

ILLINOIS POLLUTION CONTROL BOARD

January 7, 2010

IN THE MATTER OF:)
)
PETITION OF WESTWOOD LANDS, INC.) AS 09-3
FOR AN ADJUSTED STANDARD FROM) (Adjusted Standard - Land)
PORTIONS OF 35 ILL. ADM. CODE 807.104)
AND 35 ILL. ADM. CODE 810.103 OR, IN)
THE ALTERNATIVE, A FINDING OF)
INAPPLICABILITY)

ELIZABETH S. HARVEY and JOHN P. ARRANZ, SWANSON, MARTIN & BELL, LLP,
APPEARED ON BEHALF OF PETITIONER; and

WILLIAM D. INGERSOLL APPEARED ON BEHALF OF THE ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY

OPINION AND ORDER OF THE BOARD (by G.L. Blankenship):

Westwood Lands, Inc. (Westwood) owns a facility in Madison, Madison County, at which it seeks to process slag fines from steelmaking into two usable products for sale. Westwood seeks a determination that steelmaking slag fines used as raw materials in its process do not constitute “waste” under the Environmental Protection Act (Act) and that its facility therefore does not require permits under the Board’s solid waste regulations. *See* 415 ILCS 5/3.535 (2008) (defining “waste”); 35 Ill. Adm. Code 807, 810. In the alternative, if Board does not agree that the slag fines are not a “waste,” Westwood seeks an adjusted standard from specified definitions contained in the Board’s solid waste regulations. *See* 35 Ill. Adm. Code 807.104, 810.103 (both “Definitions”). The Illinois Environmental Protection Agency (Agency or IEPA) recommends that the Board deny Westwood’s petition.

Based on the record before it, the Board finds that, because of the deficiencies in Westwood’s petition, amended petition, and response, the Board cannot presently proceed to further evaluate making a determination that the steelmaking slag fines are not a waste or that an adjusted standard from the definitions in Parts 807 and 810 is warranted. Accordingly, the Board denies both Westwood’s petition for an adjusted standard and its alternative request for a finding of inapplicability.

In this opinion, the Board first provides the procedural history of this docket. The Board then provides the factual background of Westwood’s facility and proposed process. The Board then turns to Westwood’s request for a finding of inapplicability and its alternative petition for an adjusted standard. The opinion then summarizes both the Agency’s recommendation and Westwood’s response to it. The Board then analyzes the issues presented in the record before reaching its conclusion.

PROCEDURAL HISTORY

On March 31, 2009, Westwood filed a petition for an adjusted standard or, in the alternative, a finding of inapplicability (Pet.). Westwood stated that it waives hearing on its petition. Pet. at 11; *see* 35 Ill. Adm. Code 104.406(j). A motion for expedited consideration accompanied the petition. On April 20, 2009, Westwood filed proof of publication documenting that the required notice of filing the petition was published in the *Belleville News-Democrat* on April 14, 2009. *See* 415 ILCS 5/28.1(d)(1) (2008); 35 Ill. Adm. Code 104.408, 104.410.

In an order dated May 21, 2009, the Board found that Westwood had met the notice requirements of the Act and the Board's procedural regulations. *See* 415 ILCS 5/28.1(d)(1) (2008); 35 Ill. Adm. Code 104.408, 104.410. In the same order, the Board denied Westwood's motion for expedited review. The Board also found that Westwood had not provided all of the information required for an adjusted standard petition. *See* 415 ILCS 5/28.1(c) (2008); 35 Ill. Adm. Code 104.406. Specifically, the Board directed Westwood within 30 days to file an amended petition addressing nineteen informational deficiencies.

On June 22, 2009, Westwood timely filed an Amended Petition for Adjusted Standard (Am. Pet.).¹ On July 14, 2009, Westwood filed proof of publication documenting that notice of the amended petition had been published in the *Belleville News-Democrat* on July 8, 2009. *See* 35 Ill. Adm. Code 104.418(a). In an order dated July 23, 2009, the Board accepted the amended petition and directed the Agency to file its recommendation on the amended petition on or before August 6, 2009. *See* 35 Ill. Adm. Code 104.416(a). On August 5, 2009, the Agency filed its recommendation (Rec). On August 21, 2009, Westwood filed its response to the Agency's recommendation (Resp.). *See* 35 Ill. Adm. Code 104.416(d).

On October 20, 2009, the Board received a public comment (PC 1) filed by United States Steel Corporation (US Steel).

FACTUAL BACKGROUND

Westwood owns a facility located at 4 Caine Drive, Madison, Madison County. Pet. at 1, 7. The facility occupies a 4.94 acre site in an area zoned for commercial use. Am. Pet. at 10. When it begins operation, Westwood's facility will process slag fines from steelmaking by extracting metallic content in the form of metallic iron and iron oxides from the fines. *Id.* at 2; *see* Pet. at 7. Westwood projects that the facility would employ approximately 12 persons on each of two shifts. Am. Pet. at 10.

Westwood's process forms the steelmaking slag fines into two usable products for sale to steel manufacturers "for use in the making of steel in electric arc furnaces." Am. Pet. at 2; *see* Pet. at 2. The first product, a coarse metallic fraction, is to be sold in bulk form. Pet. at 2, 7.

¹ Westwood states that its "amended petition addresses the questions asked by the Board in its [May 21, 2009] order, and is intended to be read in conjunction with Westwood's March 31, 2009 petition." Am. Pet. at 1.

The second product, a fine fraction, can be sold in bulk or processed into briquettes and nuggets. *Id.* at 2, 7-8; Am. Pet. at 2.

When slag fines are delivered by truck to its facility, Westwood unloads them inside its production building and stores them in hoppers inside that building. Am. Pet. at 2, 11, 12; Pet. at 7. In the course of Westwood's process, "[t]he slag fines are first put through three stages of size reduction, each stage with its own dust collection and related control equipment." Pet. at 7; *see* Am. Pet. at 2. After reducing the size of the fractions, Westwood classifies them as either coarse, medium, fine, or very fine. Am. Pet. at 2; Pet. at 7. Westwood characterizes coarse fractions as "nuggets, which range in size from 1/16 of an inch to half an inch." Am. Pet. at 2. As noted above, Westwood separates coarse fines from the other classifications and sells them in bulk form. *Id.*

Westwood conveys medium, fine, and very fine fractions "to individual magnetic drums, which separate the predominately metallic particles from the non-metallic particles." Pet. at 7-8; Am. Pet. at 2. Westwood then transports the metallic particles to separate silos for storage. Pet. at 8. From those silos, Westwood feeds the particles through a process in which "the metallic fractions are combined with hydrated lime and molasses to create a briquette" for sale. *Id.*; Am. Pet. at 2. "The end market for Westwood's product is the same regardless of whether the product comes from the coarse fractions or from the medium, fine, and very fine fractions." Am. Pet. at 7.

Westwood's process also produces material that would be transported off-site for disposal in a landfill. Pet. at 8. Specifically, "[t]he separation of the metallic from the non-metallic particles results in a non-metallic calcium magnesium silicate." *Id.* Of the steelmaking slag fines introduced into Westwood's process as raw material, approximately two-thirds by weight will be this material. Am. Pet. at 8. Westwood conveys that material to a hopper and then transports it to a silo. Pet. at 8. Westwood then feeds it to a paddle mixer, where it is "blended with water to produce a moist cake" for landfill disposal. *Id.*

Westwood's entire process, including storage, takes place inside its production building. Am. Pet. at 11, citing Pet. at 7-8. After Westwood produces nuggets and briquettes, they are stored on a large covered pad. Am. Pet. at 11. Neither raw materials nor finished products are stored outdoors or exposed to the elements. *Id.*

Westwood currently has a contract to purchase steelmaking slag fines from U.S. Steel's Granite City facility. Pet. at 1. Westwood will use in its process all types of steelmaking slag fines addressed in that contract: desulfurization slag fines, steel slag fines, and ladle metallurgy facility slag. Am. Pet. at 16, citing Pet., Exh. A. Other sources, including Stein, Inc., may supply Westwood with steelmaking slag as raw material for its process. Pet. at 7 n.2, citing *id.*, Exh. C; Am. Pet. at 7, 8. "The [U.S. Steel] contract specifically allows Westwood to reject any fines which do not comply with the parameters necessary for Westwood's process." *Id.* at 7, citing *id.*, Exh. A. For production of a salable product, Westwood seeks steelmaking slag fines with parameters including a metallic content of 50% or greater. Am. Pet. at 5.

Westwood applied to the Agency for a permit to construct and operate air pollution control equipment for its facility. Pet. at 2; *see id.*, Exh. B. The Agency found that the application was incomplete in part because Westwood had not obtained local approval of the site under Section 39.2 of the Act. Pet. at 2; *see* 415 ILCS 5/39.2 (2008); Pet., Exh. B at 3 (Agency Notice of Incompleteness). The Agency informed Westwood that the slag fines are “waste” and trigger application of authorities regulating pollution control facilities. Pet. at 2; *see id.*, Exh. B at 3 (¶3b), citing 415 ILCS 5/3.330(b), 39.2 (2008).

WESTWOOD’S REQUEST FOR FINDING OF INAPPLICABILITY

Westwood argues that “[t]he Board has previously recognized that an adjusted standard petition can, in the alternative, seek a finding of inapplicability.” Pet. at 2, citing 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 (Jo’Lyn), AS 04-2, slip op. at 13-14 (Apr. 7, 2005); Petition of Illinois Wood Energy Partners, L.P. for an Adjusted Standard from 35 Ill. Adm. Code Part 807 or, in the Alternative, a Finding of Inapplicability, AS 94-1, slip op. at 2 (Oct. 6, 1994). In this case, Westwood seeks a finding that the material used in its process is not a “waste” and that the requirements of Parts 807 and 810 of the Board’s solid waste regulations therefore do not apply to it. Pet. at 2-3; Am. Pet. at 1, 3; *see* 35 Ill. Adm. Code 807, 810.

Statutory and Regulatory Definitions

In support of this finding, Westwood claims that the slag fines it processes do not fit within the statutory and regulatory definitions of “waste.” Pet. at 3. Westwood notes that the Act defines “waste” as “any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, *or other discarded material. . .*” *Id.* (emphasis in original), citing 415 ILCS 5/3.535 (2008); 35 Ill. Adm. Code 807.104. Westwood argues that the material it processes “is not ‘discarded’ and does not fit any of the other items in the definition of ‘waste.’” Pet. at 3. Westwood asserts that “the slag fines are not a waste.” *Id.*

AFI

Westwood argues that the Illinois Supreme Court’s decision in Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency (AFI), 215 Ill. 2d 219, 830 N.E.2d 444 (2005) supports this conclusion. Pet. at 3. Westwood states that AFI “collects, separates, and processes plastic materials into alternate fuel,” which it then sells to a power plant to use as fuel. *Id.* Westwood argues that, although the Board determined that the alternate fuel was not a “waste,” the Agency initiated an enforcement action. Pet. at 3, citing Illinois Power Co. v. IEPA, PCB 97-35, 97-36, slip op. at 15 (Jan. 23, 1997). Westwood further argues that AFI brought a declaratory judgment action against the Agency, the result of which was that both the trial and appellate courts agreed that the material at issue was not a “waste.” Pet. at 3.

Westwood claims that the Illinois Supreme Court upheld these decisions after applying the statutory definition of “waste.” Pet. at 3-4; *see* 415 ILCS 5/3.535 (2008). Westwood first

argues that, although that definition employs the term “discarded,” the Act does not define it. Pet. at 4. Westwood then argues that the Court relied upon the use of “discarded” in the Act’s definition of “recycling, reclamation or reuse.” *Id.*; see 415 ILCS 5/3.380 (2008). Westwood concludes that “[t]he court found that, pursuant to that definition, materials are ‘discarded’ only if the materials are not returned to the economic mainstream.” Pet. at 4. Westwood cites the court’s statement that

[w]e therefore reject the Agency’s contention that ‘discarded’ is defined solely from the viewpoint of the supplier in that a material is putatively ‘discarded’ as ‘any material which is not being utilized for its intended purpose’ of the generator. There is nothing in the statute which would dictate this definition. Rather 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.*” *Id.* (emphasis in original), citing AFI, 830 N.E.2d at 457.

Westwood claims that this analysis applies to the slag fines it uses. Pet. at 4. Westwood argues that, like AFI, it purchases material that might otherwise be discarded and returns it to the economic mainstream. *Id.* Westwood further argues that, “[s]imply because a material might be discarded for lack of a market does not mean that the material fits the definition of ‘waste.’” *Id.* Westwood suggests that a contrary conclusion may be inconsistent with the purposes of the Act. Westwood claims that, if the Agency generally insists that materials are “discarded” and must comply with various waste facility requirements, then more materials will be actually discarded and generate more waste. *Id.* at 5.

