

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

AUG 21 2009

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
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.)

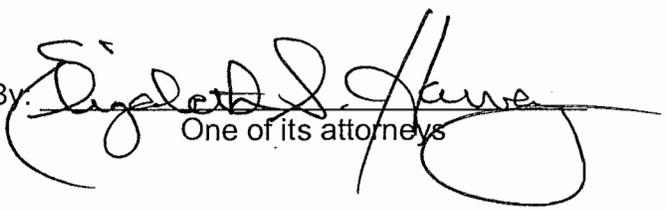
AS 09-03
(Adjusted Standard - Land)

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 21st day of August 2009, the following was filed with the Illinois Pollution Control Board: **Petitioner Westwood Lands Inc.'s Response to IEPA Recommendation**, which is attached and herewith served upon you.

WESTWOOD LANDS INC.

By: 
One of its attorneys

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CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of the above-described document to counsel of record via U.S. Mail at 330 North Wabash Avenue, Chicago, IL 60611, at or before 5:00 p.m. on August 21, 2009.


Jeanette M. Podlin

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

4376-001

SERVICE LIST

Westwood Lands, Inc. v. Illinois Environmental Protection Agency

AS 09-03

(Adjusted Standard – Land)

William Ingersoll
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Springfield, Illinois 62794-9276

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RESPONSE TO IEPA RECOMMENDATION

Petitioner WESTWOOD LANDS, INC. ("Westwood"), by its attorneys Swanson Martin & Bell LLP, hereby responds to the Illinois Environmental Protection Agency's ("IEPA") recommendation. IEPA's recommendation was served upon Westwood on August 7, 2009.

INTRODUCTION

Westwood¹ is disappointed that IEPA has recommended a denial of Westwood's petition. IEPA has not identified any risk of environmental harm from Westwood's process. In fact, IEPA admits that it does not take issue with Westwood's explanation that there are no adverse environmental or health effects. (Recommendation ("Rec.") at par. 48.) Instead, IEPA asserts objections that equate to "we don't like it." IEPA's arguments are short-sighted, and in some cases incorrect or irrelevant.

Unfortunately, IEPA has historically put roadblocks in the way of entities who seek to use material, that might otherwise be discarded, to create a useful product. In *Alternate Fuels Inc. v. IEPA*, 830 N.E.2d 444 (2005), IEPA pursued the producer of a fuel made from empty plastic containers for allegedly operating without a waste permit,

¹ IEPA is correct that Westwood Lands is incorporated under the laws of the state of Michigan.

despite the fact that the Pollution Control Board had already found that the fuel produced from the containers was not a “waste.” *Illinois Power Co. v. IEPA*, PCB 97-37 and 97-36 (January 23, 1997). The Illinois Supreme Court found that the plastic containers were not “waste”; thus, under the plain language of the Environmental Protection Act (“Act”), no waste permit was required. 830 N.E.2d at 456-457.

After this holding, IEPA continued to insist that the producer of an alternate paving product, made from scraps of pre-consumer roofing materials, needed a waste permit. In *Petition of Jo'Lyn Corporation and Falcon Waste and Recycling, Inc. for an Adjusted Standard*, AS 04-2 (April 7, 2005), the Board applied the *AFI* decision and found that the raw material (the roofing materials) was not a “waste.” *Jo'Lyn*, AS 04-2, at p. 14. Now, despite the Board's thorough analysis in *Jo'Lyn*, and the Illinois Supreme Court's decision in *AFI*², IEPA once again takes the position that the raw material used by Westwood is a “waste”. Thus, Westwood has filed its petition³ to demonstrate to the Board that Westwood's raw material is not a “waste” when used in Westwood's process to make a useful product.

Westwood recognizes and supports IEPA's interest in protecting the environment, ensuring that waste does not contaminate the environment, and regulating entities who handle waste. However, Westwood does not handle “waste.” Westwood's process will take a material that might otherwise sit unused, and return that material to the economic mainstream by producing a useful product. Westwood asks the Board to

² When the Board made its decision in *Jo'Lyn*, it noted that the Illinois Supreme Court had not yet ruled upon IEPA's petition for rehearing in the *AFI* decision. The court subsequently rejected the arguments made by IEPA on rehearing and affirmed that the material was not a “waste.” 830 N.E.2d at 456-459 (as modified on June 16, 2005).

³ Westwood filed its petition on March 31, 2009, and an amended petition on June 22, 2009. Westwood will refer to those two documents, together, as “the petition.”

look beyond the rhetoric of IEPA's recommendation, consider the facts and legal analysis demonstrated by Westwood, and grant Westwood's petition.

