BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PETITION OF APEX MATERIAL	)	
TECHNOLOGIES, LLC FOR AN	)	AS 2015-002
ADJUSTED STANDARD FROM	)	(Adjusted Standard – Land)
PORTIONS OF 35 ILL. ADM. CODE	)	
807.104 and 810.103, OR, IN THE	)	
ALTERNATIVE, A FINDING OF	)	
INAPPLICABILITY.	)	

NOTICE OF FILING

TO: Mr. John Therriault
Clerk of the Board
Illinois Pollution Control Board
James R. Thomson Center
100 W. Randolph Street
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Chicago, Illinois 60601-3218

Mr. Bradley P. Halloran
Hearing Officer
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PLEASE TAKE NOTICE that on this 28th day of October 2014, I have filed with the Office of the Clerk of the Illinois Pollution Control Board the following document entitled **REPLY TO RECOMMENDATION OF THE ILLINOIS EPA**, which is attached and herewith served upon you.

Respectfully Submitted,

Apex Material Technologies, LLC

By: /s/ Joseph L. Pellis II
Joseph L. Pellis II

Dated: October 28, 2014

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REPLY TO RECOMMENDATION OF THE ILLINOIS EPA

Petitioner, APEX Material Technologies, LLC ("APEX"), by and through its attorneys, Pellis Law Group, LLP, provides this reply to the Illinois Environmental Protection Agency's ("IEPA") Recommendation served on APEX and filed with the Illinois Pollution Control Board (the "Board") on October 9, 2014 (the "Recommendation"). In reply to the Recommendation, and in further support of its Petition for a finding of inapplicability or, in the alternative, for an adjusted standard from portions of 35 Ill. Adm. Code Sections 807.104 and 810.103, APEX states as follows:

I. PRELIMINARY STATEMENT

IEPA's Recommendation in opposition to APEX's Petition attempts to try and cast some doubt on the true facts and circumstances surrounding the issues faced by the Board, while completely ignoring controlling Illinois precedent. Rather than address the clear and supported arguments APEX sets forth in favor of a finding that the Copper Ammonium Chloride Etchant ("CAC") is not a "waste" as that term is defined under Illinois law, IEPA reverts to the same unpersuasive arguments it has made in the past, all while disregarding the compelling evidence APEX provided in its Petition to the Board. APEX respectfully disagrees with IEPA's

Recommendation, and believes that the overwhelming weight of evidence rests squarely in APEX's favor for a finding of inapplicability.

II. ARGUMENT

APEX based its entire Petition on the reasonable premise that the CAC material APEX wants to purchase and use in its process is not a "waste" and, therefore, the APEX facility is not a "pollution control facility" requiring a permit to process the CAC material. As demonstrated in its Petition, such a determination is supported by Illinois law, prior decisions of the Board, and the facts of this case. Unfortunately, rather than address the real issues based upon APEX's evidence, arguments, and controlling Illinois law, IEPA chose to ignore it all and put forth nothing compelling or sufficient to rebut APEX's Petition.

a. The CAC is Not "Hazardous"

The first false premise set forth by IEPA states "[i]f the spent etchant is *potentially* hazardous, then it is a solid waste pursuant to 35 Ill. Adm. Code 721.102(a)(1) if it is 'discarded.'" IEPA Rec. at 3 (emphasis added). IEPA seems to argue that simply because the Material Safety Data Sheet ("MSDS") included in APEX's Petition as Exhibit G acknowledged that the CAC material *might contain* trace elements of "hazardous constituents," this fact somehow catapults the CAC material into the definition of a hazardous waste. This is blatantly disingenuous. The Board's regulations state that the definition of solid waste "applies only to wastes that also *are hazardous* for purposes of the regulations implementing Subtitle C of RCRA." 35 Ill. Adm. Code 721.101(b)(1) (emphasis added).

