**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | **)** | |
| | **)** | |
| **PETITION OF WESTWOOD LANDS, INC., A Michigan Corporation, FOR ADJUSTED STANDARD FROM PORTIONS OF 35 Ill. Adm. Code §807 and §810 or, in the alternative, a FINDING OF INAPPLICABILITY.** | **)** | **AS 09-03 (Adjusted Standard – Land)** |

**NOTICE OF FILING**

Illinois Pollution Control Board
Attn: John Therriault, Clerk
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Swanson, Martin & Bell
Attn: Ms. Elizabeth S. Harvey
Mr. John P. Arranz
330 North Wabash Avenue
Suite 3300
Chicago, Illinois 60611

**PLEASE TAKE NOTICE** that I have today filed with the office of the Clerk of the Pollution Control Board an **APPEARANCE and RECOMMENDATION OF THE ILLINOIS EPA**, copies of which are herewith served upon you.

Respectfully submitted,

**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**,
**Respondent**

_____

By: William D. Ingersoll
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: August 5, 2009

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | **)** | |
| | **)** | |
| **PETITION OF WESTWOOD LANDS, INC.,** | **)** | **AS 09-003** |
| **A Michigan Corporation,** | **)** | **(Adjusted Standard – Land)** |
| **FOR ADJUSTED STANDARD FROM** | **)** | |
| **PORTIONS OF 35 Ill. Adm. Code §807 and** | **)** | |
| **§810 or, in the alternative, a FINDING OF** | **)** | |
| **INAPPLICABILITY.** | **)** | |

## ENTRY OF APPEARANCE

**NOW COMES** the undersigned, as counsel for and on the behalf of the Environmental Protection Agency of the State of Illinois, and hereby enters his Appearance in the above captioned matter.

Respectfully submitted,

**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**, **Respondent**

By _____

William D. Ingersoll
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)

Dated: August 5, 2009

.

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | **)** | |
| | **)** | |
| **PETITION OF WESTWOOD LANDS, INC.,** | **)** | **AS 09-003** |
| **A Michigan Corporation,** | **)** | **(Adjusted Standard – Land)** |
| **FOR ADJUSTED STANDARD FROM** | **)** | |
| **PORTIONS OF 35 Ill. Adm. Code §807 and** | **)** | |
| **§810 or, in the alternative, a FINDING OF** | **)** | |
| **INAPPLICABILITY.** | **)** | |

## ILLINOIS EPA RECOMMENDATION

The ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by its attorney William D. Ingersoll, hereby submits its Recommendation in the above captioned matter. This filing is submitted pursuant to Section 35 of the Illinois Environmental Protection Act ("EPAct") [415 ILCS 5/35 (2006)] and 35 Ill. Adm. Code **§**104 *et seq*. For the reasons outlined below, the Illinois EPA recommends that Westwood Land, Inc.'s Petition be **DENIED**.

## I. INTRODUCTION

1. On March 31, 2009, Westwood Lands Inc. ("Petitioner"), filed a Petition for Adjusted Standard ("Petition") requesting relief from 35 Ill. Adm. Code Parts 807.104 and 810.103 or in the alternative a finding of inapplicability. (Petition at 1)

2. According to the Petition, relief is sought from the "… panoply of regulatory requirements imposed by the Act and by Parts 807 and 810." (Petition at 8)

3. A May 21, 2009, Pollution Control Board ("Board") Order considering the Petition, pursuant to Section 104.406(a), directed Petitioner to provide information. Following consideration, the Board found that Petitioner did not provide all of the information required for an Adjusted Standard Petition and that unless Westwood offers adequate proof in an amended petitioner, the Board was not able to determine that the required statutory factors have been satisfied and cannot grant the Petition. (Order at 10)

4. On June 22, 2009, Petitioner filed a pleading entitled Amended Petition For Adjusted Standard ("Amended Petition") with the Board.

5. Within the Amended Petition, Petitioner attempts to incorporate its earlier pleading and sets out its responses to the many questions posed within the May 21, 2009, Order of the Board.

