago, IL 60611

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR LEAVE TO FILE INSTANTER and RESPONSE BRIEF, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

  
John J. Kim  
Assistant Counsel  
Special Assistant Attorney General  
Division of Legal Counsel  
1021 North Grand Avenue, East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
217/782-5544  
217/782-9143 (TDD)  
Dated: February 2, 2005

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**MOTION FOR LEAVE TO FILE INSTANTER RESPONSE BRIEF**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board ("Board") grant the Illinois EPA leave to file instanter its Response to Petitioners' Post-hearing Brief. In support of this motion, the Illinois EPA states as follows:

1. On December 22, 2004, the parties participated in a hearing in this matter. At the conclusion of the hearing, the parties agreed that, inter alia, the Illinois EPA's post-hearing response brief would be filed by no later than January 28, 2005.
2. Due to several other matters that have also fallen due in the time period between the filing of the Petitioners' post-hearing brief and the present date, the undersigned counsel for the Illinois EPA has been unable to complete the post-hearing response brief in a timely fashion. A motion was filed seeking a short extension to January 31, 2005, or one business day, to allow completion and filing of the Illinois EPA's post-hearing response brief. Unfortunately, finalization of the response brief took longer than anticipated.
3. The Petitioners should not be prejudiced by this short delay, since less than one week will elapse between the original due date and the filing date.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board grant the Illinois EPA leave to file instant its Response Brief.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



John J. Kim

Assistant Counsel

Special Assistant Attorney General

Division of Legal Counsel

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This filing submitted on recycled paper.

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**RESPONSE TO PETITIONER'S POST-HEARING BRIEF**

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and hereby submits a response to the Petitioner's post-hearing brief filed by Jo'Lyn Corporation and Falcon Waste and Recycling ("Petitioners"). In support of this response, the Illinois EPA states as follows:

**I. ILLINOIS EPA'S RECOMMENDATION**

The Illinois EPA has previously submitted a recommendation to the Illinois Pollution Control Board ("Board") in response to the Petitioners' petition and amended petition. The arguments and comments in the recommendation need not be repeated here, but the Illinois EPA does direct the Board's attention to that filing.

**II. GBSM IS A WASTE**

The underlying basis for the Illinois EPA's position in this matter is that the granulated bituminous shingle material ("GBSM") discussed in the Petitioners' proposed order or adjusted standard from the Board is a waste. The Illinois EPA's position is based both in fact and law, as set out more fully in the previously-filed recommendation.

In its post-hearing brief, the Petitioners attempt to portray the Illinois EPA's position in this matter as one seeking to distance itself from, or repudiate, a May 18, 1993 letter ("May 1993 letter") sent to IKO Chicago, Inc. ("IKO"). That letter was admitted as Exhibit 5 in the December 22, 2004 hearing. Such is not the case. Rather, the Petitioners are themselves attempting to broaden the scope and impact of that letter far beyond its clearly stated terms. The May 1993 letter was a solid waste determination sent only to IKO based upon a specific request supported by specific information. No other parties are referenced or identified in the letter as being able to take advantage of the conclusion therein, and the letter does not have any viability or relevance beyond use by IKO.

Here, the Petitioners are trying to piggy-back their proposed operations onto the May 1993 letter, hoping to stand in the shoes of IKO so that they may treat the letter as if it were issued directly to them. The Illinois EPA is not repudiating the May 1993 letter, it is simply recognizing that letter as being effective only as to IKO. The Petitioners, on the other hand, are trying to avail themselves of the finding issued to IKO and use it as their own. Since the letter was a facility-specific, requestor-specific letter, it should not be interpreted as being available for the Petitioners' use. Put another way, IKO is not the party seeking an adjusted standard, so the Petitioners' claim that the Illinois EPA is ignoring the May 1993 letter is wholly without merit.

The May 1993 letter issued to IKO clearly evidenced the Illinois EPA's decision that IKO was the recipient of the solid waste determination, that the determination was based on the information presented by IKO, and that there were limitations on the use of GBSM within the scope of the determination. Given that the Petitioners were not even in existence at the time of the issuance of the letter, there is no credible argument to be advanced that the Petitioners should regardless be able to treat the letter as being applicable to their operations. The May 1993 letter

did not contemplate IKO selling their GBSM to a third party, did not address the possibility of that third party in turn processing the GBSM in a manner that would arguably fit within the scope of the letter. Simply put, the May 1993 letter is being stretched well beyond its limits.