Jo’Lyn

Westwood argues that, in Jo’Lyn, the Board applied the AFI decision to determine “that a material that might otherwise be discarded is not a ‘waste’ when the material is returned to the economic mainstream.” Pet. at 5; see Jo’Lyn, AS 04-2, slip op. at 13-14 (Apr. 7, 2005). Westwood states that, in Jo’Lyn, the petitioner shredded granulated bituminous shingle materials (GBSM) to make a paving product known as Eclipse Dust Control for application to various paved surfaces. Pet. at 5; see Jo’Lyn, AS 04-2, slip op. at 2-4 (Apr. 7, 2005). Westwood claims that the Board disagreed with the Agency’s argument that the GBSM was a waste. Westwood argues that the Board “applied the statutory definition of ‘recycling, reclamation and reuse’ and found that the GBSM used by Jo’Lyn is not ‘discarded’ because Jo’Lyn processed the GBSM to return it to the economic mainstream.” Pet. at 5, citing Jo’Lyn, AS 04-2, slip op. at 14 (Apr. 7, 2005). Westwood concludes that the Board should follow the precedents in AFI and Jo’Lyn to determine that the steel slag fines used in its process are not a “waste.” Pet. at 5-6.

WESTWOOD’S PETITION FOR ADJUSTED STANDARD

Legal Framework

The Act and the Board’s procedural rules provide that a petitioner may request, and the Board may grant, an environmental standard that is different from the generally applicable

regulation that otherwise applies to that petitioner. *See* 415 ILCS 5/28.1(a) (2008); 35 Ill. Adm. Code 104.400(a), 104.402. This form of regulatory relief is called an adjusted standard.

Section 28.1 of the Act and Part 104, Subpart D, of the Board’s procedural rules contain the procedures governing an adjusted standard proceeding. *See* 415 ILCS 5/28.1 (2008); 35 Ill. Adm. Code 104.400-428. The Board’s procedural rules specify the required contents for the adjusted standard petition. *See* 35 Ill. Adm. Code 104.406, 104.416. Once a petition for an adjusted standard is filed, the Agency must file its recommendation with the Board. *See* 415 ILCS 5/28.1(d)(3) (2008); 35 Ill. Adm. Code 104.416. The adjusted standard proceeding is adjudicatory in nature and therefore is not subject to the rulemaking provisions of the Act or the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et seq.* (2008)). *See* 415 ILCS 5/28.1(a) (2008); 35 Ill. Adm. Code 101.202 (defining “adjudicatory proceeding”).

The burden of proof in an adjusted standard proceeding is on the petitioner. *See* 415 ILCS 5/28.1(b), (c) (2008); 35 Ill. Adm. Code 104.426. Once granted, the adjusted standard, instead of the rule of general applicability, applies to the petitioner. *See* 415 ILCS 5/28.1(a) (2008); 35 Ill. Adm. Code 101.202, 104.400(a). In granting adjusted standards, the Board may impose conditions as may be necessary to accomplish the purposes of the Act. *See* 415 ILCS 5/28.1(a) (2006); 35 Ill. Adm. Code 104.428(a).

Summary of Petition for Adjusted Standard

The petition states that, “[i]f the Board finds that the material used by Westwood is indeed a ‘waste,’ Westwood seeks an adjusted standard from specific provisions of Parts 807 and 810.” Pet. at 6; *see* 35 Ill. Adm. Code 807, 810. The following subsections address Westwood’s alternative request for an adjusted standard from the Board’s regulations.

Standard from which Westwood Seeks Relief

Section 807.104. Westwood seeks an adjusted standard from specified definitions provided at Section 807.104 of the Board’s solid waste regulations. Pet. at 6; Am. Pet. at 3; *see* 35 Ill. Adm. Code 104.406(a). Westwood states that Part 807 implements Sections 5, 21.1, and 22 of the Act. Pet. at 7, *see* 415 ILCS 5/5, 21.1, 22 (2008); *see also* 35 Ill. Adm. Code 104.406(b). Westwood further states that Section 807.104 took effect on July 27, 1973, and has undergone a number of amendments. Am. Pet. at 3. The definitions from which Westwood seeks an adjusted standard provide as follows:

* * *

“Facility”, as used in this Part, means the same thing as “unit”.

* * *

“Solid waste” means waste.

* * *

“Solid waste management” means “waste management”.

* * *

“Unit” means any device, mechanism, equipment or area used for storage, treatment or disposal of waste.

* * *

“Waste” means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, or from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under 35 Ill. Adm. Code 309.102 or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C.A. 2011 et seq.) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder (Ill. Rev. Stat. 1983 ch. 96½, par. 7901.01 et seq. and 62 Ill. Adm. Code 1700 through 1845) (Section 3 (11) of the Act). Pet. at 6, *see* 35 Ill. Adm. Code 807.104.

Westwood argues that, because the slag fines it uses in its process should not be considered as a “waste” and its facility should not be considered a solid waste management site, the Board should grant an adjusted standard from the five definitions listed above. Pet. at 6. Westwood asserts that, if the Board grants this requested relief, then “the remaining provisions of Part 807 will not be applicable to petitioner’s facility. . . .” *Id.*; *see* 35 Ill. Adm. Code 807.

Section 810.103. In addition, Westwood seeks an adjusted standard from specified definitions provided at Section 810.103 of the Board’s regulations, the general provisions addressing solid waste disposal. Pet. at 6; Am. Pet. at 3. Westwood states that Part 810 implements Sections 7.2, 21, 21.1, 22, 22.17, and 22.40 of the Act. Pet. at 7; *see* 415 ILCS 5/7.2, 21, 21.1, 22, 22.17, 22.40 (2008); *see also* 35 Ill. Adm. Code 104.406(b). Westwood further states that Part 810 took effect on September 18, 1990, and has undergone several amendments. Am. Pet. at 3. The definitions from which Westwood seeks an adjusted standard provide as follows:

* * *

“Facility” means a site and all equipment and fixtures on a site used to treat, store or dispose of solid or special wastes. A facility consists of an entire solid or special waste treatment, storage, or disposal operation. All structures used in connection with or to facilitate the waste disposal operation will be considered a part of the facility. A facility may include, but is not limited to, one or more solid waste disposal units, buildings, treatment systems, processing and storage operations, and monitoring stations.

* * *

“Landfill” means a unit or part of a facility in or on which waste is placed and accumulated over time for disposal, and which is not a land application unit, a surface impoundment or an underground injection well. For the purposes of this

Part and 35 Ill. Adm. Code 811 through 815, landfills include waste piles, as defined in this Section.

* * *

“Solid Waste” means a waste that is defined in this Section as an inert waste, as a putrescible waste, as a chemical waste or as a special waste, and which is not also defined as a hazardous waste pursuant to 35 Ill. Adm. Code 721. Pet. at 6; 35 Ill. Adm. Code 810.103.

Westwood argues that, because the slag fines it uses in its process should not be considered as a “waste” and because its facility should not be considered a landfill, the Board should grant an adjusted standard from the three definitions listed above. Pet. at 6. Westwood asserts that, if the Board grants this requested relief, then “the provisions of Parts 811 through 817 are not applicable to Westwood’s facility.” *Id.*; see 35 Ill. Adm. Code 811-817.

Applicability of Part 721. In its order dated May 21, 2009, the Board directed Westwood to file an amended petition addressing issues including the applicability of Part 721 of the Board’s regulations, which addresses the identification and listing of hazardous waste. See 35 Ill. Adm. Code 721.

The Board’s order inquired whether Westwood’s material may be a listed hazardous waste such as K177. Westwood states that the steelmaking slag fines used by Westwood in its process are not a listed hazardous waste. Am. Pet. at 4. It argues that K177 pertains to wastes from production of inorganic chemicals and not to materials generated in steel production. Am. Pet. at 4-5; see 35 Ill. Adm. Code 721.132(a). Westwood further argues that, “even if the K177 definition applied to steel production, the slag fines are not ‘speculatively accumulated or disposed of,’ as provided in the definition of K177 wastes.” Am. Pet. at 5. Westwood also claims that the steelmaking slag fines it uses in its process “do not exhibit a characteristic of hazardous waste.” Am. Pet. at 3, citing *id.*, Exh. G (laboratory reports).

Westwood argues that the steelmaking slag fines are also not “solid waste” under Part 721. Am. Pet. at 3. Westwood elaborates that, because the fines are not hazardous, the definitions of “solid waste” do not apply to them. *Id.*, see 35 Ill. Adm. Code 721.101(a), (b). Westwood notes that Appendix Z to Part 721 determines whether certain categories of materials are solid wastes. Am. Pet. at 4, citing 35 Ill. Adm. Code 721.Appendix Z. Westwood claims that “[n]one of the categories in Appendix Z applies to the steelmaking slag fines.” Am. Pet. at 4. Westwood concludes that the fines “are not classified as hazardous waste under any of the provisions of Part 721.” *Id.* at 3.

Westwood also responds to the Board’s question whether the fines constitute a special waste. Westwood argues that, under the special waste provisions, the generator is eligible to certify that its own industrial process waste is not a special waste. Am. Pet. at 5, citing 415 ILCS 5/22.48 (2008). Westwood further argues that, even if the fines constitute industrial process waste, they do not fall into any category that “would prohibit the generator from self-certifying the waste as non-special waste.” Am. Pet. at 5. Westwood asserts that it “will utilize only slag fines which have a certification from the supplier that the fines are not special waste.” *Id.*

Nature of Westwood's Activity

Westwood states that it purchases steelmaking slag fines from U.S. Steel. Pet. at 7. Westwood further states that the purchase “contract specifically allows Westwood to reject any fines which do not comply with the parameters necessary for Westwood’s process.” *Id.*, citing *id.*, Exh. A (¶4.2). Westwood argues that it thus “controls the quality of the slag fines it purchases.” *Id.* at 7.

Westwood notes that the Board’s May 21, 2009, order posed “several questions about the parameters Westwood uses to evaluate whether specific fines are appropriate and useful for Westwood’s process.” Am. Pet. at 5. Westwood states that the most important parameter in this evaluation is whether slag fines have a metallic content of 50% or greater, a level “necessary for Westwood’s process to produce a saleable product.” *Id.* at 5, 12. Noting that this content may vary with market conditions including the price of metals, Westwood characterizes that 50% threshold as “a general guide.” *Id.* at 6.

Westwood asserts that “[t]he steelmaking slag fines are not hazardous” and that it “will ensure that no hazardous material is included in the fines.” Am. Pet. at 6. Westwood states that U.S. Steel has provided it with test results demonstrating that its fines are not hazardous. *Id.* Westwood further states that it intends to obtain fines from other suppliers and that “there will [be] testing of representative samples of steelmaking slag fines from all suppliers.” *Id.* n.2. Westwood states that it “would obtain the same information from other suppliers as it has from U.S. Steel,” including results of testing demonstrating that the fines are not hazardous. *Id.* at 12, 13. Westwood characterizes the process of testing representative samples as “similar to the procedures used to test waste before acceptance at a landfill.” *Id.* at 6 n.3, 13. Westwood claims that “[r]equiring testing of each load of fines would render the process unworkable and not economically viable.” *Id.* at 6, 13. Westwood also claims that “[r]equiring test results of a representative sample of a supplier’s fines will allow Westwood to ensure that its raw materials are not hazardous.” *Id.*

Westwood emphasizes that it must “ensure the quality of the fines it receives, both in order to comply with environmental regulations and to ensure its process proceeds in an efficient and economic manner.” Am. Pet. at 16-17. Westwood also stresses that its contract with U.S. Steel allows it to “reject any materials that may have a chemical analysis that does not fit the parameters needed to make a quality product.” *Id.*, citing Exh. A (¶4.2). Westwood argues that it “has, and will exercise an absolute right to reject any fines that do not comply with environmental regulations or with the metallic content required for its process.” Am. Pet. at 17

Westwood claims that it “will also visually examine the loads for trash or any other ‘non-fine’ material.” Am. Pet. at 6. Westwood hypothesizes that, if a load includes a single non-fine item, “it would be most efficient for Westwood to simply remove that non-fine material. . . .” *Id.* at 6-7. Westwood continues by stating that, “if there is a large amount of non-fine material in a load, or if Westwood has reason to suspect that the load might contain off-specification fines, Westwood would reject the load.” *Id.* at 7.

Westwood emphasizes that, because its product has a high metallic content, it is “too valuable” for use in land reclamation projects or as soil amendment at abandoned mines. Am. Pet. at 7. Westwood states that, because the product will be sold to manufacturers for making steel in electric arc furnaces, it “does not plan to work with state agencies on land reclamation or soil amendments projects.” *Id.* at 8. Westwood states that its original petition mentioned approval for these uses “only to demonstrate that there should be no concern that the raw material is an environmental threat.” *Id.*

Of the steelmaking slag fines introduced into Westwood’s process as raw material, approximately two-thirds by weight will be calcium magnesium silicate. Am. Pet. at 8. Noting the Board’s questions about this remaining fraction, Westwood states that it “is not a listed or [characteristic] hazardous waste.” Am. Pet. at 8, citing *id.*, Exh H (chemical analysis). Westwood claims that two landfills have approved the materials for disposal at their facilities and indicate that they will accept it when Westwood begins operation. *Id.* at 8-9. Westwood further indicates that “[t]he calcium magnesium silicate is not an Illinois special waste.” *Id.* at 9. Westwood claims that the Act allows it to certify that its industrial process waste is not a special waste. *Id.*, citing 415 ILCS 5/22.48 (2008).