## II. INVESTIGATION

6. Notice of the Petition, pursuant to Section 28.1 of the EPAct and Section 104.408 of the regulations, was issued and the Order found such met the notice requirement of the Act and Board's procedural rules. (Order at 10)

7. To date, the Illinois EPA has not received a citizen inquiry.

8. The Illinois EPA notes that, when it was captioning this matter for its Recommendation, the pleadings failed to provide for the State of incorporation of Westwood Lands Inc. A search of the Illinois Secretary of State's database for corporation and LLC/certificate of good standing failed to include registration by Westwood Lands Inc. The Illinois EPA noted that in a July 28, 2008, permit application to the Agency, the applicant was Westwood Lands, and provided an address in Michigan. A Westwood Lands Inc. is a registered corporation of the State of Michigan since 2004. It is presumed that this is the entity that seeks relief from Illinois law.

## III. REVIEW OF FACTS PRESENTED IN THE PETITION

- ***RELIEF SOUGHT REVIEW***

9. The Petitioner states that it seeks alternate forms of relief; either, firstly, a finding that steelmaking slag is not a waste under the Illinois Environmental Protection Act ("EPAct") (415 ILCS 5/ 1 *et seq*) or, secondly, a finding of inapplicability of Board regulation. (See: Petition at 1)

10. Petitioner starts off its Petition in an attempt to frame the relief sought as requesting the Board "… for an Adjusted Standard from portions of Section 807.104 and 810.103…." (Pet. at 1) Some time thereafter, however, Petitioner concludes its Petition by providing that relief is sought from the "… panoply of regulatory requirements imposed by the Act and by Parts 807 and 810." (Petition at 8) The Illinois EPA would offer that the latter description of the Petition's request for relief is much more accurate than the former.

11. In support of its relief from regulation, Petitioner suggests that even if it is accepting, treating, storing or processing a waste, that its facility not be subject to regulation, apparently, under any of the Board's waste regulations. This contention is bolstered by the fact that Petitioner offers, as an alternative to a finding that they accept a waste, an Adjusted Standard which would find that the definition of waste be interpreted to exclude its site from definitions of facility, solid waste, waste, unit, solid waste management, etc. (See: Petition at 9) In short, Westwood Lands Inc. does not intend to seek relief from a regulation, it seek relief from any and all possible regulation.

12. Relief, in the form of an Adjusted Standard, should not be granted. Generally speaking, Adjusted Standard Petitions are filed to seek specific relief from rules of general applicability. In this case, Petitioner does not request specific relief within its discussion of the matter, choosing instead to request general relief from Sections of the law which provides definitions for the Parts within which they exist. As such, relief, as requested, is not consistent with the pleading filed. As the Illinois EPA noted within its Recommendation filed with the Board in *In the Matter of Petition of Jo'Lyn Corporation and Falcon Waste and Recycling, Inc. for an Adjusted Standard,* AS 04-02) (Hereinafter "*Jo'Lyn*"), included among the definitions in Section 807.104 and 810 that are the subject of the Petitioner's request are those of "solid waste" and "waste." Those definitions are taken from statutory definitions found within Section 3.470 and 3.535 of the EPAct (415 ILCS 5/3.470, 3.535), respectively. Although the Board has in the past considered matters that involved the question of whether the material under review is a waste, in this case the Petitioner seeks direct regulatory relief from what is clearly identified as a statutory definition. Thus, a persuasive argument could be made that as to the portion of the request that would involve relief from the definitions of "solid waste" and "waste," the request is inappropriate since an adjusted standard cannot be granted to relieve a statutory obligation or standard. And secondly, in this case Westwood does not conceal and clearly expresses within this petition that if the slag is determined to be waste, then Westwood would be required to seek local siting approval pursuant to Section 39.2 of the EPAct. Once more, this essentially is an argument that Petitioner seeks relief from the siting requirements within the EPAct and not regulations of general applicability.

13. What cannot be lost, however, is the central fact that, even though Petitioner offers that it seeks an Adjusted Standard, Westwood has no intention of seeking relief from regulations of general applicability and contends in both instances that no regulation be forthcoming, exclusive of the possibility of permitting equipment under the Bureau of Air permitting program.