35 Ill. Adm. Code 721.111 sets forth the Criteria for Listing Hazardous Waste. The fact that CAC might have some "hazardous constituents" does not automatically propel the CAC into the category of being hazardous. Rather, in order for a compound that contains such a

constituent to be considered a hazardous waste, a long list of eleven other factors must be considered in coming to a final determination, including toxicity, concentration, and the "nature and severity of the human health and environmental damage *that has occurred* as a result of the improper management of the wastes containing the constituent." See 35 Ill. Adm. Code 721.111(3)(A)-(K) (emphasis added). APEX has found no mention of any Illinois regulation of materials that are "*potentially*" hazardous. Further, IEPA has never listed CAC as hazardous per 35 Ill. Adm. Code 721.111(3)(A)-(K), nor to APEX's knowledge has IEPA ever analyzed the eleven factors that must be investigated before a compound is considered hazardous. Rather, IEPA seeks to cast some doubt on the true nature of CAC by implying that it is "potentially hazardous." 35 Ill. Adm. Code 721.111 makes it clear that a compound is not automatically listed as a hazardous waste because it "potentially" contains a constituent that is listed in Appendix H. Accordingly, IEPA has not argued (because it cannot) that the CAC material is "hazardous" for purposes of RCRA Subtitle C regulations.

The purpose of RCRA Subtitle C regulations is the permitting of hazardous waste treatment, storage, and disposal facilities. As stated in its Petition, APEX's plan does not include the treatment, storage, or disposal of hazardous waste. To the contrary, APEX would simply be *separating* the CAC material that it purchases from its customers into its component parts to make and send useful products back into the stream of commerce. Further, there is no evidence whatsoever that the incoming CAC material has ever been, or would ever be, considered "hazardous," or that the APEX facility would ever be considered a treatment, storage, and disposal facility in the RCRA Subtitle C context. Thus, the premise of IEPA's initial argument is defective, and should be disregarded.

IEPA follows its defective premise of the "*potentially* hazardous" CAC material with a "reasonable concern" that if APEX rejects a load of CAC that did not meet its specifications, then "such a situation would result in two unregulated shipments of hazardous liquid waste, first from the generator and then back." IEPA Rec. at 4. Initially, APEX notes that nowhere in its Recommendation does IEPA provide a single question or comment on APEX's Quality Assurance/Quality Control ("QA/QC") procedures, nor APEX's plans to spend upwards of $1 million or more on the upgrading of its existing infrastructure to properly process the CAC material and generate useful products that will be sold back into the stream of commerce. APEX takes pride in its QA/QC safety procedures as a responsible corporate citizen in the state of Illinois, and rejects the insinuation that it would intentionally ship an "unregulated shipment[ ] of hazardous liquid waste" back to its customer without the proper RCRA waste manifests. IEPA Rec. at 4.

Secondly, IEPA also ignores the fact that the CAC material is currently being shipped across Illinois roads and highways on Bills of Lading as a "Corrosive Liquid," and not via hazardous waste manifests. See APEX Petition, Exhibit J. The fact is, CAC is currently not being regulated as a hazardous waste in the state of Illinois from the Customers' perspective. As such, the "*potentially* hazardous" CAC material is currently travelling from Illinois Customers across state lines to Indianapolis, Indiana, with no apparent concern or regulation at all from IEPA. Lastly, 35 Ill. Adm. Code 722.111 sets forth the generator's responsibility to determine whether the generator's waste is "hazardous" for purposes of Subpart C regulations. As noted in its Petition, all of the Customers from which APEX plans to purchase the CAC material have fulfilled their respective responsibilities under Illinois regulations, and have themselves

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determined that the CAC material is not hazardous. IEPA appears to have overlooked these important facts in its Recommendation.