Westwood acknowledges that its original petition referred to the possibility that calcium magnesium silicate could be approved for use as a landfill cover. Am. Pet. at 9, citing Pet. at 8 n.3. Westwood states, however, that it has not yet determined that it can sell the material as landfill cover. Am. Pet. at 9. Westwood further states that, for the purpose of its petition, it “presumes that it will dispose of the calcium magnesium silicate at an approved landfill.” *Id.*

Finally, regarding other permits, Westwood states that, before its facility begins operating, it will obtain an air permit approved by the Agency. Am. Pet. at 11. Westwood further states that its “facility will have a complete system of air pollution control equipment, including cyclones, baghouses, bin vent filters, and stacks.” *Id.* at 10. Westwood emphasizes that, because it conducts its process indoors, “dust and particulate matter generated by the process are fully contained and routed through the air pollution equipment.” *Id.* at 10-11. Westwood claims that, because raw materials and finished products are not stored outdoors and are not exposed to the elements, its facility does not require a stormwater runoff permit. *Id.* at 11.

Compliance Alternatives

Westwood argues that, if the Board determines that the slag fines used in its process are a “waste,” then “the only compliance alternative available to Westwood is full compliance with the panoply of regulatory requirements imposed by the Act and by Parts 807 and 810.” Pet. at 8. Westwood states that these requirements including local approval of the site, which it characterizes as “an expensive and lengthy process.” *Id.* at 9; citing 415 ILCS 5/39.2(2008); *see* Am. Pet. at 14-15. Westwood states that, if it obtains local approval of the site, it must then comply with the requirements of Part 807. Pet. at 9. Westwood characterizes these requirements, which include financial assurance, as “cost-prohibitive.” *Id.* Westwood argues that the costs of

obtaining local approval of the site and complying with solid waste regulations “would almost certainly render it economically impossible for Westwood to construct and operate its proposed facility.” Am. Pet. at 15.

Westwood states that, “[b]ecause the proposed adjusted standard would exempt Westwood’s facility from the specified definitions, there are no additional costs of achieving compliance with the adjusted standard.” Am. Pet. at 14. Westwood asserts that, even if it duplicates the testing of fines performed by one of its suppliers, it will not experience higher costs because it intends to perform that testing in any event. *Id.* Westwood concludes that its “costs to achieve the proposed adjusted standard are similar to the costs necessary to operate its process.” *Id.*

Impact of Westwood’s Activity

Westwood notes that its process produces calcium magnesium silicate, which it will dispose of at a permitted landfill. Am. Pet. at 10; *see supra* at 3. Otherwise, argues Westwood, its “process produces no emissions, discharges or releases directly to the land.” *Id.* Westwood notes that, although its facility will require an air permit, it does not seek an adjusted standard from air regulations, so its petition presents no qualitative or quantitative difference in air emissions. Pet. at 10 n.5; *see* Am. Pet. at 10 n.6. Westwood claims that “the qualitative and quantitative impact of compliance with the rule of general applicability is the same as compliance with the proposed adjusted standard.” *Id.* at 10. Westwood further claims that, “because the recycling process provides a beneficial use of the slag fines, producing a useful product, issuance of the proposed adjusted standard will actually decrease emissions and releases, in an overall sense.” *Id.*

Westwood notes that the Board’s May 21, 2009, order posed questions about the use of steelmaking slag fines as soil amendment. Westwood states that its “end product will not be used as a soil amendment or for land reclamation” and that it noted this potential use “only to demonstrate that the raw material used in Westwood’s process is not an environmental threat.” Am. Pet. at 15. Westwood states that the process approving this use is not relevant to its petition. *Id.*

Justification for Proposed Adjusted Standard

Westwood argues that its proposal “is justified by the environmental and economic benefits of recycling slag fines into a marketable product.” Pet. at 11. Westwood argues that the City of Madison has supported and approved its facility. *Id.*, citing *id.*, Exhs. D, E. Westwood also argues that the Agency has allowed slag fines from the same U.S. Steel plant that would supply Westwood’s fines as a soil amendment at abandoned mines. Pet. at 11, citing *id.*, Exh. F. Westwood concludes that “it is clear that the slag fines do not present an environmental threat.” Pet. at 11.

Westwood’s Proposed Adjusted Standard

Westwood offers the following language for its proposed adjusted standard:

Westwood Lands, Inc. is hereby granted an adjusted standard from the following definitions of 35 Ill. Adm. Code 807.104: “facility,” “solid waste,” “solid waste management,” “waste,” and “unit.” Westwood Lands, Inc. is further granted an adjusted standard from the following definitions of 35 Ill. Adm. Code 810.103: “facility,” “landfill,” and “solid waste.” These enumerated definitions do not apply to operations conducted by Westwood at the facility in Madison County, Illinois, so long as:

1. Westwood uses only steelmaking slag fines.
2. For purposes of this adjusted standard, “steelmaking slag fines” is defined as “slag fines generated from the processing of raw steelmaking slag.” “Raw steelmaking slag” means “the residual material produced in steelmaking operations.”
3. Westwood retains control of the quality of steelmaking slag fines, including the right to reject any steelmaking slag fines that do not comply with Westwood’s standards for fines.
4. Westwood operates the facility in compliance with other provisions of the Environmental Protection Act. Pet. at 9-10; *see* 35 Ill. Adm. Code 104.406(f).

In response to questions posed by the Board in its May 21, 2009, order, Westwood states that “it is unnecessary to include, in the language of the adjusted standard, conditions specifying the parameters of acceptable slag fines.” Am. Pet. at 12. Westwood argues that, because the metallic content of slag fines may vary over time, “including a specific percentage of metallic content in the language of the adjusted standard would limit Westwood’s ability to respond to changing market conditions.” *Id.* at 13. Westwood further argues that imposing such a limit would not yield an environmental benefit. *Id.* Westwood agrees to language requiring specifically that the fines are not hazardous and do not contain asbestos, PCBs, or a listed hazardous waste, but it expresses the belief that these limitations are reflected in the language of subsection (4) above. *Id.* n.8. Nonetheless, Westwood states that it “would agree that limitations be more specifically spelled out.” *Id.*

Westwood states that it would reject an incoming load of steelmaking slag finds on various grounds: if it contained a large amount of material other than fines; if it appeared to be materially different from fines ordinarily used in its process; or if it had any reason to believe that the fines were hazardous or contained asbestos, PCBs, or a listed hazardous waste. Am. Pet. at 13. Westwood emphasizes that it benefits from using only those raw materials suitable for its process. Westwood argues that, to comply with environmental standards and to achieve its business goals, “it is essential to Westwood that it use only steelmaking slag fines that meet the parameters of the representative samples.” *Id.*

Westwood states that, if it finds after slag fines arrive at its facility that the fines exhibit a characteristic of hazardous waste or contain asbestos, PCBs or a listed hazardous waste, then “Westwood will reject the load and return the fines to the supplier.” Am. Pet. at 14. Westwood further states that it “would agree to such a condition in the language of the adjusted standard.” *Id.*

Section 28.1 Factors

Westwood states that “[t]he regulations of general applicability (Parts 807 and 810) do not specify a level of justification or other requirements for an adjusted standard.” Pet. at 7; *see* Rec. at 10 (¶36); *see also* 35 Ill. Adm. Code 104.406(c). Section 28.1(c) of the Act provides that,

[i]f a regulation of general applicability does not specify a level of justification required of a petitioner to qualify for an adjusted standard, the Board may grant individual adjusted standards whenever the Board determines, upon adequate proof by petitioner, that:

- (1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
- (2) the existence of those factors justifies an adjusted standard;
- (3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
- (4) the adjusted standard is consistent with any applicable federal law. 415 ILCS 5/28.1(c) (2008).

The Board separately addresses Westwood’s arguments regarding these four statutory factors below.

Substantially Different Factors. Westwood argues that, “[i]n adopting Part 807, the Board replaced and superseded the ‘Rules and Regulations for Refuse Disposal Sites and Facilities,’ adopted by the Illinois Department of Public Health in 1966.” Pet. at 12, citing 35 Ill. Adm. Code 807.102. Westwood further argues that the adoption of Part 807 implements “Section 22 of the Act, which gives the Board authority to regulate, *inter alia*, waste disposal, storage, treatment, and disposal sites.” Pet. at 12. Westwood claims that “[t]hese requirements should not be imposed on Westwood, as its operation is not the type of operation contemplated by the Board in promulgating Parts 807 and 810.” Pet. at 9.

Westwood claims that its facility does not dispose of refuse or waste and is not a transfer station or landfill. Pet. at 12. Westwood argues that treating its facility as a landfill or transfer station “is unnecessary for the protection of the environment and beyond the scope of facilities considered by the Board.” *Id.* at 9. Westwood further claims that it performs recycling by processing slag fines into a saleable product. *Id.* Westwood asserts that “[t]his process actually reduces waste, as it returns a material that might otherwise be discarded, for lack of a market, to the economic mainstream and prevents it from being disposed of.” *Id.* Consequently, Westwood argues that “the factors relating to Westwood’s recycling activities are substantially and significantly different than those pertaining to activities regulated under Parts 807 and 810. *Id.* at 12, citing Jo’Lyn, AS 04-2, slip op. at 13 (Apr. 7, 2005); *see also* Pet. at 9.

Existence of Factors Justifying Standard. Westwood argues that the existence of these different factors justifies an adjusted standard. Pet. at 12; *see also id.* at 11, citing 35 Ill. Adm. Code 104.406(h). Westwood emphasizes that it engages in recycling by processing steelmaking slag fines into a saleable product. Pet. at 12. Westwood argues that compliance with the requirements of Parts 807 and 810 is economically unreasonable for it and yields no environmental benefit. *Id.* at 12-13. Westwood concludes that, “the proposed adjusted standard is justified as the only possible means of compliance.” *Id.* at 13.

Impact on Environment. Westwood asserts that its proposed adjusted standard “will not result in adverse environmental or health effects substantially and significantly different from the factors relied upon by the Board in adopting Parts 807 and 810.” Pet. at 13. Westwood argues that the adjusted standard generates positive environmental and health effect by processing slag fines into a usable product. *Id.*

Consistency with Federal Law. Westwood states that “[t]he proposed adjusted standard is consistent with federal law, and granting the adjusted standard will not violate federal law.” Pet. at 13; *see also id.* at 11, citing 35 Ill. Adm. Code 104.406(i).

AGENCY RECOMMENDATION

The Agency states that its technical staff has undertaken a “thorough review” of Westwood’s petition. Rec. at 13. As a preliminary matter, the Agency indicates that, on July 28, 2008, it received a permit application from a Westwood Lands located at a Michigan address. *Id.* at 2. The Agency notes that “[a] Westwood Lands Inc. is a registered corporation of the State of Michigan since 2004.” *Id.* The Agency presumes “that this is the entity that seeks relief from Illinois law.” *Id.*

The Agency states that it “does not request a hearing regarding this matter.” Rec. at 13; *see* 35 Ill. Adm. Code 104.406(j).

On the basis of its investigation, the Agency concludes that Westwood has provided “insufficient justification” for the Board to grant a finding of inapplicability or an adjusted standard. *Id.* The Agency thus recommends that the Board deny Westwood’s petition. Rec. at 1,

13, citing 415 ILCS 5/35 (2006), 35 Ill. Adm. Code 104.400-428. Below, the Board summarizes the arguments made by the Agency in its recommendation.

Request for Finding of Inapplicability

Nature of Relief Sought

The Agency notes that Westwood seeks what is “essentially a declaratory ruling” that the slag used in its process is not a “waste” under the Act. Rec. at 2, 4, citing Pet. at 1. The Agency suggests that, if the Board makes such a finding, then Westwood would be relieved of complying with any waste regulation. *See* Rec. at 2.

The Agency claims that its recommendation is based solely on information provided by Westwood and that it has “no procedural right to compel, seek or review information. . . .” Rec. at 4. Characterizing Westwood’s request for a finding of inapplicability as “objectionable,” the Agency claims that “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.” *Id.*

Caselaw

The Agency argues that “the caselaw does not support Westwood’s request.” Rec. at 4. The Agency first addresses AFI by arguing that the Court in that case examined statutory language and separated materials that may be recycled, reclaimed, or reused into two main categories. *Id.*, citing AFI, 830 N.E.2d at 457. The Agency states that the first category consists of “waste,” from which contaminants may be removed to render that waste reusable. Rec. at 5, citing 415 ILCS 5/3.380 (2008) (definition of “recycling, reclamation or reuse”). The Agency states that the second category consists of “materials.” Rec. at 5; *see* 415 ILCS 5/3.380 (2008). The Agency quotes that Court’s language that “[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.’” Rec. at 5, citing AFI, 830 N.E.2d at 456.