14. When you follow Petitioner's argument to its conclusion, if, the Board were to find that the material used is not a waste, the Board will likely find the proceeding moot and that there would be no need for an Adjusted Standard. (See generally: *Jo'Lyn*) What has not been reviewed is what occurs when the Board finds that a material used is a waste. Again, Petitioner seeks "inapplicability" by an Adjusted Standard. Yet, an Adjusted Standard is appropriate only when a facility demonstrates that a regulation of general applicability does not fit the facility or that such facility's operation was not considered when the Board was promulgating the general regulation. Thus, if the Board finds that the material used is a waste, in the Illinois EPA's opinion, it would not be reasonable for the Board to find the applicable sections of the existing regulations inapplicable. Indeed, what would be more reasonable would be for relief to be sought through site specific rule if it is found that the general rules do not account for its facility. (See generally: *In the matter of Petition of Ameren Energy Generating Company for Adjusted Standards from 35 Ill.*

*Adm. Code Parts 811, 814, 815,* AS 09-01). That is, assuming relief is warranted, which the Illinois EPA does not concede.

15. The other form of "relief" sought within this Petition for Adjusted Standard is essentially a declaratory ruling regarding slag and the definition of "waste" within the EPAct. The Illinois EPA finds such a request objectionable. As detailed more fully below in a discussion of the merits of a finding relative to the definition of waste, the Illinois EPA is limited in its Recommendation to petitions such as this one to only information given voluntarily by the Petitioner with no procedural right to compel, seek or review information and contentions made more deeply. Moreover, as discussed below, the caselaw does not support Westwood's request. As such, a declaratory action type of review should not be entertained, nor should the Board grant relief based upon that type of rationale in this proceeding.

- ***INTRODUCTION REVIEW***

16. Within the Petitions *Introduction*, Westwood acknowledges that it applied to the Illinois EPA for an air permit to construct the facility and that Illinois EPA found the application to be incomplete. (Petition at 2) Westwood goes on to note that "[i]n addition to questions about air emissions for the facility, [Illinois EPA] found the permit application to be incomplete because Westwood had not included proof of local siting approval pursuant to Section 39(c) of the Act." (Petition at 2) Initially, this statement is at the same time both a gross under-characterization and over-characterization of the denial. Of the five page letter, only a very few lines of relate to proof of local siting approval. (See: Petition, Exhibit B, page 3) As such, the vast majority of issues identified within the denial deal with matters other than denial based upon proof of siting. Moreover, since this denial, Westwood has not responded to the denial points within the Agency's August 25, 2008, denial letter. So, more issues than just presented in the Petition exist with permitting the facility and operating the site and that point deserves more attention than just noting that there were "questions about air emissions." As such, this Introduction over-sells the siting issue and under-sells the many other issues confronting issuance of the permit requested.

17. More importantly, Illinois EPA states within this denial point that "… [t]he letters provided with the application did not demonstrate compliance by holding a public hearing, along with other procedural requirement of Section 39.2 of the Act." (Petition, Exhibit B, page 3) Now, Petitioner itself submitted with its permit application the July 10, 2008, letter from John W. Hamm III, Mayor of the City of Madison, Illinois and the July 1, 2008, letter of John T. Papa, City Attorney. Noteworthy is the fact that Petitioner awaited the issuance of these letters when submitting its application to the Illinois EPA, which was received by the Illinois EPA on July 28, 2008. It is curious, to say the least, for an applicant for a permit to submit documentation letters, one providing expressly that the Petitioner's request for local siting approval was accepted and then complain about the reviewing

Agency considering such information in the decision process. (See: Petition: Exhibits D and E)

Furthermore, Petitioner had an opportunity to address this very issue before the Board had it appealed the Illinois EPA's denial letter within the statutory timeframe. As such, discussion of the matter should be suspect.