Regarding testing of the CAC material, APEX would like to clarify that it will test *all inbound* loads of CAC to confirm that the material is non-hazardous and meets its specifications. The interim testing referenced in its Petition on page 23, which APEX plans to preform "at least every six months" was reference to sending samples of the CAC to outside, independent laboratories for confirmatory testing. APEX appreciates the significance of the CAC being a liquid material, and has designed its safety procedures to take this factor into consideration.

b. The CAC Material is Not "Discarded" and Therefore is Not a "Waste"

The second faulty premise that IEPA attempts to rely upon is that the copper within the CAC "becomes a contaminant" and therefore "is 'discarded' by the generator in favor of fresh product that can effectively etch circuit boards." IEPA Rec. at 4. First, the Customers *sell* CAC as a valuable product and do not dispose or discard it as a waste. Second, the value of the CAC, because of its copper content, exceeds the value of the fresh etchant. Third, IEPA's false premise completely ignores nearly 35 years of Illinois precedent from this Board and from the Illinois Supreme Court as to the interpretation of the undefined term "discarded material." IEPA's arguments erroneously focus on APEX's planned process for separating the copper from the incoming CAC as somehow evidencing that the CAC is "discarded." Rather, IEPA tries to divert the Board's attention away from the threshold issue – is the incoming CAC a "waste" in the first instance – and wants to focus attention on the process for separating out the copper from the CAC once the material arrives at APEX. IEPA conveniently presupposes that the copper within the CAC becomes a "contaminant" without any justification, and then leaps into its

conclusory argument about APEX's planned process, without any analysis of the factors set forth in controlling precedent from this Board and the Illinois Supreme Court.

Perhaps IEPA's most transparent oversight in its Recommendation is its simple passing reference to *Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency,* 830 N.E.2d 444 (2004), the controlling and guiding precedent from the Illinois Supreme Court on the threshold issue before the Board.[1]

c. The AFI "Two Categories Test"

In its Petition, APEX detailed the Illinois Supreme Court case of *Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency*, 830 N.E.2d 444, 455-56 (2004) ("*AFI*"), which established a "two categories test" to determine whether a substance, like CAC, is a "waste" or a "material," and if determined to be a material, whether that material is "discarded." As set forth in its Petition, APEX believes that the CAC is a material, and that the CAC material is not discarded, and therefore not a waste subject to regulation.

Application of the *AFI* test, which this Board adopted in *Jo'Lyn*,[2] is critical to the Board's determination of the instant matter. The Board must first determine if the CAC is a "material," and then whether it is "discarded." *Jo'Lyn* at 13.

Under the *AFI* test, "waste" is an item from which contaminants may be removed, while all other items are "materials." *AFI*, 830 N.E.2d at 456. As stated in its Petition, and contrary to what IEPA contends in its Recommendation, the APEX process does not remove any "contaminates" from the used etchant solution. Rather, the APEX process simply ***separates*** the

[1] To simply ignore *AFI* and the relevant legal standard in this state, and instead cite to a Connecticut case for its justification calls into question IEPA's entire argument against APEX's Petition. The Connecticut case IEPA cites was decided based upon a different set of regulations, has no precedential value, and is not binding upon the Board.

[2] *Petition of Jo'Lyn Corporation and Falcon Waste and Recycling Inc. for an Adjusted Standard from 35 Ill. Adm. Code 807.103 and 35 Ill. Adm. Code 810.103 or, in the Alternative, a Finding of Inapplicability*, AS 04-2, slip op. (Apr. 7, 2005) ("*Jo'Lyn*")

ammonia-based etchant from the residual copper. The copper that is stripped away from the circuit boards does not "contaminate" the etchant. As this Board found in the matter of *Westwood Lands*, and contrary to IEPA's argument, the calcium magnesium silicate was "an intrinsic part of the slag fines" and was therefore not a "contaminant." [3] In this case, the copper is designed to be in the CAC at the end of the day. The copper is "an intrinsic part" of the chemical composition within the CAC, and not some foreign substance that has "contaminated" the CAC. Similarly, as detailed in the Petition, the chemical composition of the wash water brine is "an intrinsic part" of the CAC, and thus cannot be considered a contaminant. Any excess chloride and water generated during the process are constituents of the original CAC material purchased from the Customers. As such, neither the copper, nor the wash water brine are "contaminants." Thus, CAC is not a solution from which contaminants are removed. Therefore, the CAC is a "material" under the *AFI* "two categories test."