Stressing this categorization, the Agency suggests that returning a material to the economic mainstream does not automatically prevent that material from being a “waste.” *See* Rec. at 5, 6. The Agency notes that Westwood has described its own process as one that liberates iron and iron oxides from slag for reuse. Rec. at 6, citing Pet. at 7. The Agency further notes Westwood’s statement that approximately one-third of the weight of the processed raw material will be a usable product while the remaining two-thirds will be calcium magnesium sulfate disposed of in landfills. Rec. at 6, citing Am. Pet. at 8. The Agency argues that, “[w]here approximately 67 percent of a material must be removed and discarded from the slag accepted at a facility, it is arguable that the slag is a ‘waste’ under the two categories test.” Rec. at 6.

The Agency further states that the Court in AFI indicated that “all portions of a relevant statutory enactment should be read as a whole.” Rec. at 6, 7, citing AFI, 830 N.E.2d at 455. The Agency claims that Part 817 of the Board’s regulations, which addresses new landfills for steel

and foundry industry wastes, specifically include steelmaking slag. Rec. at 6, citing 35 Ill. Adm. Code 817. The Agency further claims that the section addressing scope and applicability identifies steelmaking slag as waste generated by these industries. Rec. at 6, citing 35 Ill. Adm. Code 817.101. The Agency argues that Section 817.101 allows that such slag may be used for specified purposes if not prohibited or if approved by the Agency. Rec. at 6; *see* 35 Ill. Adm. Code 817.101. The Agency further argues that, if the Agency can prohibit or approve such uses, “it stands to reason that this slag is a waste to be reviewed by Illinois EPA.” Rec. at 6. The Agency also argues that, because Part 810 defines both “slag” and “steel slag,” the Board intends to bring those materials into its regulatory framework. Rec. at 7; *see* 35 Ill. Adm. Code 810.103.

The Agency also distinguishes the Board’s decision in Jo’Lyn from Westwood’s petition. *See* Rec. at 7. The Agency argues that, in Jo’Lyn, the Board specifically found that the petitioners “are not removing any contaminant from waste. In fact, no contaminants are removed from the GBSM at all. Therefore, the GBSM is a ‘material.’” *Id.*, citing Jo’Lyn, AS 04-2, slip op. at 13 (Apr. 7, 2005). The Agency again claims that Westwood has not fully addressed the disposal of the two-thirds of its raw material that is not metal and that is removed during its process. Rec. at 7. In addition, the Agency claims that Westwood’s petition differs from the caselaw it cites. *Id.* The Agency expresses the feeling that “it is most difficult to review claims that a valid contract [for purchase of slag] exists when key terms such as price, royalties, right of refusal as well as other terms are excluded under a claim of ‘trade secret.’” *Id.* The Agency suggests that these exclusions cast doubt on the existence of a genuine market for Westwood’s product or a binding contract for its sale. *See id.* at 7-8, citing Pet., Exh. A; Am. Pet. at 7, 8. The Agency claims that it should be incumbent upon Westwood “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.” Rec. at 8.

Petition for Adjusted Standard

Although the Agency renews its argument that it is not appropriate for Westwood to seek relief from statutory definitions, it states that it will continue its Recommendation as required by the Board’s regulations and address Westwood’s request for an adjusted standard. Rec. at 8; *see* 415 ILCS 5/28.1(d)(3) (2008); 35 Ill. Adm. Code 104.416.

Standard from which Westwood Seeks Relief

The Agency notes that Westwood seeks relief from two parts of the Board’s solid waste and special waste hauling regulations. Rec. at 8-9; *see* 35 Ill. Adm. Code 104.406(a), 807, 810.

Section 807.104. Noting that Westwood seeks relief from this section of the Board’s solid waste regulations, the Agency states that the Board originally promulgated Part 807 through emergency rulemaking in 1973. Rec. at 8. The Agency lists amendments to Part 807 since its original enactment. *See id.* The Agency notes that an amendment to Section 807.104 took effect on November 25, 1985. *Id.*; citing 9 Ill. Reg. 18942 (Nov. 25, 1985).

Section 810.103. Noting that Westwood also seeks relief from this Section of the Board’s solid waste disposal regulations, the Agency states that the Board originally adopted Part 810 in 1990. Rec. at 9, citing 14 Ill. Reg. 15838 (Sept. 18, 1990). The Agency lists amendments to Part 810 since its original enactment. Rec. at 9. The Agency notes that an amendment to Section 810.103 took effect on August 15, 1996. *Id.*, citing 19 Ill. Reg. 11985.

Level of Justification. The Agency states that both Section 807.104 and Section 810.103 provide definitions and, “[t]hus, there is no ‘standard’ from which this adjusted standard is sought.” Rec. at 9, citing 35 Ill. Adm. Code 104.406(a). The Agency further states that “[n]o regulation of general applicability exists from which relief is sought.” Rec. at 9. The Agency claims that the definitions that are the subject of Westwood’s petition “do not specify a level of justification or other requirements.” *Id.* at 10; *see* 35 Ill. Adm. Code 104.406(c).

Nature of Relief Sought

The Agency indicates that petitioners generally seek adjusted standards for relief from specified rules of general applicability. *See* Rec. at 2. The Agency argues that Westwood does not seek relief from specific provisions but instead seeks general relief from definitions applicable to parts of the Board’s regulations. *Id.*, citing 35 Ill. Adm. Code 807.104, 810.103. The Agency notes that Westwood seeks relief from the statutory definitions of “waste” and “solid waste.” Rec. at 2, citing 415 ILCS 5/3.470, 3.535 (2008). The Agency states that, “[a]lthough the Board has in the past considered matters that involved the question of whether material under review is a waste, in this case the Petitioner seeks direct regulatory relief from what is clearly identified as a statutory definition.” Rec. at 2. The Agency suggests that the Board must deny Westwood’s request because “an adjusted standard cannot be granted to relieve a statutory obligation or standard.” *Id.* The Agency further notes that, if the material used in its process is a waste, then Westwood acknowledges that it would be required to seek approval of its site as a pollution control facility. *Id.*, citing 415 ILCS 5/39.2 (2008). The Agency suggests that Westwood effectively seeks relief from the Act’s siting procedures and requirements and “any and all possible regulation.” Rec. at 2.

The Agency argues that “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 regulations.” Rec. at 3. The Agency claims that, if the Board considers the material used in Westwood’s process to be a waste, then “it would not be reasonable for the Board to find the applicable sections of the existing regulations inapplicable.” *Id.* The Agency suggests that, if “it is found that the general rules do not account for” Westwood’s facility, then it would be more reasonable for Westwood to pursue regulatory relief through site-specific rulemaking. *Id.*, citing Petition of Ameren Energy Generating Company or Adjusted Standards from 35 Ill. Adm. Code Parts 811, 814, 815, AS 09-1.

Nature of Westwood’s Activity

The Agency concludes, based upon its petition and supporting documents, that Westwood “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.” Rec. at 10. The Agency notes Westwood’s claim that the contract for purchase of slag fines “specifically allows Westwood to reject any fines which do not comply with the parameters necessary for Westwood’s process.” *Id.*, citing Pet. at 7. However, the Agency argues that the contract “merely provides that Westwood must be presented with an 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.” Rec. at 10, citing Pet., Exh. A (§ 4.2). The Agency further argues that these contract provisions do not require “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.” Rec. at 10. The Agency suggests that these provisions provide little more “than assurances that Westwood may control the quality of slag purchased.” *Id.* The Agency also suggests that each of Westwood’s purchases of slag may be subject to “different standards, parameters, tests or rejections.” *Id.*

The Agency recognizes Westwood’s claim that the material it seeks to process is not hazardous waste. Rec. at 11, citing Am. Pet. at 3-5. The Agency argues that the information submitted by Westwood “to demonstrate the waste is not characteristically hazardous waste indicates the sample was not prepared using the TCLP test method 1311 in SW 486.” Rec. at 11. The Agency claims that this information is “not conclusive” in determining that the material is not a characteristic hazardous waste. *Id.*

The Agency notes Westwood’s claim that testing each load of material “would render the process unworkable.” Rec. at 11, citing Am. Pet. at 5-7, 12-15. The Agency claims that Westwood has not provided the parameters and specifications applicable to its raw materials or explained how any parameters or specifications ensure that those materials will be acceptable for its process. Rec. at 11, citing Am. Pet. at 12-15, 16-17. The Agency argues that Westwood should propose some type and frequency of testing to be performed on its raw materials. Rec. at 11. The Agency further argues that “[t]otal 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.” *Id.* The Agency also claims that Westwood has failed “to provide detailed procedures that would be used to determine when a load of slag is unacceptable.” *Id.*, citing Am. Pet. at 12-15.

The Agency argues that Westwood has failed to demonstrate that its process does not constitute “sham recycling.” Rec. at 10. The Agency states that Westwood’s petition and supporting documents should have provided the following information: “the value of the material after reclamation, the cost associated with the process and the slag purchase price.” *Id.* The Agency claims that Westwood’s filings have redacted all information regarding cost and price. *Id.*; see Pet. Exh. A. The Agency also states that Westwood “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.” *Id.* at 11.

Compliance Alternatives

The Agency argues that Westwood has not identified regulations in Parts 807 and 810 that are inappropriate or objectionable with regard to its facility. Rec. at 11. The Agency notes Westwood's claim that, if the slag it uses as a raw material is deemed a "waste," then it will have to comply with a various provisions of the Act and the Board's regulations. *Id.*, citing Pet. at 8, 9. The Agency argues that Westwood merely claims that these requirements are numerous and that they include local site approval under the Act. Rec. at 11-12, citing 415 ILCS 5/39.2 (2008). The Agency suggests that Westwood's petition is in effect a request for relief from site approval procedures and requirements. *See* Rec. at 12. The Agency claims that Westwood has not shown that it is more costly for Westwood to obtain this approval than it is for any other entity seeking it. *Id.* The Agency argues that it is therefore difficult for the Board to "find that factors relating to Petitioner are substantially and significantly different from the factors relied on by the Board in adopting the general regulations applicable to the Petitioner, and as such, grant an Adjusted Standard." *Id.*

Impact of Westwood's Activity

The Agency states that it "does not take issue, generally, with the representations made by Petitioner concerning environmental impact." Rec. at 12; *see supra* at 14.

Justification for Proposed Adjusted Standard

The Agency suggests that a discussion of regulating waste should not begin with a request for relief from definitions. *See* Rec. at 12. The Agency notes that Section 104.426 lists issues the Board considers in determining whether to grant a petition for an adjusted standard. Rec. at 12, citing 415 ILCS 5/27(a), 35 Ill. Adm. Code 104.426. The Agency argues that "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." Rec. at 12.

Westwood's Proposed Adjusted Standard

The Agency notes the language proposed by Westwood but states that "it cannot agree to such." Rec. at 12; citing Pet. at 9; *see supra* at 12 (proposed language).

Consistency with Federal Law

The Agency states that the definitions from which Westwood seeks an adjusted standard "were not promulgated to implement, in whole or in part, the requirements of" the Clean Water Act, the Clean Air Act, or state programs concerning underground injection control or the National Pollutant Discharge Elimination System. Rec. at 9-10, citing 33 U.S.C. § 1251 *et seq.*, 42 U.S.C. § 7401 *et seq.*, 415 ILCS 5/28.1 (2008); *see* 35 Ill. Adm. Code 104.406(b).

Regarding the Resource Conservation and Recovery Act of 1976 (RCRA), the Agency states that it "would suggest that Part 810 of the regulations was proposed in response to the

requirement of Subtitle D - State or Regional Solid Waste Plans.” Rec. at 10, citing 42 U.S.C. § 6901 *et seq.* The Agency further argues that the Board’s regulations at Part 811, Standards for New Solid Waste Landfills, are identical-in-substance to federal regulations promulgated under RCRA. Rec. at 10, citing 35 Ill. Adm. Code 811.101I(1)(B).

The Agency states that “[n]o direct issues regarding compliance with federal law were identified during the review of this matter.” Rec. at 13; *see* 35 Ill. Adm. Code 104.406(i).