- ***CASELAW REVIEW***

18. Petitioner, from pages 2 through 5 of the Petition, offers arguments within a Section entitled "*The Material Used is Not A 'Waste'*." Essentially, this Section contains Petitioner's contention that the material it intends to accept is not a "waste" and, therefore the requirements of Parts 807 and 810 should not apply. (See: Petition at 3)

19. Petitioner opens its discussion by claiming that "… [t]he Board has previously recognized that an adjusted standard petition can, in the alternative, seek a finding of inapplicability." (See: Petition at 2) Yet, the caselaw relied upon by Westwood is not supportive of its arguments and facts are very different from previous analysis and decisions.

20. Regarding Petitioner's contention that a finding of declaratory relief/ inapplicability is supported by caselaw, Illinois EPA notes that the facts presented within this action differ significantly from *Jo'Lyn*. As discussed briefly above, Petitioner has filed an application for a construction permit and provided documents from the unit of local authority to establish that approval for the site had been granted. One document states expressly that "local siting approval" had been approved. (See: Petition, Exhibit D) It is arguable that Petitioner has had its bite of the siting issue apple and as such the Board should not exercise extraordinary jurisdiction or relief requesting a second bite at the issue, especially when Petitioner itself raised and failed to follow-up on this issue.

21. Westwood's analysis of caselaw also neglects to consider some key analysis points within *Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency*, (2005) 215 Ill.2d 219 (Hereinafter "*AFI*"). Westwood does note that the Supreme Court provides that the EPAct contemplates that materials that may otherwise be discarded by the supplier may be diverted from becoming waste and returned to the economic mainstream. (See: *AFI*, 830 N.E.2d 444, 457) However, absent from discussion is the analysis of the term "discarded" in Section 3.380 of the EPAct, which reads as follows:

> " 'Recycling, reclamation or reuse' means a method, technique, or process designed to remove any contaminant from waste so as to render such waste reusable, or any process by which materials

> that would otherwise be disposed of or discarded are collected, separated or processed and returned to the economic mainstream in the form of raw materials or products." (See: 415 ILCS 5/3.380)

22. The *AFI* court continues with its reasoning by noting that "[u]nder this phrasing the legislature has categorized items that may be recycled, reclaimed, or reused into two main categories: (1) "waste" from which contaminants may be removed and (2) "materials." According to the court, "[m]aterials are further subdivided into those that are "discarded" and those "materials that would otherwise be disposed of or discarded [which] are collected, separated or processed and returned to the economic mainstream in the form of raw materials or products." (*AFI*, 830 N.E.2d 444, 456)

23. As such, it is not as easy to conclude, as Westwood suggests, that a material is not a waste if it is returned to the economic mainstream. (See: Petition at 4) What is necessary is for a review of the "waste" or "material" to occur. Recycling, reuse and reclamation occur to two categories: (1) waste or (2) material, which could also be discarded. Steel slag, from multiple sources, which contain material Petitioner itself acknowledges must be removed and disposed of would likely fall more characteristically within the definition of "waste" under this analysis than under "material." Westwood states that its process "…liberate[s] the metallic iron and the iron oxides from the slag, for reuse."(See: Petition at 7) The Illinois EPA would highlight that even Petitioner recognizes that the metal is liberated/removed from the "slag" which apparently it is within. Petitioner continues in its discussion and provides that "… a small amount of material from the process that will be transported off-site to a landfill." (See: Petition at 8) Yet, in its Amended Petition, Westwood reveals that "… [r]oughly one-third by weight of the raw material (the steelmaking slag fines) will be usable product (the nuggets and briquettes), while the remaining two-thirds will be the calcium magnesium sulfate" which will be disposed of at landfills. In footnote 5 of the above sentence, Westwood takes back the use of the term "small" in its Petition. (See: Amended Petition at 8) Where approximately 67 percent of a material must be removed and discarded from the slag accepted at this facility, it is arguable that the slag is a "waste" under the two categories test.