Since the filing of the Illinois EPA's recommendation, the Illinois Supreme Court has issued an opinion in the case of Alternate Fuels, Inc. v. Director of the Illinois EPA, No. 96071, 2004 WL 2359398 (October 21, 2004) ("AFI 2004"). That decision affirms the appellate court decision reached in Alternate Fuels, Inc. v. Illinois EPA, 337 Ill. App. 3d 857, 786 N.E.2d 1063 (5<sup>th</sup> Dist. 2003) ("AFI 2003"). As argued in the Illinois EPA's recommendation, the AFI 2003 opinion is factually and legally distinguishable from the present case, and thus the Supreme Court's disposition in AFI 2004 is not persuasive.<sup>1</sup>

Therefore, the Board should not look to the AFI 2004 decision as being applicable, relevant or controlling. Much more on-point, factually and legally, is the Board's decision in In the matter of: Petition of Illinois Wood Energy Partners, LP, For An Adjusted Standard From 35 Ill. Adm. Code 807 Or, In The Alternative, A Finding Of Inapplicability, AS 94-1 (December 1, 1994). Based on the Illinois Wood Energy Partners decision, as well as the other legal arguments presented thus far by the Illinois EPA, the Board should not enter an order in this matter that the GBSM is not a waste.

### **III. REQUEST FOR ADJUSTED STANDARD**

The Board should also not grant the adjusted standard as requested by the Petitioners. The supporting documentation provided thus far, along with the testimony and exhibits presented

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<sup>1</sup> Even if the Board did decide that the AFI 2004 decision was relevant in some manner, the Illinois EPA notes that it filed a motion for rehearing to that decision. (This filing is listed on the Illinois Supreme Court's website at: <http://www.state.il.us/court/SupremeCourt/Docket/2005/Pdf/rehear01.pdf>.) As of the date of filing this response, the court has yet to rule on the motion for rehearing. The court could grant the motion and possibly re-open the matter. Without seeing what the court's final order is in that case, the Illinois EPA is in the difficult position of either not being able to further distinguish what may be the court's final order, or cite to a new order that may be more clearly supportive of (or not inconsistent with) the Illinois EPA's position articulated here. Similarly, the Board may want to consider how much reliance it wishes to place on a decision that could be modified or reversed.

at the hearing held on December 22, 2004, fail to sufficiently justify the Board's granting of an adjusted standard.

In the hearing, the Petitioners attempted to address at least some of the Illinois EPA's concerns described in its recommendation; nonetheless, there are serious issues that remain unresolved. Those issues, along with others to be discussed below, include quality control concerns, the Petitioners plans to accept GBSM from sources other than IKO, and missing information from the adjusted standard "checklist."

#### **A. Testimony and exhibits offered at the December 2004 hearing**

Kathy Powles, the vice-president of Jo'Lyn Corporation and president of Falcon Waste and Recycling, presented testimony at the December 2004 hearing. Her testimony raised a number of issues that warrant consideration and, ultimately, denial of the adjusted standard.

Ms. Powles testified that a blacktop or asphalt application could essentially be replaced with Eclipse Dust Control ("EDC"), which is the name of the paving product that the Petitioners wish to market. Hearing Transcript, p. 22.<sup>2</sup> She also testified that EDC is made from GBSM. Tr., p. 18. Upon cross-examination, she initially testified that she did not foresee any limits as to the types of roads that EDC could be used upon, though she later agreed that something such as a high volume roadway would not be appropriate for application. Tr., pp. 72-73. Upon questioning from a member of the Board's technical staff, she stated she was not aware of any regulatory restrictions in using EDC on roadways, such as limitations imposed by the Department of Transportation. Tr., p. 73.

However, the Illinois Department of Transportation ("IDOT") does have standards and specifications for road construction ("road standards") on its website.<sup>3</sup> Section 400 of the IDOT

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<sup>2</sup> Reference to the Hearing Transcript will henceforth be made as, "Tr., p. \_\_\_\_."

<sup>3</sup> See, <http://www.dot.state.il.us/desenv/stdspecs1.html>.

road standards addresses bituminous surfaces and pavements, and includes a discussion of reclaimed asphalt pavement (“RAP”). Ms. Powles testified that, in at least one situation, a potential client had backed out of a contract with the Petitioners and instead utilized RAP. Tr., p. 125. By her testimony, RAP is not dissimilar in application and use from her companies’ product, yet RAP is specifically addressed in the IDOT road standards. The Petitioners apparently are not aware of the IDOT road standards or, if they are, have not addressed them to date.<sup>4</sup> The apparent failure of the Petitioners to properly research all relevant and applicable roadway construction standards and guidelines is further proof that the proposed process is flawed and not worthy of an adjusted standard.

The Petitioners have not presented any testimony or evidence that recognizes the IDOT road standards, nor have they presented any testimony or arguments as to whether the standards are applicable. Without such testimony, all that can be fairly stated is that the Petitioners have not fully considered the possible limitations of use for EDC.