ARGUMENT

Westwood's petition seeks alternative forms of relief. First, Westwood seeks a finding of inapplicability. Westwood's petition demonstrates that, pursuant to Illinois Supreme Court as well as Pollution Control Board precedent, the definition of "waste" is inapplicable to the raw material used by Westwood. Because the raw material is not a "waste," it cannot be regulated as a "waste." Alternatively, if the Board disagrees and finds that the raw material is a "waste," Westwood seeks an adjusted standard from the identified definitions of Section 807.104 and Section 810.103.⁴

Westwood will not reiterate the arguments made in its petition and amended petition for adjusted standard. Instead, Westwood responds to the claims raised by IEPA.

The raw material used by Westwood is not a "waste."

Westwood has demonstrated that the raw material used in its process -- steelmaking slag fines -- is not a "waste" as defined by the Act. Because the material is not a "waste," Westwood does not need to obtain a waste permit from IEPA. (Petition at pp 2-6.) This conclusion is supported by the Illinois Supreme Court's decision in *AFI*, and by the Board's decision in *Jo'Lyn*. IEPA raises the following allegations in an attempt to distinguish Westwood's process from those decisions.

⁴ Westwood seeks an adjusted standard from the Section 807.104 definitions of "facility," "solid waste," "solid waste management," "waste," and "unit". Westwood also requests an adjusted standard from the Section 810.103 definitions of "facility," "landfill," and "solid waste."

1. IEPA asserts that because Westwood, when applying for a construction permit, provided documents that purported to grant “local siting approval,” somehow Westwood has had its “bite at the apple.” Such a claim is absurd. IEPA technical staff told Westwood to obtain “local siting approval” before refiling its construction permit application. Westwood, which was not represented by counsel at the time,⁵ attempted to comply with IEPA’s direction. Westwood sought “local siting approval” from the local government (the City of Madison) and submitted letters from Madison as part of its permit application. (See Exhibits D and E.)⁶ One area in which IEPA and Westwood are in agreement is that the letters do not satisfy the requirements of Section 39.2.⁷ (See Exhibit B, IEPA notice of incompleteness, at par. 3(b).) IEPA’s suggestion that Westwood’s inclusion of material in its application, provided at the direction of IEPA, should now prohibit Westwood from pursuing a finding of inapplicability is ridiculous.

2. Equally absurd is IEPA’s complaint that Westwood should have filed an appeal of IEPA’s notice of incompleteness instead of pursuing this petition. IEPA has cited no statute, regulation, or case decision that an applicant cannot choose its available remedies from the options provided by the Act.

3. In attempting to distinguish the instant case from *AFI* and *Jo’Lyn*, IEPA asserts that because Part 817 of the Board’s rules contains provisions addressing

⁵ It would be inefficient and unfortunate if every entity seeking a permit from IEPA would feel the need to retain an attorney when applying to IEPA for every permit. It would be even more unfortunate if an entity were subsequently punished by IEPA for not retaining an attorney when attempting to follow IEPA’s direction.

⁶ Exhibits A-F are attached to Westwood’s March 31, 2009 petition, and Exhibit G is attached to the amended petition filed on June 22, 2009.

⁷ Westwood included Exhibits D and E with its petition to demonstrate that the local government is supportive of Westwood’s facility. Westwood does not contend that those letters are sufficient under Section 39.2.

“steelmaking slag,” that means the slag is “waste” under Board rules. IEPA overlooks two important points. First, Part 817 is titled “Requirements for New Steel and Foundry Industry Waste Landfills.” Westwood does not seek to construct or operate a steel and foundry industry waste landfill. Second, and dispositive of the issue of Part 817’s applicability, is that Part 817 specifically exempts the use of steelmaking slags as ingredients to make a product. (Amended Petition, p. 16, fn. 10.) Section 817.101(f) provides: “This Part shall not apply to the use or reuse of iron and steelmaking slags and foundry sands as ingredients in an industrial process to make a product.” This definition fits Westwood’s process perfectly. Westwood uses “steelmaking slags” as “ingredients in an industrial process to make a product.” Thus, by the specific terms of Section 817.101(f), Part 817 does not apply to Westwood’s process.

4. IEPA erroneously asserts that Westwood’s discussion of the applicability of the *AFI* and *Jo’Lyn* decisions does not include analysis of the term “discarded.” On the contrary, Westwood’s discussion of the *AFI* and *Jo’Lyn* decisions includes that analysis of “discarded.” (Pet. at pp 3-5.) In short, the *AFI* court found that the Act “contemplates that materials that may otherwise be discarded by the supplier may be diverted from becoming waste and returned to the economic mainstream.” 830 N.E.2d at 457. Like *AFI*, Westwood uses materials -- in Westwood’s case, slag fines -- that might otherwise be discarded, but can be returned to the economic mainstream by recycling.