24. Also, it is instructive to note that the *AFI* court expressly recognized that when reviewing a statutory enactment, a reviewing authority must not read each sentence in isolation but, rather, interpret each sentence in light of other relevant provisions. (See: *AFI*, 830 N.E.2d 444, 455) Steelmaking slag is included within Subtitle G of Title 35 of the Illinois Administrative Code, Part 817 which establishes regulations for new steel and foundry industry wastes landfills. The "Scope and Applicability" (Section 817.101) identifies "steelmaking slags" within several subsections as a waste from this industry. This Section provides that such may be used, if not prohibited or if approved by the Agency, for certain purposes. If, as stated, uses can be otherwise prohibited or discretionally approved by the Agency, it stands to reason that this slag is a waste to be reviewed by Illinois EPA. Again, under the *AFI*

review, all portions of a relevant statutory enactment should be read as a whole, which would require recognition that the Board has expressly noted this type of waste as something that may be addressed within its regulatory framework.

25. Similarly, Section 810.103 contains definitions for the term "slag" and "steel slag" which would tend to be an express recognition by the Board that such material is intended to exist within the regulatory framework of the Board's regulations.

26. Westwood argues that the Board's decision in *Jo'Lyn* favors its position in this matter and a finding that since some of the material may be returned to the generating facility the Board should find the slag not a waste is also unpersuasive. Yet, in *Jo'Lyn*, the Board specifically found "… that the petitioners, again like in AFI, are not removing any contaminant from waste. In fact, no contaminants are removed from the GBSM at all. Therefore, the GBSM is a 'material.'" (See: *Jo'Lyn* at 13) Once again, the Petition is silent on a discussion relative to the removal of 2/3 of the slag during its process and the ultimate disposal of the contaminants that comprise the slag which are not metal.

27. Other facts (or lack thereof) make this proceeding quite different from the caselaw relied upon by Petitioner. Initially, the Illinois EPA does feel that it is most difficult to review claims that a valid contract exists when key terms such as price, royalties, right of refusal as well as other terms are excluded under a claim of "trade secret." Although such law may curtail the necessity to reveal information to third parties under a request for information, it is different when the Petitioner is voluntarily submitting such documents as proof of a point and using them to establish the validity of their claim that a valid contract exists.

28. Further, the contract attached to the Petition, includes a Section for *Greenhouse Gas Credits* which has been entirely redacted. Illinois EPA is unable to review how a gas credit affects whether an actual purchase of the slag has occurred since it is unable to review the details deleted. (See: Petition, Exhibit A page 16) And, what can be found does not support Westwood's argument. For example, Westwood within its Amended Petition provides that "[t]he contract between Westwood and U.S. Steel (included as Exhibit A to the petition) includes provisions for U.S. Steel to purchase Westwood's products (See: Redacted Section 10 of Exhibit A, Claimed as trade secret [Foot Note 4]." (See: Amended Petition at 7) However, the entirety of Section 10 of Exhibit A is deleted. What can be determined, and only from the Title to Subsection 10, is that the section, apparently, provides for "*royalties and/or right of first refusal to purchase*." Generally speaking, since that is the most that may be done when presented with only an un-redacted title to a subsection and nothing more, a "right of first refusal" is, as the phrase implies, a first opportunity to purchase, and a discretionary option to purchase and not a classic binding contract to purchase, as may be inferred by the Petition. Furthermore, the Illinois EPA would ask the Board's consideration of the inequity of allowing a Petitioner to offer a contract and provision within that contract as a basis of proving a point and then, in

the same pleading, withhold such information from review. Where a person voluntarily subjects something as a basis for argument, that person should not be heard to claim limits on review of the information that is the basis for that argument.

29. For that matter, it is very difficult to reconcile Petitioner's arguments regarding the product it intends to produce. As noted above, Petitioner claims a contract to sell with U.S. Steel, and in the next breath states that "[b]ecause the product will be sold on the open market to steel manufacturers … ." (See: Amended Petition at 8) The "contract" with U.S. Steel is questionable for the reasons stated herein and as for sale on the open market, Westwood has failed to provide proof of that and at best a market must be presumed to go any further with discussion. The Illinois EPA is not able to engage in argument on a presumption.

30. It should, at very least, be incumbent upon a Petitioner seeking relief from regulations (declaratory judgment/finding of inapplicability - and the like) to provide all relevant terms and conditions to at least some legally binding commercial transaction with a third party concerning a newly created raw material or product.