Another subject of Ms. Powles’ testimony was the “Operating Manual for Production and Application of Eclipse Dust Control” (“operating manual”), introduced into evidence as Exhibit 2 and first provided to the Illinois EPA at the December 2004 hearing. Tr., pp. 24-25. The operating manual was presumably prepared and provided to the Board in response to concerns previously raised by the Illinois EPA that there was a dearth of information provided, the petition and amended petition notwithstanding. The operating manual, however, itself raises questions that need to be answered.

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<sup>4</sup> Admittedly, counsel for the Illinois EPA was also not heretofore aware of the IDOT road standards and therefore did not specifically bring those standards to Ms. Powles’ attention during the December 2004 hearing. However, it should be incumbent upon the Petitioners to have properly and fully researched any regulations or standards that could be applicable to use of EDC. That the Petitioners were unaware of the IDOT road standards (or possibly knew of the standards and chose to not acknowledge them) is in and of itself problematic, and certainly warrants denial of the adjusted standard.



For example, Ms. Powles testified that it would be the Petitioners' plan to use at least one other supplier of GBSM in addition to IKO. Tr., p. 84. However, she was not able to testify with certainty that the operating manual would or would not need to be revised, since much of the operating procedures within the operating manual are tailored specifically for interaction with IKO. Exhibit 2, p. 4. One such instance would be the use of a live camera, via internet feed, to watch the GBSM tab box at the GBSM supplier. Such a camera is listed in the operating manual, but Ms. Powles was not clear in her testimony as to whether such a camera would be required for each and every potential supplier. Thus the operating manual would undoubtedly need to be revised to some extent.

Ms. Powles' testimony that another supplier other than IKO would be utilized raises two more issues. First, the Petitioners have attempted to argue that the May 1993 letter issued to IKO should control the characterization of GBSM. However, as noted above, that letter was issued in direct response to voluminous and detailed supporting information sent by IKO to the Illinois EPA. If an as yet unidentified supplier of GBSM became involved with the Petitioners' business, the Petitioners—to be consistent with their reliance on the May 1993 letter—would have to produce a similar solid waste determination that was issued to that other supplier. No such letter has been produced. Yet the Petitioners want the Board to somehow find that the May 1993 letter, issued only to IKO, is in fact applicable to IKO, the Petitioners, and any other shingle manufacturer that may enter into business with the Petitioners. That kind of finding is clearly inappropriate.

Second, as testified to later by David Foulkes, aside from IKO's present plant, the only other GBSM supplier in the state of Illinois is Owens Corning. Tr., pp. 144-43. However, the Petitioners have not stated that Owens Corning would their second supplier of GBSM, even

though right now there is no other potential supplier in the state. There was testimony that IKO intended to open a second manufacturing plant in Kankakee, Illinois, later in 2005. Tr., p. 132. However, the Petitioners did not name that facility as the possible supplier either. Thus it is unclear who the Petitioners intend to seek out as their secondary supplier of GBSM.

Ms. Powles also testified that the thickness of the EDC upon application is between four to six inches. Tr., p. 39. She later testified that there may be a need in the future to adjust the specifications related to application of EDC. Tr., p. 114. In their post-hearing brief, the Petitioners followed up on that theme, stating that it is best that the adjusted standard not include a specific thickness specification. Petitioners' brief, p. 16. This position is again contrary to the May 1993 letter that purportedly supports the Petitioners' request for an adjusted standard, since that letter provides a specific thickness (i.e., five to six inches) in its terms.

Another issue that arose from Ms. Powles' testimony concerns the second test site in which EDC was used. Ms. Powles testified that the second of the two test sections created by the Petitioners held up very good in the full sun area. Tr., pp. 41-43. But on cross-examination, Ms. Powles admitted that in the shaded areas of the second test site, the EDC was slightly broken up. Tr., p. 95. Based on this testimony, the conclusion must be drawn that EDC does not perform as well in areas that receive at least some if not full shade. If that is the case, then the adjusted standard should not be granted as it does not reflect a limitation on the areas on which EDC could be used.

#### **B. Issues raised in Petitioners' post-hearing brief**

In addition to the issues discussed and identified above, the Petitioners also address issues in their post-hearing brief. Some of those issues warrant response and further discussion.

## 1. Experiences in other states

The Petitioners first elaborate on experiences in other states, citing to testimony by Mr. Foulkes that the Illinois EPA has essentially revoked the May 1993 letter. Mr. Foulkes further testified that since the Petitioners' operations are on hold, IKO is being forced to landfill most of its GBSM. Petitioners' brief, p. 7.

That argument is wrong, and the testimony is misleading. The Illinois EPA has done nothing to revoke the May 1993 letter; however, there has been no attempt by IKO to take advantage of the letter. Rather, the Petitioners are attempting to take advantage of IKO's letter. The Illinois EPA fully recognizes that IKO could utilize its GBSM in the manner described in the May 1993 letter, and nothing has been presented by the Petitioners to dispute that.