Summary

The Agency states that it has thoroughly reviewed Westwood’s petition and that it “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.” Rec. at 13. The Agency recommends that the Board deny Westwood’s petition. *Id.*

WESTWOOD’S RESPONSE TO AGENCY RECOMMENDATION

Westwood argues that the Agency’s recommendation does not identify any risk of environmental harm from Westwood’s process. Resp. at 1. Westwood also notes the Agency’s statement that it does not generally take issue with Westwood’s statements regarding environmental impact. *Id.*, citing Rec. at 12 (¶48). Westwood argues that the Agency “has historically put roadblocks in the way of entities who seek to use material, that might otherwise be discarded, to create a useful product.” Resp. at 1, citing Alternate Fuels, Inc. v. EPA, 830 N.E.2d 444 (2005); Petition of Jo’Lyn Corp. and Falcon Waste and Recycling, Inc. for an Adjusted Standard, AS 04-2 (Apr. 7, 2005). Westwood expresses disappointment with the Agency’s recommendation, claiming that its “arguments are short-sighted, and in some cases incorrect or irrelevant.” Resp. at 1. Westwood requests that the Board “look beyond the rhetoric of IEPA’s recommendation, consider the facts and legal analysis demonstrated by Westwood, and grant Westwood’s petition.” *Id.* at 2.

Before addressing the substance of the response, the Board notes Westwood’s statement that the Agency “is correct that Westwood Lands is incorporated under the laws of the State of Michigan.” Resp. at 1 n.1; *see* Rec. at 2 (¶8). The Board further notes Westwood’s statement that it “will not reiterate the arguments made in it petition and amended petition for adjusted standard. Instead, Westwood responds to the claims raised by IEPA.” Resp. at 3.

Proposed Finding of Inapplicability

Westwood argues that its petition demonstrates that that the raw material used in its process is not a “waste” under Act and Supreme Court and Board precedent. Resp. at 3. Westwood further argues that, because the definition of “waste” does not apply to that raw material, “it cannot be regulated as a ‘waste.’” *Id.* Specifically, Westwood claims that, because the material is not a “waste,” it “does not need to obtain a waste permit from IEPA.” *Id.*, citing Pet. at 2-6. Westwood adds that slag is recognized generally as a useful product and has had numerous applications for many years. *See* Resp. at 7 (citations omitted).

Westwood notes that its application to the Agency for a construction permit included letters showing that the Mayor and the City Attorney of the City of Madison approve Westwood's proposed facility. Resp. at 4; *see* Pet., Exhs. D, E. Westwood states that it obtained these letters at the direction of Agency technical staff. *See* Resp. at 4. Westwood argues that the Agency now maintains the "absurd" and "ridiculous" position that Westwood has had its opportunity to seek approval of its site and is now barred from seeking a finding of inapplicability. Resp. at 4. Westwood claims that it agrees with the Agency "that the letters do not satisfy the requirements of Section 39.2 [of the Act]." *Id.*, citing 415 ILCS 5/39.2 (2008) (Local siting review). Westwood characterizes as "equally absurd" the Agency claim "that Westwood should have filed an appeal of IEPA's notice of incompleteness instead of pursuing this petition." Resp. at 4. Westwood argues that the Agency cites "no statute, regulation, or case decision that an applicant cannot choose its available remedies from the options provided by the Act." *Id.*

Westwood next addresses the Agency's assertion that, "because Part 817 of the Board's rules contains provisions addressing 'steelmaking slag,' that means the slag is 'waste' under Board rules." Resp. at 4-5. Westwood first counters that Part 817 provides requirements for new steel and foundry industry waste landfill. *Id.* at 5; *see* 35 Ill. Adm. Code 817. Westwood suggests that this Part cannot apply to it because it "does not seek to construct operate a steel and foundry industry waste landfill." Resp. at 5. Second, Westwood argues that it is "dispositive" that Part 817 "exempts the use of steelmaking slags as ingredients to make a product." *Id.*, citing Am. Pet. at 16 n.10. Specifically, Westwood cites Section 817.101(f), which provides that "[t]his 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." Resp. at 5, citing 35 Ill. Adm. Code 817.101(f). Westwood argues that this language applies to its process "perfectly" and makes Part 817 inapplicable to it. Resp. at 5.

Westwood next characterizes as "erroneous" the Agency's claim that Westwood has discussed AFI and Jo'Lyn without analyzing the term "discarded." Resp. at 5. Westwood argues that its petition addressed this point. *Id.*, citing Pet. at 3-5. Westwood specifically cited the finding by the AFI court 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." Resp. at 5, citing AFI, 830 N.E.2d at 457. Westwood claims that, like AFI, it use materials "that might otherwise be discarded, but can be returned to the economic mainstream by recycling." Resp. at 5.

Westwood next addresses the Agency's arguments regarding the silicate material resulting from its process. Westwood claims that "[t]he fact that the silicate material is removed from the slag is immaterial to the determination" of whether the slag fines used in its process are a "waste." Resp. at 6. Westwood acknowledges that this material may be placed in a landfill but argues that the Agency fails to explain how the production of the silicate material "makes the slag fines themselves 'waste.'" *Id.* at 5-6. Westwood further argues that "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.”” Westwood claims that it may identify beneficial uses for the silicate, although it now “is concentrating on obtaining approval for the facility to operate.” *Id.* at 6.

Westwood next disputes the Agency’s claim that its process removes contaminants from the slag fines. Resp. at 6. Westwood states that the silicate material is “part of the chemical composition of the fines” and not a “contaminant.” *Id.* at 6. Westwood further states that its process separates the metallic fractions of the fines from the silicate material. *Id.* at 6-7.

Westwood also addresses the Agency’s objection to claiming trade secret protection in two of Westwood’s exhibits attached to its petition. Resp. at 7. Westwood argues that it “properly asserted trade secret protection for portions of Exhibits A and C.” *Id.*, citing 415 ILCS 5/7, 7.1 (2008); 35 Ill. Adm. Code 130. Westwood claims that, instead of seeking a determination from the Board “whether the redacted portions of the exhibits are properly protected as trade secrets,” the Agency simply “claims that it cannot make a full recommendation without the redacted information.” Rec. at 7, 8, citing 35 Ill. Adm. Code 130.208. Westwood argues that it “should not be ‘punished’ for using the trade secret provisions enacted by the legislature and the Board” when the Agency has not sought a full justification for reliance on those provisions. Rec. at 8.

Westwood states that its petition does not “seek a determination that all steelmaking slag fines are not ‘waste.’” Resp. at 8. Westwood further states that it seeks only a determination that the slag fines used in its own process, “which takes a material that might *otherwise* be discarded and returns it to the economic mainstream,” is not a “waste.” *Id.* (emphasis in original). Westwood elaborates that it ask the Board to determine, consistent with the AFI and Jo’Lyn precedents, that the slag fines it seeks to use in its process are not a “waste.” *Id.*

Proposed Adjusted Standard

If the Board concludes that the slag fines use in Westwood’s process are a “waste,” then Westwood seeks an adjusted standard from specified provisions of Sections 807.104 and 810.103 of the Board’s regulations. Resp. at 8. Westwood argues that it has demonstrated that the Board should grant of this relief and characterizes the Agency’s objections as “scattered arguments.” *Id.*

Westwood notes the Agency’s claim that Westwood fails to demonstrate that the slag fines used in its process are not hazardous. Resp. at 9. Westwood stresses that the Agency asserts “only that the test results submitted by Westwood are not conclusive of the issue.” *Id.* Westwood stresses that federal law excludes steel slag from the category of hazardous waste. *Id.* Westwood argues that this is known as the “Bevill exclusion” and provides that “solid waste from the extraction, beneficiation, and processing of ores and minerals” is excluded from consideration as hazardous. *Id.*, citing 42 U.S.C. § 6921(b)(3)(A)(ii), 40 C.F.R. § 261.4(b)(7). Westwood concludes that, under federal law, “slag from steel production is not a hazardous waste.” Resp. at 9.

Westwood next addresses the Agency's objection to redaction of portions of its exhibits as trade secrets. Resp. at 9; *see* Rec. at 7. Westwood argues that it "has legitimate business reasons for protecting the redacted information" and that it "properly triggered the trade secret protections enacted by the legislature and the Board." Resp. at 9. Westwood further argues that the Agency "has failed to seek a full determination of the claimed trade secret" and that it should not be punished for that failure. *Id.*

Westwood also acknowledges the Agency's contention "that any adjusted standard should be subject to testing of loads of fines at some defined frequency." Resp. at 10. Westwood states that it "does not object to a provision that loads be tested for metal content at a defined schedule." *Id.* Westwood suggests that, if the Board imposes a condition of this nature, "testing should occur weekly, and when receiving the first load from a new supplier." *Id.*

Westwood also addresses the Agency's view that Westwood has failed to demonstrate that its process does not constitute sham recycling. Resp. at 10. Westwood first indicates that the Agency has not adequately explained the term "sham recycling." *Id.* Westwood argues that, if the term means merely pretending to make a product, then "it is hard to see why Westwood would pay to obtain its raw materials (the slag fines) and go to the expense of building and operating the facility, without the making the product which results in economic gain for Westwood." *Id.* Westwood laments that the Agency did not avail itself of opportunities to seek more information about this issue. *Id.* Although acknowledging that it bears the burden of demonstrating it should receive an adjusted standard, Westwood argues that "it is unfair for IEPA to expect Westwood to read IEPA's mind." *Id.*

Finally, Westwood responds to the Agency by clarifying why it seeks an adjusted standard from specified definitions. Westwood states that an adjusted standard from five definitions in Section 807.104 "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." *Id.*; *see* 35 Ill. Adm. Code 807.104. Westwood continues that an adjusted standard from three definitions in Section 810.103 "will render the provisions of Part 811 through 817 inapplicable to Westwood's facility." Resp. at 11. Westwood concludes that "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." *Id.*, citing Jo'Lyn, AS 0-42, slip. op. at 13 (Apr. 7, 2005).

PUBLIC COMMENT BY US STEEL (PC1)

As noted above under "Procedural History," the Board on October 20, 2009, received a comment in support of Westwood's petition from US Steel. *See* PC 1. US Steel argues

that the Board should find Illinois' waste handling/permitting regulations inapplicable to Westwood's processing of steel slag fines because such fines are a useful product rather than a waste. In the alternative, if the Board finds that steel slag fines are a waste, then U.S. Steel believes an adjusted standard is appropriate

given the *de minimus* environmental impact which results from processing such fines. *Id.* at 1, 3.

US Steel also cite “the positive impact that Westwood’s operation will have on the City of Madison, which supports Westwood’s proposal.” *Id.* at 3. The Board in the following subsections of the opinion summarizes US Steel’s arguments on these issues.

Request for Finding of Inapplicability

US Steel characterizes steel slag fines as “a fraction of the steel slag produced during the steelmaking process,” which consists of “calcium silicates and ferrites combined with fused oxides of iron, aluminum, manganese, calcium and magnesium.” PC 1 at 1. Noting that slag has metallic content, US Steel argues that the steelmaking industry seeks to remove as much of that metal as possible for recycling in its own operations. *Id.* US Steel indicates that “fines are the end result of slag being crushed and screened to the point where mills can no longer remove the metal from the slag.” *Id.* US Steel states that these fines have for many years been sold for applications “including, but not limited to, asphalt aggregate, fill, cement manufacturing raw feed, and road construction.” *Id.*

US Steel states that, although it lacks the capacity to use slag fines in its own operation, the metallic content of the fines causes them to have value. PC 1 at 2. US Steel further states that it “depend[s] on operations such as Westwood to extract the metallic portion of the fines to form easily manageable briquettes and nuggets which can be returned to our furnaces to make steel.” *Id.* US Steel characterizes the fines as “just one of the raw materials in the steel making process.” *Id.*

US Steel argues that, “in order for material to be deemed a product instead of a waste, it must be returned to the economic mainstream.” PC 1 at 2, citing AFI, 830 N.E 2d at 444. US Steel further argues that, because Westwood’s process returns fines to use in the steelmaking process, “the fines are not a waste.” PC 1 at 2. US Steel also stresses that the silicate materials remaining from Westwood’s process also have uses “including cement manufacturing, concrete admixtures, landfill covering, abandoned mine reclamation, and fertilizer.” *Id.*

Petition for Adjusted Standard

US Steel states that, if the Board does not conclude that the slag fines are not a waste, then “the environmentally benign nature of such fines qualifies Westwood’s operations for an adjusted standard.” PC 1 at 2. US Steel argues that the Board’s solid waste regulations address facilities posing risks of environmental harm. *Id.*, citing 35 Ill. Adm. Code 807, 810. US Steel further argues that “federal regulations expressly exclude slag from the definition of a hazardous waste via the Bevill amendment.” PC 1 at 2, citing 40 C.F.R. 261.4(b)(7). US Steel claims that “the fines that Westwood will receive from U. S. Steel have been tested to ensure that they do not contain other hazardous constituents.” PC 1 at 2. US Steel further claims that “Westwood’s process does not create a waste stream on the back end, meaning that there will be no emissions,

discharges or releases to the land directly.” *Id.* US Steel concludes that granting the adjusted standard sought by Westwood “will not negatively impact the environment in any way.” *Id.*

BOARD ANALYSIS

Standard of Review

The regulations of general applicability at issue here do not specify a level of justification required to qualify for an adjusted standard. *See* 415 ILCS 5/28.1(c) (2008); 35 Ill. Adm. Code 104.406(c); *see also* Pet. at 7, Rec. at 10 (¶36). Accordingly, under Section 28.1(c) of the Act, a petitioner must demonstrate that:

- 1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
- 2) the existence of those factors justifies an adjusted standard;
- 3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
- 4) the adjusted standard is consistent with any applicable federal law. 415 ILCS 5/28.1(c) (2008); *see* 35 Ill. Adm. Code 104.426(a); *see also* Pet. at 11-12, Rec. at 12.