- ***ADUSTED STANDARD REQUEST REVIEW***

31. The Illinois EPA will continue with its Recommendation and provide comment required by Board regulations, even though the Illinois EPA believes that relief in not appropriate in this matter due to the Petition seeking relief from mere definitions contained within the Board's regulations, as well as, identical definitions contained within the EPAct.

## IV. STATUTORY CRITERIA

### STANDARD FROM WHICH ADJUSTED STANDARD IS SOUGHT
### 35 Ill. Adm. Code Section §104.406(a)

32. The Board promulgated the requirements of 35 Ill. Adm. Code Part 807 as adopted by emergency rule and filed with the Secretary of State on July 27, 1973. The following administrative changes have occurred to Part 807:

> Adopted as an emergency rule and filed with the Secretary of State July 27, 1973; amended at 2 Ill. Reg. 16, p. 3, effective April 10, 1978; codified at 7 Ill. Reg. 13636; recodified from Subchapter h to Subchapter i at 8 Ill. Reg. 13198; emergency amendment in R84-22A at 9 Ill. Reg. 741, effective January 3, 1985, for a maximum of 150 days; amended in R84-22B at 9 Ill. Reg. 6722, effective April 29, 1985; amended in R84-22C at 9 Ill. Reg. 18942, effective November 25, 1985; amended in R84-45 at 12 Ill. Reg. 15566, effective September 14, 1988; amended in R88-7 at

14 Ill. Reg. 15832, effective September 18, 1990; emergency amendment in R93-25 at 17 Ill. Reg. 17268, effective September 24, 1993, for a maximum of 150 days; amended in R90-26 at 18 Ill. Reg. 12451, effective August 1, 1994; amended in R96-1 at 20 Ill. Reg. 12459, effective August 15, 1996.

Section 807.104 was amended at 9 Ill. Reg. 18942, effective November 25, 1985.

33. The Board promulgated the requirements of 35 Ill. Adm. Code Part 810 as part of R88-7 at 14 Ill. Reg. 15838, effective September 18, 1990. The following administrative changes have occurred to Part 810:

Amended in R93-10 at 18 Ill. Reg. 1268, effective January 13, 1994; amended in R90-26 at 18 Ill. Reg. 12457, effective August 1, 1994; amended in R95-9 at 19 Ill. Reg. 14427, effective September 29, 1995; amended in R96-1 at 20 Ill. Reg. 11985, effective August 15, 1996; amended in R97-20 at 21 Ill. Reg. 15825, effective November 25, 1997; amended in R04-5/R04-15 at 28 Ill. Reg. 9090, effective June 18, 2004; amended in R05-1 at 29 Ill. Reg. 5028, effective March 22, 2005; amended in R06-5/R06-6/R06-7 at 30 Ill. Reg. 4130, effective February 23, 2006; amended in R06-16/R06-17/R06-18 at 31 Ill. Reg. 1425, effective December 20, 2006; amended in R07-8 at 31 Ill. Reg. 16166, effective November 27, 2007.

Section 810.103 was amended at 19 Ill. Reg. 11985, effective August 15, 1996.

34. As noted above, Sections 807.104 and 810.103 of 35 Ill. Adm. Code Parts 807 and 810, respectively, are definitional sections. Both Sections 807.104 and 810.103 are enactments which define terms used within the Board's regulations. Thus, there is no "standard" from which this adjusted standard is sought. (See: 35 Ill. Adm. Code Section 104.406(a)) No regulation of general applicability exists from which relief is sought.