5. IEPA also claims that Westwood’s process is distinguishable from the situations in *AFI* and *Jo’Lyn* because Westwood’s process results in a silicate material that, at present, is proposed to be placed in a landfill. IEPA does not explain, however,

how the fact that the silicate material is produced as part of the process makes the slag fines themselves “waste.” Further, as explained in Westwood’s petition, Westwood believes beneficial uses for this silicate from Westwood’s process will be available to Westgate shortly. Among those possible uses are landfill cover, construction uses such as additives to paving products, and agricultural uses such as fertilizer and soil conditioners. Westwood has not yet fully completed the testing and approval process for such uses because it is concentrating on obtaining approval for its facility to operate. Practical economic considerations require that Westwood focus on constructing and operating the facility first. However, the fact that the silicate may be landfilled for a period of time does not change the analysis that slag fines are not a “discarded material.” The fines are returned to the economic mainstream by using them to make a useful product -- the metallic nuggets and briquettes. Westwood believes the silicate resulting from Westwood’s process is also a useful product.

6. The fact that the silicate material is removed from the slag is immaterial to the determination here. The issue is whether the steelmaking slag fines, when used in Westwood’s process, are a waste. It is illogical to assert that because silicate results from the processing of the slag fines, the slag fines themselves are “waste.” The focus of the determination is on the slag fines themselves -- not on the silicate that results from the process. The fact that silicate is a product of the processing cannot somehow transform the slag fines into a “waste.”

7. Further, it is important to note that the silicate is not a “contaminant”; it is part of the chemical composition of the fines. Contrary to IEPA’s claims, Westwood’s process does not remove “contaminants” from the slag fines. Rather, the process

transforms the fines into the metallic fractions, shaped into nuggets and briquettes, and separates out the silicate material. The silicate is not a contaminant; it is simply part of the chemical composition of the slag fines.

8. Perhaps lost in this discussion is that steel slag has been considered a useful product for many years. The National Slag Association notes that roads made from slag were made in England as early as 1813. In the United States, slag was used for track ballast for railroads, and for building military roads in World War I. (See <http://www.nationalslag.org/slaghistory.htm>.) Steel slag is used in asphalt aggregate, as fill, as material in cement manufacturing, as an agricultural soil amendment, for road base, and a myriad of other applications. (See generally <http://www.nationalslag.org/appmatrix.htm>.) Westwood offers this information not as dispositive of the issue of whether the slag fines are “waste”; Westwood believes the analysis used by the *AFI* and *Jo’Lyn* decisions is the applicable analysis, and that the slag fines used by Westwood are not “waste” under that analysis. However, Westwood believes it is important to recognize that steel slag is itself a useful product, which has been used for many applications for many years.

9. Next, IEPA objects that Westwood claimed trade secret protection for portions of two exhibits submitted in support of the petition. However, IEPA failed to avail itself of the proper procedure if it truly believed the redacted portions of those two exhibits were essential to its recommendation. Westwood properly asserted trade secret protection for portions of Exhibits A and C, pursuant to the provisions of Section 7 and 7.1 of the Act, and Part 130 of the Board’s procedural rules. IEPA could have

asked the Board to make a determination⁸ under Part 130, Subpart B as to whether the redacted portions of the exhibits are properly protected as trade secrets. The Board would presumably then have requested a full statement of justification from Westwood, and proceeded to make a determination under Section 130.208. Instead of making that request, IEPA now asserts that it cannot make a full recommendation without the redacted information. Westwood should not be “punished” for using the trade secret provisions enacted by the legislature and by the Board, when IEPA did not follow those provisions.

10. Westwood has demonstrated that the slag fines, when used in Westwood’s process, are not a “waste.” This conclusion is consistent with the holdings in *AFI* and *Jo’Lyn*, which IEPA cannot successfully distinguish. Westwood emphasizes that it does not, in this petition, seek a determination that all steelmaking slag fines are not “waste.” Westwood takes no position on that broad question. Westwood’s request for a determination is limited to slag fines used in Westwood’s process, which takes a material that might otherwise be discarded and returns it to the economic mainstream. Therefore, under prior Illinois Supreme Court and Board decisions, Westwood asks the Board to determine that the raw material used in its process is not a “waste.”

Alternatively, the Board should grant the adjusted standard.