Further, Section 28.1(a) of the Act provides that the Board may grant an adjusted standard “for persons who can justify such an adjustment consistent with subsection (a) of Section 27 of this Act.” 415 ILCS 5/28.1(a) (2008). Section 27(a) requires the Board to “take into account,” among other things, “the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.” 415 ILCS 5/27(a) (2008).

Discussion

Westwood seeks relief from the requirements related to waste under the Board’s nonhazardous waste regulations in Parts 807 and 810 or, in the alternative, a finding of inapplicability. However, as discussed below, Westwood has not demonstrated conclusively that the steelmaking slag fines are not a hazardous waste. Nor has Westwood made adequate provisions for analysis of incoming steelmaking slag fines for characteristics of hazardous waste or that an exclusion applies as part of its quality control parameters.

Whether or not the steelmaking slag fines are a hazardous waste is a threshold issue that determines whether the petition is appropriately filed under the Board’s nonhazardous waste provisions in Subchapter i or the hazardous waste provisions in Subchapter c. If the steelmaking slag fines are a listed or characteristic hazardous waste, the Board cannot make a finding that the

steelmaking slag fines are not waste under the nonhazardous waste provisions of Parts 807 and 810 as requested by Westwood. If Westwood is recycling the steelmaking slag fines by reclamation and wishes to proceed under the hazardous waste provisions of Subchapter c, Westwood might be eligible for a non-solid waste determination, pursuant to 35 Ill. Adm. Code 720.131.

Because of the deficiencies discussed below in Westwood's petition, amended petition, and response, the Board cannot proceed to further evaluate making a determination that the steelmaking slag fines are not a waste or that an adjusted standard from the definitions in 807 and 810 is warranted.

Hazardous Waste as a Threshold Issue

In support of its petition, Westwood cites prior cases in which petitioners have sought a finding of inapplicability with regard to waste requirements in Parts 807 and 810: Petition of Jo'Lyn Corporation and Falcon Waste and Recycling, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 807.103 and 810.103, or in the Alternative, a Finding of Inapplicability, AS 04-2, (April 7, 2005), and Petition of Wood Energy Partners, L.P. for an Adjusted Standard from 35 Ill. Adm. Code 807 or, in the Alternative, a Finding of Inapplicability, AS 94-1 (Dec. 1, 1994). Westwood also cites AFI, in which the Illinois Supreme Court determined that the alternate fuel was not a waste. AFI, 830 N.E.2d at 444.

Although both Jo'Lyn and AFI represent prior cases in which materials were determined not to be a waste, in Wood Energy Partners, the Board found the produced wood fuel was and continued to be a solid waste. However, in Illinois Power, the Board concluded that the alternate fuel was not a waste. Illinois Power Company, an Illinois Corporation (Unit 2 - Baldwin Power Station) v. IEPA, PCB 97-35 (Jan. 23, 1997) and Illinois Power Company, an Illinois Corporation (Unit 1 - Baldwin Power Station) v. IEPA, PCB 97-36 (Jan. 23, 1997).

In the three cases of Jo'Lyn, Illinois Power, and AFI in which materials were determined not to be a waste, the petitioners satisfactorily demonstrated that the materials at issue were not hazardous waste. *See* Jo'Lyn, slip op. at 10 (April 7, 2005); Illinois Power, slip op. at 15 (Jan. 23, 1997); Alternate Fuels, Inc., v. IEPA, 337 Ill. App. 3d 857, 860, 786 N.E. 2d 1063 (5th Dist. 2003).

Where petitioners have chosen to proceed under the hazardous waste provisions of Subchapter c, the Board has issued non-solid waste determinations pursuant to 720.131. Petition of Recycle Technologies, Inc., AS 97-9, (Sept. 3, 1998); Petition of Progressive Environmental Services, Inc. d/b/a Antifreeze Recycling for an Adjusted Standard Under 35 Ill. Adm. Code 720.131(c), AS 01-7, (Jan. 10, 2002); Petition of World Recycling, Inc. d/b/a Planet Earth Antifreeze for an Adjusted Standard from 35 Ill. Adm. Code 720.131(c), AS 02-2, (May 2, 2002).

Hazardous Waste Exclusions

In Westwood's Response to the Agency's Recommendation, Westwood states for the first time, "that steel slag is excluded, by federal law, as a hazardous waste." Resp. at 9. Westwood cites to the exclusion contained in 40 CFR 261.4(b)(7) and states, "The exclusion includes slag from steel production." *Id.*, citing 42 U.S.C. 6921(b)(3)(A)(ii), 40 C.F.R. 261.4(b)(7)(ii). U.S. Steel Corporation also notes the federal exclusion in its comment in support of the petition. PC 1 at 2.

The Board's identical-in-substance provision appears at 35 Ill. Adm. Code 721.104, Exclusions.

- b) Solid wastes that are not hazardous wastes. The following solid wastes are not hazardous wastes:

- 7) Solid waste from the extraction, beneficiation, and processing of ores and minerals (including coal, phosphate rock, and overburden from the mining of uranium ore), except as provided by 35 Ill. Adm. Code 726.212 for facilities that burn or process hazardous waste.
- A) For purposes of this subsection (b)(7), beneficiation of ores and minerals is restricted to the following activities: crushing; grinding; washing; dissolution; crystallization; filtration; sorting; sizing; drying; sintering; pelletizing; briquetting; calcining to remove water or carbon dioxide; roasting; autoclaving or chlorination in preparation for leaching (except where the roasting (or autoclaving or chlorination) and leaching sequence produces a final or intermediate product that does not undergo further beneficiation or processing); gravity concentration; magnetic separation; electrostatic separation; floatation; ion exchange; solvent extraction; electrowinning; precipitation; amalgamation; and heap, dump, vat tank, and in situ leaching.
- B) For the purposes of this subsection (b)(7), solid waste from the processing of ores and minerals includes only the following wastes as generated:
- i) Slag from primary copper processing;
 - ii) Slag from primary lead processing;
 - iii) Red and brown muds from bauxite refining;
 - iv) Phosphogypsum from phosphoric acid production;
 - v) Slag from elemental phosphorus production;
 - vi) Gasifier ash from coal gasification;
 - vii) Process wastewater from coal gasification;

- viii) Calcium sulfate wastewater treatment plant sludge from primary copper processing;
 - ix) Slag tailings from primary copper processing;
 - x) Fluorogypsum from hydrofluoric acid production;
 - xi) Process wastewater from hydrofluoric acid production;
 - xii) Air pollution control dust or sludge from iron blast furnaces;
 - xiii) Iron blast furnace slag;
 - xiv) Treated residue from roasting and leaching of chrome ore;
 - xv) Process wastewater from primary magnesium processing by the anhydrous process;
 - xvi) Process wastewater from phosphoric acid production;
 - xvii) Basic oxygen furnace and open hearth furnace air pollution control dust or sludge from carbon steel production;
 - xviii) Basic oxygen furnace and open hearth furnace slag from carbon steel production;
 - xix) Chloride processing waste solids from titanium tetrachloride production; and
 - xx) Slag from primary zinc production.
- C) A residue derived from co-processing mineral processing secondary materials with normal beneficiation raw materials or with normal mineral processing raw materials remains excluded under this subsection (b) if the following conditions are fulfilled:
- i) The owner or operator processes at least 50 percent by weight normal beneficiation raw materials or normal mineral processing raw materials; and
 - ii) The owner or operator legitimately reclaims the secondary mineral processing materials. 35 Ill. Adm. Code 721.104(b)(7).

Under 35 Ill. Adm. Code 721.104(b)(7), the exclusion applies only to solid wastes listed in Section 721.104(b)(7)(B)(i) – (xx). Although Westwood states the exclusion includes slag from steel production, the term “slag from steel production” does not specifically appear to fall under any of the specific wastes types listed in 721.104(b)(7)(B). Of the various categories of slag fines indicated in the U.S. Steel, none appear to fall under the specific wastes types listed in 721.104(b)(7)(B):

- “Desulfurization Slag Fines”,
- “Steel Slag Fines”,
- “Ladle Metallurgy Facility (LMF) Slag”,
- “Steelmaking Slag Fines from Area 1 and the West End of Pile #3”,
- “all current generation and segregated Desulfurization Slag fines”,
- “all current generation and segregated metallic Steel Slag Fines” , and
- “Steelmaking Slag fines [produced prior to U.S. Steel’s ownership that] may contain blast furnace slag, open hearth slag, and/or other byproducts of the steelmaking process”. Exh. A at 1-2, 3-4.

The exclusion under 721.104(b)(7)(B)(xviii) is for slag from carbon steel production in basic oxygen and open hearth furnaces. Although Westwood indicates the steelmaking slag fines would be used for making steel in electric arc furnaces, Westwood does not indicate what type of furnace is or was used to produce the steelmaking slag fines. Am. Pet. at 2. If Westwood is unable to identify which specific waste types listed in 721.104(b)(7)(B) apply to each type of slag, in particular to the legacy slag produced prior to U.S. Steel’s ownership, testing under 35 Ill. Adm. Code 721.124(a) would be required to exclude the slag fines from the hazardous waste provisions. (See discussion on Hazardous Waste Characteristics below.) Without further information clarifying how an exclusion would apply to the slag from steel production that Westwood wishes to utilize, the Board finds the information presented by the Petitioner is inconclusive to demonstrate the steelmaking slag fines are not hazardous waste.

Characteristic Hazardous Waste

After finding that the information provided by Westwood does not demonstrate that the hazardous waste exclusions apply to steelmaking slag fines, the Board will now examine whether slag fines are not characteristically hazardous. In its amended petition, Westwood states, “[t]he steelmaking slag fines used by Westwood are not hazardous. They are not listed as a hazardous waste, and do not exhibit a characteristic of hazardous waste. . . . The steelmaking slag fines are not classified as hazardous under any of the provisions of Part 721.” Am. Pet. at 3. U.S. Steel also states the fines have been tested to ensure they do not contain hazardous constituents. PC 1 at 2. With regard to the calcium magnesium silicate, Westwood states, “[t]he calcium magnesium silicate is not a listed or hazardous waste; test results are attached as Exhibit H.” Am. Pet. at 8; *see id.*, Exh. H. (chemical analysis of Michigan Technological University).

Exhibit G to Westwood’s amended petition includes the laboratory results for two samples collected January 11, 2007 and November 12, 2007. Exhibit G presents results for the following analytes: Total Dissolved Solids, Arsenic, Barium, Cadmium, Chromium, Copper, Iron, Manganese, Selenium, Zinc, Lead, Sulfate, Nitrate, Fluoride, Chloride, and several volatile organic compounds. Exhibit G lists the test methods as:

- ASTM D3987, EPA 600 160.1
- ASTM D3987, SW-846 3005A, 6010B
- ASTM D3987, SW-846 3020A
- ASTM D3987, SW-846 9038

- ASTM D3987, SW-846 9210
- ASTM D3987, SW-846 9214
- ASTM D3987, SW-846 9251
- SW-846 1312, 5030, 8260B. Am. Pet. Exh. G.

Exhibit H includes laboratory results dated January 7, 2007, and presents results for the following analytes: Total Iron, Metallic Iron, Fe₂O₃, FeO, P₂O₅, CaO, SiO₂, Al₂O₃, MgO, MnO, K₂O, Na₂O, Carbon, Sulfur, TiO₂, and Zn. Exhibit H indicates the method as “Iron (LGI)”.

In response to Westwood’s claim that the steelmaking slag fines are not hazardous waste, the Agency states that the test results provided by Westwood in Exhibit G indicate the sample was not prepared using the TCLP test method in SW 846. The Agency believes the results are inconclusive for demonstrating the steelmaking slag fines are not hazardous waste. Rec. at 11.

Under 35 Ill. Adm. Code 721.124(a), to demonstrate if a solid waste exhibits the characteristic of toxicity, the material must be analyzed using Method 1311 (Toxicity Characteristic Leaching Procedure (TCLP)) in “Test Methods for Evaluating Solid Waste, Physical / Chemical Methods,” USEPA publication number EPA-530/SW-846. The analyses in Exhibits G and H were not conducted using Method 1311, nor do they cover the entire suite of contaminants listed in 35 Ill. Adm. Code 721.124(b). The Board finds that the laboratory analyses in Exhibits G and H of the amended petition are not sufficient to demonstrate the slag fines and calcium magnesium silicate do not exhibit characteristics of hazardous waste.