The second part of the *AFI* two categories test calls for a determination of whether the material was "discarded" or "collected, separated or processed and returned to the economic mainstream in the form of raw materials or products." *AFI*, 830 N.E.2d at 456. As set forth in more detail in its Petition, the CAC that APEX plans to ***purchase*** from its Customers will not be discarded, but rather "collected, ***separated*** or processed and returned to the economic mainstream in the form of raw materials or products." Accordingly, based on the Illinois Supreme Court's decision in *AFI*, the CAC is clearly not a "discarded material," and thus not a "waste" as defined under 415 ILCS 5/3.535 and 35 Ill. Adm. Code 807.104.

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[3] See, *Petition of Westwood Lands, Inc. for an Adjusted Standard from Portions of 35 Ill. Adm. Code 807.104 and 35 Ill. Adm. Code 810.103 or, in the Alternative, a Finding of Inapplicability*, AS 09-3, slip op. at 12 (Oct. 7, 2010) ("*Westwood Lands*") (The Board ruled that the "calcium magnesium silicate [was] part of the chemical composition of the slag fines and [was] not a 'contaminant.'").

As this Board has repeatedly concluded, and as the Supreme Court did in *AFI*, material, such as CAC, that is processed and "returned to the economic mainstream in the form of raw materials and products" is not "discarded material," and thus not "waste." [4]

d. Focus Must Be On the Incoming CAC not the APEX Process

IEPA tries to distinguish the cases cited in support of APEX's Petition by shifting the focus to the APEX "treatment method." IEPA Rec. at 5. IEPA cherry-picks other tangential issues that were discussed in order to try and somehow distinguish the cases cited from the case at hand. However, IEPA ignores the basic fact that all the cases cited dealt with the ultimate question of whether the material in question was a "waste." For example, IEPA completely ignores this Board's ultimate ruling in *Safety-Kleen*, that the spent solvent at issue <u>was not a waste</u> because it was "destined to be reused, rather than discarded." *Safety-Kleen*, slip op. at 2. Similarly, the CAC material that APEX plans to purchase has always been, and will continue to be, "destined to be reused" and "returned to the economic mainstream." Accordingly, the CAC is a material that is not discarded, and the focus on APEX's process is not determinative of whether the CAC is a "waste" in the first instance. Instead, IEPA's argument is nothing more than a red-herring meant to distract the Board from the ultimate issue in this case.

As noted in *AFI*, the focus must be on the 'material' itself as it passes between entities." *AFI*, 830 N.E.2d at 455. Here, IEPA makes the same unpersuasive argument that this Board and the Illinois Supreme Court have previously rejected, that the term "'discarded' is defined solely from the viewpoint of the generator." *Jo'Lyn* at 12. Instead of focusing on the non-hazardous

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[4] See, *Westwood Lands, and Jo'Lyn*, *supra*. See also, *Safety-Kleen Corp. v. Environmental Protection Agency, PCB 80-12, order at 2 (Feb. 7, 1980), affirmed by Environmental Protection Agency v. Pollution Control Board, 427 N.E.2d 1053 (Ill. App. Ct. 1981) (no opinion)* ("*Safety-Kleen*"), *Southern California Chemical Co., Inc. v. Illinois Environmental Protection Agency, PCB 84-51, slip op. at 2 (Sept. 20, 1984) ("SCC"), and R.R. Donnelley & Sons Co. v. Illinois Environmental Protection Agency*, PCB 88-79, slip op. (Feb. 23, 1989) ("*R.R. Donnelley*").