**STATEMENT OF IMPLEMENTATION OF FEDERAL REQUIREMENTS**
**35 Ill. Adm. Code §104.406(b)**

35. The regulation/definition(s) of general applicability were not promulgated to implement, in whole of in part, the requirements of the CWA (33 USC 1251 et seq.), CAA (42 USC 7401 et seq.), or the State programs concerning UIC or NPDES [415

ILCS 5/28.1]. Concerning the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.) ("RCRA"), the Illinois EPA would suggest that Part 810 of the regulations was proposed in response to the requirement of Subtitle D – State or Regional Solid Waste Plans. (See: Section 4001 of RCRA) As noted within the "Scope and Applicability" section of Subpart A of Part 811 (Standards for New Solid Waste Landfills), the standards adopted in that part that are identical-in-substance to the federal regulations promulgated by the U.S. Environmental Protection Agency pursuant to Sections 4004 and 4010 of the RCRA relating to Municipal Solid Waste Landfill program. (See: 35 Ill. Adm. Code 811.101(c)(1)(B))

**LEVEL OF JUSTIFICAITON**
**35 Ill. Adm. Code §104.406(c)**

36. The regulations (or, in this case, "definitions") do not specify a level of justification or other requirements.

**DESCRIPTION OF PETITIONER'S ACTIVITY**
**35 Ill. Adm. Code §104.406(d)**

37. At this time, based upon the information submitted, the Illinois EPA can only state that Petitioner intends to process slag from one source and hopes to return the metal part of the slag back to the source that generated the slag. Within Westwood's review of its own process, Westwood states that the contract specifically allows Westwood to reject any fines which do not comply with the parameters necessary for Westwood's process. (See: Petition at 7) Westwood directs attention to Section 4.2 of the contract. Yet, this provision provides little insight into what Petitioner claims. The contract section merely provides that Westwood must be presented with the opportunity to inspect prior to purchase and may reject slag that may have a chemical analysis that does not fit the parameters needed to make a quality product. Petitioner has granted itself an "opportunity" to inspect without specificity. This Section does not direct inspection at any intervals, on any given type of slag, with any specific analysis, based upon any articulated parameters, and is ultimately discretionary relative to rejection. There is virtually nothing to review and comment on other than assurances that Westwood may control the quality of the slag purchased.

38. For that matter, the State is left to wonder if different standards, parameters, tests or rejections will be made for each and every slag Westwood may purchase.

39. Westwood has failed to explain the economics of the reclamation process to demonstrate the activity is not sham recycling. At a minimum, for a rational review, the Petition should provide an explanation which includes the value of the material after reclamation, the cost associated with the process and the slag purchase price. As discussed; all cost/price information offered has been redacted. Also, Petitioner

should have provided the price per pound basis and what percentage of iron is present in the finished product and approximate weight per cubic foot.

40. Under Sections 2 through 5 of the Amended Petitioner, Westwood indicated that the material is not hazardous waste; however, Exhibit G of the Petitioner which was provided to demonstrate the waste is not characteristically hazardous waste indicates the sample was not prepared using the TCLP test method 1311 in SW 846. As such, the results would be inconclusive on this point.

41. Under Sections 7 and 16 of Westwood's Amended Petition, the company argues that testing of each load would render the process unworkable. However, some testing at some frequency should be conducted on arriving loads. The type of testing and frequency should be proposed by the Petitioner. Total metals testing may be appropriate since the Petitioner argues this is the only parameter needed to be tested to verify that the produced product is economically saleable. Frequency of sampling should be based on the variability of the slag.

42. Under Section 16 of the Amended Petition, Westwood fails to provide detailed procedures that would be used to determine when a load of slag is unacceptable.

43. Regarding, Sections 16 and 19, Westwood fails to provide the parameters and specifications for the martial accepted at the facility for processing and explain how the specifications and parameters ensure that the slag is acceptable for processing into a product.

**DESCRIPTION OF COMPLIANCE EFFORTS AND ALTERNATIVES**
**35 Ill. Adm. Code §104.406(e)**

44. Within its description of compliance efforts and alternatives, Westwood offers that if the slag is a waste, then they will be forced to comply fully with regulations imposed by the EPAct and regulations. (See: Petition at 8 and 9) This is an interesting argument, especially when you consider the fact that Petitioner itself within its Petition provides that "Westwood will operate the facility in compliance with other provisions of the Environmental Protection Act." (Petition at 10) No argument is given to what regulation within Sections 807 or 810 are objectionable as they relate to operation or construction of the facility. No reason is given for why these regulations are not appropriate. And, once again, Section 810 contains only four Sections (Scope and Applicability, Severability, Definitions and Incorporations by Reference). It is hard to fathom what the objectionable regulation is concealed within these provisions from which relief must be sought. And, Westwood acknowledges that it will need permitting for some of its equipment by the Illinois EPA's Bureau of Air. (See: Petition at 10, footnote 5)