Special Waste

Steelmaking Slag Fines Generally. In response to an issue raised by the Board regarding whether the steelmaking slag fines constitute an Illinois Special Waste, Westwood indicated that they do not. Am. Pet. at 5. Pursuant to Section 22.48 of the Act (415 ILCS 5/22.48 (2008)), Westwood indicated that it would only utilize slag fines which have a certification from the supplier that the fines are not special waste. Am. Pet. at 5.

Section 22.48 provides for a non-special waste certification where a “generator certifies in a signed, dated, written statement that the waste is outside the scope of the categories listing in subdivision (1) of subsection (c) of Section 3.475 of this Act.” 415 ILCS 5/22.48 (2008). Section 22.48(b)(1) of the Act requires that certification include “the means by which the generator has determined that the waste is not a hazardous waste.” 415 ILCS 5/22.48(b)(1) (2008).

Specifically, Section 22.48(b) provides that:

* * *

- (b) All information used to determine that the waste is not a special waste shall be attached to the certification. The information shall include but not be limited to:

- (1) the means by which the generator has determined that the waste is not a hazardous waste;
- (2) the means by which the generator has determined that the waste is not a liquid;
- (3) if the waste undergoes testing, the analytic results obtained from testing, signed and dated by the person responsible for completing the analysis;
- (4) if the waste does not undergo testing, an explanation as to why no testing is needed;
- (5) a description of the process generating the waste; and
- (6) relevant Material [Safety Data] Sheets. 415 ILCS 22.48(b) (2008).

Westwood states that it “has received test results from the generator of the steelmaking slag fines (U.S. Steel) that demonstrate the fines are not hazardous.” Am. Pet. at 6. However, as discussed above, the information in Exhibit G from U.S. Steel is not sufficient to demonstrate the slag fines do not exhibit characteristics of hazardous waste because the material was not analyzed per 35 Ill. Adm. Code 721.124 and because the analysis did not cover the entire suite of contaminants listed in 35 Ill. Adm. Code 721.124(b). Additionally, Westwood has not clearly identified how an exclusion would apply.

Westwood’s petition also does not provide evidence that the steelmaking slag fines from U.S. Steel or from any future potential suppliers have a non-special waste certification. Neither does Westwood provide sufficient supporting documentation required by Section 22.48(b) to illustrate that the steelmaking slag fines are not a special waste.

Calcium Magnesium Silicate – Non-metallic fraction. Westwood states that “[t]he calcium magnesium silicate is not an Illinois special waste.” Am. Pet. at 9. Westwood further states that it plans to self-certify that the calcium magnesium silicate is not a special waste, pursuant to Section 22.48 of the Act. *Id.*, citing 415 ILCS 5/22.48 (2008). Westwood explains that the calcium magnesium silicate does not fall into any of the categories which would prohibit the generator from self-certifying the waste as non-special waste. Am. Pet. at 9. Although the waste may be eligible for generator certification, Westwood has still not provided information consistent with the all information required in Section 22.48(b) to support its petition here.

Without further information pursuant to section 22.48(b) of the Act to demonstrate the steelmaking slag fines or calcium magnesium silicate are not Illinois special waste, the Board finds the information presented by the Petitioner is inconclusive to demonstrate the steelmaking slag fines are not Illinois Special Waste.

Quality Control

Westwood states that the contract with U.S. Steel in Exh. A “allows Westwood to reject any fines which do not comply with the parameters necessary for Westwood’s process.” Pet. at 7. Of these parameters, Westwood indicates the most important parameter is metallic content.

Depending on market conditions affecting the price of metals, Westwood generally seeks at least 50% metallic content in order to produce a saleable product. Am. Pet. at 5-6. Westwood explains that metallic content of the raw material varies as do the prices for metals, so setting a specific value is not possible. Am. Pet. at 5-6.

In addition to ensuring the slag fines contain sufficient metallic content, Westwood states that it will also visually examine each load for trash or other items that are not steelmaking slag fines. Depending on the situation, Westwood intends to remove those items or reject the load. Am. Pet. at 6-7. Westwood states that it would reject loads that contain large amounts of material that are not steelmaking slag fines; loads that “appear materially different than steelmaking slag fines ordinarily used in the process;” and loads that Westwood believes are hazardous, contain asbestos, PCBs or a listed hazardous waste. Am. Pet. at 13.

In its amended petition, Westwood was opposed to including language in the conditions of an adjusted standard specifying the parameters of acceptable slag fines based on metallic content because it would limit Westwood’s ability to respond to fluctuating market conditions. However, Westwood was amenable to language that would require steelmaking slag fines accepted at Westwood facility not be hazardous or contain asbestos, PCBs, or a listed hazardous waste. Am. Pet. at 12-13, 14.

Later, in Westwood’s response to the Agency’s Recommendation, Westwood states that it “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.” Resp. at 10.

The “Steelmaking Slag Fines Sales Agreement” provided as Exh. A states that “Westwood shall be provided the opportunity to inspect all Steelmaking Slag Fines prior to purchase and may reject any materials that may have chemical analysis that does not fit the parameters needed to make a quality product from Westwood's slag processing plant.” Exh. at 4. Westwood states that testing of each load would be unworkable and not economically viable. Am. Pet. at 13. Instead, Westwood indicates that suppliers or Westwood would arrange for testing a representative sample so that Westwood may ensure the slag fines are “consistent, non-hazardous, and contains the metallic content needed for Westwood’s process.” Am. Pet. at 13-14.

As the Agency points out, in the U.S. Steel agreement, “[p]etitioner has granted itself an ‘opportunity’ to inspect without specificity. This Section [4.2 of the U.S. Steel agreement] 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.” Rec. at 10.

Although Westwood indicates it is amenable to language that would require steelmaking slag fines accepted at Westwood facility not be hazardous or contain asbestos, PCBs, or a listed hazardous waste and that loads be tested for metallic content on a weekly schedule; Westwood has not provided specificity on the majority of these parameters. Am. Pet. at 12-13, 14, Resp. at 10.

On a load-by-load basis, Westwood states that it will visually examine each load for trash or other items that are not steelmaking slag fine, which presumably includes asbestos, PCBs, and listed hazardous waste. On a weekly basis, Westwood is willing to test for metallic content to ensure sufficient metallic content to produce a saleable product based on market conditions. However, Westwood does not clearly describe the analysis to be used to determine the metallic content. Nor does Westwood clearly address how representative samples of different types of slag from the same and various suppliers will be analyzed for hazardous waste characteristics or to demonstrate that an exclusion applies. As discussed below, Westwood has not provided sufficient information to indicate the samples provided in Exhibit G to characterize the steelmaking slag fines are representative of all types of slag fines that Westwood intends to process, in this case of Exhibit G from U.S. Steel. Westwood has also not provided a sampling protocol to ensure samples from other suppliers of various types of steelmaking slag fines will be representative for quality control.

Despite Westwood's intentions for weekly testing for metallic content, initial testing for new suppliers, and load-by-load visual inspections; Westwood does not indicate at what intervals Westwood would take the appropriate steps to ensure slag fines accepted at the Westwood facility are not characteristic hazardous waste or that an exclusion applies. In the absence of Westwood's clearly established procedures and parameters, the Board is not provided with assurance that Westwood has a quality control procedure in place to ensure the slag fines received are not hazardous waste and are viable to produce a saleable product.

Representative Sampling

Westwood indicates that suppliers or Westwood would arrange for testing a representative sample so that Westwood "can ensure that its raw material is consistent, non-hazardous, and contains the metallic content needed for Westwood's process." Am. Pet. at 13-14. Westwood further states that, "Westwood will obtain test results for a representative sample of any supplier's fines . . . to ensure that the fines are not hazardous. . . ." Am. Pet. at 12. Westwood likens its process of taking representative samples to the process used at landfills in Illinois, in which not every load of waste coming into the facility is tested. Am. Pet. at 14. Westwood states that testing of each load would be unworkable and not economically viable. Am. Pet. at 13.

Westwood elaborated that purchases from U.S. Steel will include all types of steelmaking slag fines listed in the U.S. Steel contract. Am. Pet. at 16. Westwood clarified that the phrase "steelmaking slag fines" is an inclusive term, referring to all types of steelmaking slag fines as defined in the U.S. Steel contract. Am. Pet. at 16. As stated above, the agreement in Exh. A includes:

- "Desulfurization Slag Fines",
- "Steel Slag Fines",
- "Ladle Metallurgy Facility (LMF) Slag",
- "Steelmaking Slag Fines from Area 1 and the West End of Pile #3",

- “all current generation and segregated Desulfurization Slag fines”,
- “all current generation and segregated metallic Steel Slag Fines” , and
- “Steelmaking Slag fines [produced prior to U.S. Steel’s ownership that] may contain blast furnace slag, open hearth slag, and/or other byproducts of the steelmaking process”. Exh. A at 1-2, 3-4.

In addition, the “Steelmaking Slag Fines Sales Agreement” states that, “[i]n the event of a significant change in operating conditions at Granite City Works, Westwood and U.S. Steel shall meet to discuss any resulting changes to the quality of material. . . .” Exh. A at 4.

As a representative sampling, Westwood provided Exhibit G, which includes the laboratory results for two samples collected January 11, 2007 and November 12, 2007. To ensure that the steelmaking slag fines from other supplier sources are acceptable, Westwood elaborated that it would “require the same testing to demonstrate the fines are not hazardous as it obtained from U.S. Steel.” Am. Pet. at 12. Westwood indicates this would include assurances that the slag fines have at least 50% metallic content and that the slag fines are not hazardous.

As discussed above, not only are the test methods used in Exhibit G insufficient to demonstrate the steelmaking slag fines are not hazardous waste, the two samples presented for analysis appear to be insufficient for demonstrating a representative sampling of all the types of steelmaking slag fines Westwood intends to process, in the case of Exhibit G from U.S. Steel. In addition, Westwood has not provided a sampling protocol to ensure initial representative samples are taken of each type of steel slag from each supplier, interim representative samples are taken to ensure consistency, and new samples are taken of slag that results from significant changes in operating conditions.

Rejected Loads

Westwood states that, “[i]f Westwood finds, after slag fines arrive at its facility, that the slag fines exhibit a characteristic of hazardous waste or contain asbestos, PCBs, or a listed hazardous waste, Westwood will reject the load and return the fines to the supplier.” Am. Pet. at 14; *see also* Pet., Exh. A at 4. The “Steelmaking Slag Fines Sales Agreement” provided as Exh. A states that “Westwood shall be provided the opportunity to inspect all Steelmaking Slag Fines *prior to purchase* and may reject any materials that may have chemical analysis that does not fit the parameters needed to make a quality product from Westwood's slag processing plant.” Pet., Exh. A at 4 (emphasis added). The agreement goes on to state that “U.S. Steel will be free to market without limitations any material rejected by Westwood or any material with a chemical composition similar to the rejected material.” Pet., Exh. A at 4.

The agreement appears to be clear that rejected loads remain the property of U.S. Steel if they are rejected by Westwood before Westwood makes the purchase. However, the contract and the petition are not specific on the disposition of a load if it is purchased by Westwood and later rejected. Westwood states that it is to Westwood’s benefit to ensure only steelmaking slag fines suitable for its process are used in order to economically produce a saleable product. Am. Pet. at

13. However, Westwood is not definitive about the disposition of rejected loads after purchase, whether the rejected loads would be returned to the supplier, disposed of in a landfill, or treated otherwise.

Availability of Relief Under Section 720.131(b) or (c)

Based on the record before the Board, the Board is not in a position to determine if the steelmaking slag fines exhibit any characteristics of hazardous waste. *See* Petition of Recycle Technologies, Inc. (Recycle Technologies), AS 97-9, slip op. at 7 (Sept. 3, 1998).

If the steelmaking slag fines are a listed or characteristic hazardous waste, the Board cannot make a finding that the steelmaking slag fines are not waste under the non-hazardous waste provisions of Parts 807 and 810 as requested by Westwood. Parts 807 and 810 fall under the nonhazardous waste provisions in Subchapter i: Solid Waste and Special Waste Hauling. However, if Westwood is recycling the steelmaking slag fines by reclamation and wishes to proceed under the hazardous waste provisions of Subchapter c, Westwood might be eligible for a non-solid waste determination, pursuant to 35 Ill. Adm. Code 720.131. Part 720 falls under the hazardous waste provisions of Subchapter c. Sections 720.131 (b) and (c) allow the Board to determine that materials that are reclaimed are not solid wastes based on certain criteria.

The Board's regulations define a material as "reclaimed" if it is "processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents." 35 Ill. Adm. Code 721.101(c)(4).

According to USEPA, materials are reclaimed if "material values...are recovered as an end-product of a process" or if they are "processed to remove contaminants in a way that restores them to their usable original condition." Recycle Technologies, AS 97-9, slip op. at 8, quoting 50 Fed. Reg. 614,633 (Jan. 4, 1985).