In the alternative, if the Board finds that the slag fines used in Westwood’s process are a “waste,” Westwood seeks an adjusted standard from the delineated provisions of Sections 807.104 and 810.103. The material submitted in Westwood’s

⁸ See, inter alia, Section 130.201(b), which allows the Board to request a statement of justification when the Board has received a request to disclose the article claimed as a trade secret.

petition and amended petition demonstrates that the Board should grant the requested adjusted standard. IEPA objects, raising more scattered arguments.

1. IEPA contends that Westwood has not conclusively demonstrated that the slag fines are not hazardous. Westwood emphasizes that IEPA does not assert that the fines are hazardous, only that the test results submitted by Westwood are not conclusive of the issue. Perhaps, in its efforts to answer the numerous specific questions asked by the Board in its May 21, 2009 order seeking more information, Westwood was not clear that steel slag is excluded, by federal law, as a hazardous waste. The Bevill exclusion, as it is known, excludes "solid waste from the extraction, beneficiation, and processing of ores and minerals" from consideration as "hazardous." 42 U.S.C. 6921(b)(3)(A)(ii). This exclusion is contained in USEPA's regulations at 40 CFR 261.4(b)(7). The exclusion includes slag from steel production. 40 CFR 261.4(b)(7)(ii). Thus, pursuant to federal law, slag from steel production is not a hazardous waste.

2. IEPA again raises objections to the adjusted standard based upon Westwood's redaction, as trade secrets, of portions of Exhibits A and C. IEPA claims that it cannot make a determination on the economic considerations of the adjusted standard because of the redactions. As demonstrated above, Westwood properly triggered the trade secret protections enacted by the legislature and the Board. IEPA has failed to seek a full determination of the claimed trade secret. Westwood has legitimate business reasons for protecting the redacted information. Westwood should not be punished for utilizing the trade secret provisions, where IEPA has not utilized those same provisions.

3. IEPA contends that any adjusted standard should be subject to testing of loads of fines at some defined frequency. Westwood does not object to a provision that loads be tested for metal content at a defined schedule. If the Board grants the adjusted standard, Westwood suggests that testing should occur weekly, and when receiving the first load from a new supplier.

4. IEPA also complains that Westwood has not adequately explained the economics of its process “to demonstrate the activity is not sham recycling.” (Rec. at par. 39.) First, IEPA does not explain what it means by “sham recycling.” Presuming that IEPA means some process by which Westwood would pretend to make a product, it is hard to see why Westwood would pay to obtain its raw material (the slag fines) and go to the expense of building and operating the facility, without then making the product which results in economic gain for Westwood. Such a result is simply illogical. Second, it is unfortunate that IEPA did not ask Westwood for further information or raise these concerns during the phone conversations between counsel for Westwood and IEPA⁹. While Westwood does bear the burden of demonstrating that it should receive an adjusted standard, it is unfair for IEPA to expect Westwood to read IEPA’s mind.

5. IEPA fails to understand why Westwood has sought an adjusted standard from the identified definitions in Sections 807.104 and 810.103. The answer is simple, as explained at page 6 of Westwood’s petition. An adjusted standard exempting Westwood from the Section 807.104 definitions of “facility,” “solid waste,” “solid waste management,” “waste,” and “unit” will exempt Westwood’s facility from the provisions of Part 807, since it will not handle “waste” and will not be a solid waste management site.

⁹ Counsel for Westwood and IEPA had substantive conversations about Westwood’s petition on at least two occasions. Westwood was seeking IEPA’s support for the petition.

Likewise, the requested adjusted standard from the Section 810.103 definitions of "facility," "landfill," and "solid waste" will render the provisions of Parts 811 through 817 inapplicable to Westwood's facility. Like the Jo'Lyn facility, "substantially different factors apply to [Westwood's] operation than the factors the Board relied on in adopting the solid waste regulations at Parts 807 and 810 of the Board's rules." *Jo'Lyn*, AS 04-2 at p. 13.

CONCLUSION

Westwood's process will take a material, that might otherwise be discarded, and create a useful product. The metallic nuggets and briquettes will be sold to steel manufacturers for use in making steel in electric arc furnaces, thus conserving resources and preventing the discarding of the slag fines. As the Board stated in *Jo'Lyn*, finding that the slag fines are not a waste, as used by Westwood, "serves the interests of encouraging recycling and returning a material difficult to recycle into the economic mainstream in an environmentally friendly way." *Jo'Lyn*, AS 04-2 at p. 14.

Westwood's petition demonstrates that the steelmaking slag fines used in its process are not a "waste" and, therefore, not subject to regulation as a "waste." Alternatively, Westwood has demonstrated that the Board should grant the requested adjusted standard from the delineated definitions of Parts 807 and 810.

Respectfully submitted,

WESTWOOD LANDS, INC.

By:


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Dated: August 21, 2009

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