As for Mr. Foulkes' testimony that IKO is being forced to landfill its GBSM, that is a very misleading characterization of the present situation. The Illinois EPA issued the solid waste determination to IKO in May 1993. The Petitioners did not come into existence until 1997, and did not begin to look into the prospect of using GBSM until 1999. Tr., pp. 13, 15-16. The first test application of EDC did not take place until 2000. Tr., p. 157. Mr. Foulkes acknowledged that from 1993 to 2000, IKO sent the majority of its GBSM to a landfill. This decision by IKO had absolutely nothing to do with the Illinois EPA's position regarding the Petitioners' proposed activity. The Petitioners have represented that for a time they did accept GBSM at their facility, and that they currently have approximately 4,730 tons of GBSM on-site. Petitioners' brief, p. 10. So for at least some period of time following 2000, IKO was able to send some of its GBSM to the Petitioners. The notion that the Illinois EPA is forcing IKO to dispose of GBSM in the same manner it did for the seven years prior to the creation of the Petitioners is without merit, as the Illinois EPA has taken no action upon or against IKO.

## **2. Comparison of test results to regulatory standards**

The Petitioners cite to much of the information that was provided by IKO to the Illinois EPA in support of the ultimate issuance of the May 1993 letter. Petitioners' brief, p. 8. However, this citation further illustrates the problem identified by the Illinois EPA; namely, that the Petitioners have stated they intend to use at least one other supplier other than IKO. Since only IKO's information is being cited to, a complete picture is not being presented since no information from the Petitioners' other supplier(s) has been discussed (or even identified). There is no dispute that IKO's data says what it says, but what is unclear is whether there is any correlating data from whatever other supplier the Petitioners intend to use.

The Petitioners also argue that RAP can be looked to by analogy, as RAP has no environmental impact on humans or the environment and asphalt is a component of GBSM. Petitioners' brief, p. 9. But, as noted above, there are specific IDOT road standards that address the manner in which RAP is to be used in road construction. There is no evidence from the Petitioners that EDC can meet IDOT road standards.

## **3. Are there any roadways which are not appropriate for application of EDC?**

Again, the Petitioners state that EDC is used for lower-traffic applications, just like traditional asphalt. Petitioners' brief, p. 10. If that is the case, the Petitioners should have previously researched and located the IDOT road standards cited to herein, and determined how use of EDC meshes, if at all, with those standards. The failure to recognize those road standards, and instead focus on the aesthetics of EDC, is indicative of the lack of quality control that the Illinois EPA has referred to.

#### **4. Would EDC be sold to customers for installation by the customer?**

For the first time, the Petitioners now state that there may be potential customers that would like to purchase EDC for their own installation. Petitioners' brief, p. 13. The Petitioners note that if such were the case, the Petitioners would provide detailed installation instructions, the same as those to be used by the Petitioners. The Petitioners refer to the operating manual for those instructions. Referencing the operating manual, however, shows that the "detailed" instructions amount to five steps that take up less than half a page. Exhibit 2, p. 6. Setting aside whether those instructions are detailed, it clearly would require a further revision of the operating manual to account for third party installation.

Also, that situation would then result in not IKO, not the Petitioners, but a third party attempting to somehow fall within the coverage of the May 1993 letter issued by the Illinois EPA. Whether the May 1993 letter is acknowledged by the Petitioners to be their main basis for the adjusted standard, the fact remains that application of the EDC is a key component in the argument that there is no waste involved (as the installation specification was clearly a part of the Illinois EPA's 1993 solid waste determination), and the adjusted standard language now being proposed by the Petitioners does not take into account the possibility that a third party would perform the application.

#### **IV. CONCLUSION**

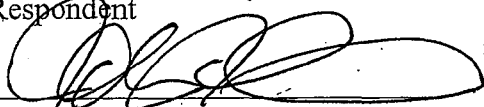
The Board should carefully weigh the Illinois EPA's concerns set forth in its recommendation and this response brief. The material in question is a waste, and no successful legal or factual argument has been proffered to the contrary. There are still a number of unanswered concerns and problems with the adjusted standard sought by the Petitioners, and therefore the Board should deny the relief requested.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board deny the Petitioners' request for an adjusted standard or, in the alternative, a finding of inapplicability.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



John J. Kim

Assistant Counsel

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Dated: February 2, 2005

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## CERTIFICATE OF SERVICE


I, the undersigned attorney at law, hereby certify that on February 2, 2005, I served true and correct copies of a MOTION FOR LEAVE TO FILE INSTANTER and RESPONSE BRIEF, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer  
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