45. All in all, Petitioner does not identify any single regulation of general applicability to discuss why compliance with such regulation is at issue. Westwood posits simply that regulatory requirements would be many and, significantly, that Westwood

would be required to seek local siting approval pursuant to Section 39.2 of the EPAct. In this light, Petitioner comes full circle; identifying that at the very heart of this Adjusted Standard Petitioner it seeks relief from the EPAct. Such relief is not appropriate, even if local siting approval is claimed to be expensive. Even accepting some debate on this issue, *arguendo,* Illinois EPA is not aware of any suggestion that the cost associated with siting approval is more prohibitive on this company than any other company seeking such approval within the unit of local government. As such, it is difficult to reason, as Petitioner attempts, that the Board could find that factors relating to the Petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulations applicable to the Petitioner, and as such, grant an Adjusted Standard.

46. The Illinois EPA cannot respond to the mere contention that compliance with Part 807 is cost-prohibitive without Petitioner providing some basis for this conclusion. (See: Petition at 9)

**PROPOSED ADJUSTED STANDARD**
**35 Ill. Adm. Code §104.406(f)**

47. The Illinois EPA notes the language proposed by Petitioner in at page 9 of the Petition, but can not agree to such.

**IMPACT ON THE ENVIRONENT**
**35 Ill. Adm. Code §104.406(g)**

48. The Illinois EPA does not take issue, generally, with the representations made by Petitioner concerning environmental impact.

**JUSTIFICATION FOR PROPOSED ADJUSTED STANDARD**
**35 Ill. Adm. Code §104.406(h)**

49. The Burden of Proof contained at Section 104.426 states those matters the Board should consider in rendering a decision regarding a Petition for Adjusted Standard. (See also: Section 27(a) of the EPAct, 415 ILCS 5/27(a)) The Illinois EPA would reassert that requesting relief from definitions is not the starting point for discussion of the application of regulation to a waste.

50. Once again, taken in total, it is difficult to suggest that the Board could find that factors relating to the Petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulations applicable to the Petitioner, and as such, grant an Adjusted Standard based upon this rationale.

**CONSISTENCY WITH FEDERAL LAW**
**35 Ill. Adm. Code §104.406(i)**

51. No direct issues regarding compliance with Federal law were identified during the review of this matter.

**WAIVER OF HEARING**
**35 Ill. Adm. Code §104.406(j)**

52. The Illinois EPA does not request a hearing regarding this matter.

## V. RECOMMENDATION

A thorough review of the petition for relief was made by Illinois EPA technical staff. The Illinois EPA concludes that insufficient justification has been made to sufficiently justify allowing Petitioner to be granted an Adjusted Standard, a finding of inapplicability or declaratory relief.

Based upon the forgoing, the Illinois EPA recommends that the Board **DENY** Westwood's Petition for Adjusted Standard.

Respectfully submitted,

**ENVIRONMENTAL PROTECTION AGENCY**
**OF THE STATE OF ILLINOIS**

By: _____
William D. Ingersoll
Division of Legal Counsel

Of Counsel: Kyle Nash Davis

DATED: August 5, 2009
1021 North Grand Ave. East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544

CERTIFICATE OF SERVICE

I, the undersigned, certify that I served the attached Notice of Filing, Appearance and Illinois EPA Recommendation on August 5, 2009 by electronic filing and first class mail, as indicated below, upon the following persons:

Illinois Pollution Control Board
Attn: John Therriault, Clerk
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(By Electronic Filing)

Swanson, Martin & Bell
Attn: Ms. Elizabeth S. Harvey
Mr. John P. Arranz
330 North Wabash Avenue
Suite 3300
Chicago, Illinois 60611
(By First Class Mail)

_____
William D. Ingersoll