If Westwood is recycling the steelmaking slag fines by reclamation and wishes to proceed under the hazardous waste provisions of Subchapter c, Westwood might be eligible for a non-solid waste determination, pursuant to 35 Ill. Adm. Code 720.131(b) or (c). Without a non-solid waste determination, a waste that is in the process of being reclaimed is a waste until the reclamation is complete. *See* Recycle Technologies, AS 97-9, slip op. at 8. The term "waste" as it is used in this reference applies to materials that are also "hazardous waste" for purposes of Subtitle C of RCRA.

Additional Agency Concerns

The Agency expressed several concerns beyond the deficiencies discussed above in recommending denial of Westwood's petition. Westwood provided a response to the Agency's Recommendation. Here, the Board preliminarily addresses some of the Agency's concerns.

Relief in the Form of an Adjusted Standard. In the Recommendation, the Agency states that, "[r]elief, in the form of an Adjusted Standard, should not be granted. . . . 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.” Rec. at 3. Instead, the Agency suggests relief would be more reasonably sought through a site specific rule, referring to Petition of Ameren Energy Generating Company for Adjusted Standards from 35 Ill. Adm. Code Parts 811, 814, 815 (AS 09-1). Rec. at 3; *see also* Ameren Ashpond Closure Rules (Hutsonville Power Station) Proposed: 35 Ill. Adm. Code 840.101 through 840.144 (R 09-21) (Ameren). The Board notes that, aside from the current rulemaking in Ameren, in prior Board decisions, where the Board has determined a material is not a waste under the nonhazardous waste provisions of Subchapter i, the need for an adjusted standard was rendered moot. Jo’Lyn (April 7, 2005) at 14. Under the provisions of Subchapter c, Section 720.133, the Board has used the adjusted standard procedures for making a Solid Waste Determinations. Section 720.133 provides that “[t]he Board will use the procedures of Subpart D of 35 Ill. Adm. Code 104 for determining whether a material is a solid waste or for determining whether a particular enclosed flame combustion device is a boiler.” 35 Ill. Adm. Code 720.133; *see* Petition of World Recycling, Inc. d/b/a Planet Earth Antifreeze for an Adjusted Standard from 35 Ill. Adm. Code 720.131(c), AS 02-2, (May 2, 2002); Petition of Progressive Environmental Services, Inc. d/b/a Antifreeze Recycling for an Adjusted Standard Under 35 Ill. Adm. Code 720.131(c), AS 01-7, (Jan. 10, 2002).

Agency’s Permit Denial Letter. Referring to the Agency’s denial letter dated August 25, 2008, and responding to Westwood’s construction permit application (Exh. B), the Agency cautioned against under-characterizing the denial points within the letter. The Agency emphasized that the letter identifies other substantive issues with permitting and operating the facility beyond the issues presented by Westwood in the instant petition. The Board recognizes that Westwood will need to address the other issues identified by the Agency in its denial letter in the context of its construction permit application and that the relief sought here relates narrowly to the issue of whether steelmaking slag fines should be considered a waste under the provisions of Subchapter c or Subchapter i.

Within the context of the construction permit application, the Agency focuses on documents that the Agency states Westwood provided “to establish that approval for the site had been granted.” Rec. at 4-5, referring to Pet., Exh. D, E. The Agency argues that Westwood “has had its bite of the siting issue apple” and suggests that the Board should not grant relief to provide a “second bite at the issue.” Rec. at 5. In response, Westwood states Exh. D and E were included only to demonstrate support from the local government. Westwood clarified that the letters in Exh. D and E were not meant to satisfy the requirements of Section 39.2 of the Act. Although Westwood used the term “local siting approval” in its permit application, Westwood was not represented by counsel at the time, and the term “local siting approval” was not used consistent with the statutory requirements of Section 39.2 of the Act. Resp. at 4. The Board recognizes that Westwood did not intend the letters in Exhibits D and E to satisfy the requirements of Section 39.2 of the Act (415 ILCS 5/39.2 (2008)).

AFI. In its review of the case law, the Agency notes that the court in AFI reasoned 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.’” The court then proceeded to subdivide “materials” into 2 groups: “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.” Rec. at 6, *citing AFI*, 830 N.E.2d at 444, 456. Since the calcium magnesium silicate comprises approximately two thirds of the steelmaking slag fines by weight, and usable product is derived from one-third of the raw material, the Agency argues that “the slag is a ‘waste’ under the two categories test.” Rec. at 6.

Westwood responded that it uses “materials”, as categorized by the court in *AFI*, that are returned to the economic mainstream in the form of products by recycling. Resp. at 5. Westwood questioned the Agency’s reasoning that producing a waste from a material makes the material itself a “waste.” Resp. at 5-6. Consistent with the decision in *AFI*, Westwood reiterated that the slag fines would be processed and returned to the economic mainstream in the form of useful products: nuggets and briquettes. Resp. at 5-6.

The Agency continues that, in *Jo’Lyn*, the Board specifically found “that the petitioners, again like in *AFI*, are not removing any contaminant from the waste. In fact no contaminants are removed from the GBSM at all. Therefore, the GBSM is a ‘material.’” Rec. at 7, *citing Jo’Lyn* at 13. The Agency characterizes the two thirds of the slag removed during Westwood’s process as contaminants. Rec. at 7. Westwood responded, contending that the processing of steelmaking slag fines does not constitute removing contaminants from a waste because the calcium magnesium silicate is not a “contaminant”. Westwood characterizes the silicate as part of the chemical composition of the fines. Resp. at 6-7. The Board notes that, although Westwood characterized the calcium magnesium silicate as part of the chemical composition of the fines and not a contaminant, Westwood has not supplied supporting evidence to distinguish the origin of the calcium magnesium silicate, for example, as a naturally occurring part of the iron ore, an ingredient purposefully introduced in the steelmaking process, a compound formed during the steelmaking process, or as a contaminant introduced through processing.

Applicability of Part 817. The Agency raised the applicability of Part 817, which establishes regulations for new steel and foundry industry waste landfills and provides for Agency purview of certain uses or dispositions of steelmaking slags. Rec. at 6. Westwood responded that Part 817 is not applicable to Westwood’s production process, citing Section 817.101(f): “[t]his 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.” Resp. at 5; *see* 35 Ill. Adm. Code 817.101(f).

The Agency believes that, since the terms “slag” and “steel slag” are defined in Section 810.103, the Board intended for such material to exist within the regulatory framework of the Board’s regulations. Rec. at 7. The Scope and Applicability section of Part 810 states, “[t]his Part applies to all solid waste disposal facilities regulated pursuant to 35 Ill. Adm. Code 811 through 817.” 35 Ill. Adm. Code 810.101. The Board notes that the terms “slag” and “steel slag” only appear in Part 817 and are not otherwise specifically mentioned in Parts 811 through 816. And, as Westwood states, Part 817 does not appear to be applicable to Westwood’s use of steelmaking slags as ingredients in an industrial process to make a product. The regulatory

framework specific to these terms lies only within Part 817, which appears to be inapplicable based on Westwood's description of its process.

Existence of a Market. In its recommendation, the Agency takes issue with Westwood's agreement with U.S. Steel in Exhibit A, and finds that the provisions of the agreement provide U.S. Steel with a "discretionary option to purchase and not a classic binding contract to purchase. . . ." Rec. at 7. The Agency believes that providing a legally binding commercial transaction should be incumbent upon a petitioner seeking relief from the regulations for a newly created product. Rec. at 8. The Agency also points to Westwood's claim that "the product will [also] be sold on the open market to steel manufacturers..." Rec. at 8, citing Am. Pet. at 8. The Agency states that Westwood has not provided proof that an open market for its product even exists. Rec. at 8. As to the existence of an open market, Westwood had discussions with other possible purchasers, but since the time for the Madison facility to be permitted is still uncertain, Westwood indicated that entering into formal contracts is impossible at this time. Am. Pet. at 7.

The Board notes that, in Jo'Lyn, the petitioner provided contracts with potential customers, letters of interest, as well as proof that an open market existed in other states. *See Jo'Lyn, slip op.* at 4, 9 (Apr. 7, 2005). Further, the contracts in Jo'Lyn did not appear to be necessarily "binding" in that a customer could presumably cancel an order before the product was actually installed. In this case, the Board agrees with the Agency that Westwood has not yet established that an "open market to steel manufacturers" exists for its products, only that a private, non-binding agreement exists between Westwood and U.S. Steel.

Economic Incentives and "Sham Recycling". The Agency contends that Westwood, by redacting information as trade secret, has failed to support the economics of its operation to demonstrate the proposed activity is not "sham recycling." Rec. at 16. Westwood observed that "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." Resp. at 10. Westwood reminded the Agency of its right to request the Board to make a determination under 35 Ill. Adm. Code 130, Subpart B as to whether the redacted information was properly protected as trade secret. Resp. at 8.

Indicators of "sham recycling" are discussed in the January 4, 1985 preamble to the U.S. EPA final rule that promulgated the original definition of solid waste in RCRA Subtitle C, in which U.S. EPA established its concept of legitimate recycling. 73 Fed. Reg. 646701 (Oct. 30, 2008), citing 50 Fed. Reg. 638 (Jan. 4, 1985). The 2008 Federal Register discussion stated that, "due to economic incentives for managing hazardous secondary materials outside the RCRA regulatory system, there is a potential for some handlers to claim that they are recycling the hazardous secondary materials when, in fact, they are conducting waste treatment and/or disposal." 73 Fed. Reg. 64671 (Oct. 30, 2008). U.S. EPA codified factors for use in determining when recycling of hazardous secondary materials is legitimate under 40 C.F.R. 260.31. 73 Fed. Reg. 64671 (Oct. 30, 2008). The Board's identical-in-substance provisions appear at 35 Ill. Adm. Code 720.131. The Board notes this information in response to the Agency's concern regarding sham recycling and recognizes the specific legitimacy factors pertain only to RCRA Subtitle C to determine when recycling of hazardous secondary materials is legitimate.

The Board finds that, in Westwood's case, although specific prices were redacted as trade secret, the economic incentive appears to be straightforward. Since Westwood is paying for the steelmaking slag fines and paying for disposal of the calcium magnesium silicate, the only economic incentive to Westwood that appears to exist is for U.S. Steel (or another buyer) to pay Westwood for its product in an amount greater than the cost to produce the product. If U.S. Steel (or another supplier) were paying Westwood to take the steelmaking slag fines, then the economic incentive would be more cloudy. The Board notes that, under such circumstances, more information would be needed to demonstrate that the facility is not engaging in sham recycling, where the materials are actually treated or disposed of outside the RCRA regulatory system.

Factors in Solid Waste Determinations

The Board notes that, in previous solid waste determinations under the nonhazardous solid waste provisions of Subchapter i, the Board has used other factors for determining whether a material is a solid waste than the legitimacy factors in Part 720.131. In its decision in Wood Energy, the Board relied on the following three factors to determine whether the material at issue was a waste: (1) the material was customarily thrown away or discarded; (2) the material was generated off-site and did not result from the petitioner's own process; and (3) the petitioner planned to purchase the material from a third party. Petition of Wood Energy Partners, L.P. for an Adjusted Standard from 35 Ill. Adm. Code 807 or, in the Alternative, a Finding of Inapplicability, AS 94-1 (Dec. 1, 1994). The second and third factors appear to apply to Westwood's process. However, Westwood has provided some evidence to differentiate itself from the first factor by indicating that the steelmaking slag fines are not customarily thrown away or discarded. The agreement with U.S. Steel refers to legacy steelmaking slag fines at the U.S. Steel facility, indicating that U.S. Steel has been holding this material rather than seeking to dispose of it. Exh. A. Additionally, Westwood provided information on projects through the Illinois Department of Natural Resources, which propose to use steel slag fines from U.S. Steel's Granite City facility for mine reclamation projects. Pet. at 11, Exh. F, Am. Pet. at 7-8.

CONCLUSION

Because of the deficiencies discussed above in Westwood's petition, amended petition, and response, and based on its review of the entire record, the Board cannot presently proceed to further evaluate making a determination that the steelmaking slag fines are not a waste or that an adjusted standard from the definitions in Parts 807 and 810 is warranted. Accordingly, the Board denies both Westwood's petition for an adjusted standard and its alternative request for a finding of inapplicability.

If the steelmaking slag fines are a listed or characteristic hazardous waste, the Board cannot make a finding the steelmaking slag fines are not waste under the non-hazardous waste provisions of Parts 807 and 810 as requested by Westwood. Parts 807 and 810 fall under the nonhazardous provision in Subchapter i: Solid Waste and Special Waste Hauling.

Depending on its conclusion as to its most appropriate course of action, Westwood may seek relief by, among other courses, filing a motion for reconsideration of this opinion and order, filing a petition addressing the deficiencies identified above, or petitioning the Board by seeking a non-solid waste determination pursuant to 35 Ill. Adm. Code 720.131.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 7, 2010, by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board