CAC material as the threshold issue, the IEPA also erroneously focuses on the process and the amount of processed wash water brine that the APEX process will generate. IEPA Rec. at 6. Again, IEPA's argument is misdirected, in that the amount of by-product generated from APEX's process is not a determinative factor in whether the CAC material should be regulated under Illinois law in the first instance.[5]

Further, APEX has pointed out that IEPA's assumptions about the by-product from its process is incorrect. *See* IEPA Rec. at 6. The IEPA ignores the fact that most of the excess chloride and water that will be disposed of pursuant to APEX's existing discharge permit will be constituents of the original CAC purchased from the Customers, and not "generated" from APEX's process as IEPA erroneously concluded and would like this Board to believe.

The last faulty premise from IEPA is its back-handed treatment of this Board's ruling in the *Southern California Chemical* case[6] and its mention of "industrial process waste" per 415 ILCS 5/3.235 as somehow justification for "reevaluation of the 30-year old Board decision." IEPA Rec. at 7. First, this Board's decision in *SCC* dealt with the exact same CAC material that APEX plans to purchase from its Customers, and concluded that the CAC was <u>not a waste</u>. *SCC* at 4. The reference to the definition of "industrial process waste" is again a red-herring, in that IEPA presupposes for the sake of its argument that the CAC is a "waste" in the first instance. This is their fatal error. Further, the definition of "industrial process waste" talks about a "waste" that "would pose a threat or potential threat to human health or to the environment" or make the "disposal of such waste in a landfill difficult." *See* 415 ILCS 5/3.235. Other than

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[5] IEPA also ignores the fact that in the *Westwood Lands* case, the by-product generated and disposed of, calcium magnesium silicate, was two-thirds of the process. See, *Westwood Lands* at 12.

[6] *Southern California Chemical Co., Inc. v. Illinois EPA*, PCB No. 84-51 (September 20, 1984) ("*SCC*"). As an aside, IEPA incorrectly stated that the *SCC* decision was "a mere two pages long." IEPA Rec. at 6. *SCC* is in fact 4 single-spaced pages.

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IEPA's insinuations that CAC is "potentially" hazardous, there is no evidence (or even an allegation) that CAC poses any threat to either human health or the environment. Further, APEX is not planning on "disposing" of any CAC or anything other than the inert, non-hazardous wash water brine, and certainly not in a landfill. As such, IEPA's mention of the definition of "industrial process waste" is irrelevant.

III. CONCLUSION

APEX has demonstrated that the definition of "waste" does not apply to CAC, since the CAC is not a "discarded material." Thus, the Board's solid waste regulations should not apply to APEX's intended use of CAC. APEX does not plan to store, landfill, dispose, transfer, treat, or incinerate any "waste," and as such the APEX facility is not a "pollution control facility" pursuant to Illinois regulations. IEPA's Recommendation to deny APEX's Petition is based on erroneous premises and old arguments that have been repeatedly rejected by this Board and the Illinois Supreme Court. The fact is, there is no good reason why APEX's Petition should be denied. Instead, there are many good reasons for approving APEX's Petition. First, the CAC material is already being handled and transported as a product, and not a waste. Second, the APEX plan will create jobs, provide Illinois companies with market competition where none currently exists, will create a "closed loop" system with Customers, will reduce the carbon footprint for the existing market process, and will have no adverse effects on human health or the environment. All these reasons, as well as the fact that APEX has 35 years of Illinois precedent on its side, should be enough for this Board to find in APEX's favor.

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Respectfully submitted,

APEX MATERIAL TECHNOLOGIES, LLC

Dated: October 28, 2014

By: /s/ Joseph L. Pellis II

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CERTIFICATE OF SERVICE

I, Michael J. Tenuto, the undersigned, an attorney, certify that I have served the attached **REPLY TO RECOMMENDATION OF THE ILLINOIS EPA**, upon:

Mr. John Therriault
Clerk of the Board
Illinois Pollution Control Board
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/s/ Michael J. Tenuto
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