

ILLINOIS POLLUTION CONTROL BOARD

October 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):

On January 7, 2010, the Board issued an opinion and order denying both a petition for an adjusted standard filed by Westwood Lands, Inc. (Westwood) and Westwood’s alternative request for a finding of inapplicability. After the Board granted an extension of time, Westwood on April 2, 2010, filed a motion for reconsideration of the Board’s January 7, 2010 order.

For the reasons stated below, the Board grants Westwood’s motion for reconsideration and, upon reconsideration, finds that the steelmaking slag fines Westwood processes to produce coarse and fine metallic fractions in bulk, nugget, and briquette form to be used for steel manufacturing are not under listed conditions a waste. The Board grants Westwood’s requested relief and exempts the steelmaking slag fines meeting these listed conditions from the Board’s solid waste regulations. Having done so, the Board denies Westwood’s request for an adjusted standard as moot.

In this opinion and order, the Board first provides the procedural background of this docket before addressing a preliminary matter. The Board then summarizes Westwood’s motion for reconsideration and the Agency’s response to it before granting the motion. On reconsideration, the Board discusses a number of issues before reaching its conclusion and issuing its order.

**PROCEDURAL BACKGROUND**

On March 31, 2009, Westwood filed a petition for an adjusted standard or, in the alternative, a finding of inapplicability (Pet.). Westwood waived a 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

Belleville *News-Democrat* had published the required notice of filing the petition 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 and directed Westwood within 30 days to file an amended petition addressing nineteen informational deficiencies. *See* 415 ILCS 5/28.1(c) (2008); 35 Ill. Adm. Code 104.406.

On June 22, 2009, Westwood timely filed an amended petition (Am. Pet.).<sup>1</sup> On July 14, 2009, Westwood filed proof of publication documenting that the Belleville *News-Democrat* had published notice of the amended petition 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 Illinois Environmental Protection Agency (Agency or IEPA) filed its recommendation. On August 21, 2009, Westwood filed its response to the Agency's recommendation. *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).

In an order dated January 7, 2010 (Order), the Board denied both Westwood's petition for an adjusted standard and its alternative request for a finding of inapplicability.

On February 11, 2010, Westwood filed a motion for an extension to April 2, 2010, of the deadline for filing a motion for reconsideration. In an order dated March 4, 2010, the Board granted Westwood's motion and extended the deadline. On April 2, 2010, Westwood filed a motion for reconsideration (Mot.) which included a single exhibit (Exh. 1). On April 27, 2010, the Agency filed a motion for leave to file a response (Agency Mot.) accompanied by its response to Westwood's motion for reconsideration (Resp.). On May 18, 2010, the hearing officer issued an order directing Westwood to file the complete laboratory report and documentation for testing summarized in the exhibit to its motion for reconsideration. On June 8, 2010, Westwood submitted the laboratory report and documentation as Exhibits 2 and 3 (Exh. 2, Exh. 3).

### **PRELIMINARY MATTER**

On April 27, 2010, the Agency filed a motion for leave to file a response to Westwood's motion to reconsider. The Agency noted that, after the Board extended the filing deadline to April 2, 2010, Westwood filed its motion to reconsider. Agency Mot. at 1. The Agency reported

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<sup>1</sup> 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.

that it had not yet received a copy of that filing but had downloaded it from the Board's website after counsel received notification that the motion to reconsider had been filed. *See id.* The Agency claims that Westwood's "arguments require a full reply from the IEPA so that the Board can be fully briefed when making its decision on the case." *Id.* The Agency requested that the Board allow it to respond to Westwood's motion "to prevent material prejudice." *Id.* at 2.

Section 101.500(d) of the Board's procedural rules provides in pertinent part that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). After reviewing the substance of the motion and in the absence of any response to it, the Board grants the Agency's motion for leave to file a response and accepts the response into the record. The Board summarizes that filing below in the section entitled "Agency Response."

### **WESTWOOD'S MOTION FOR RECONSIDERATION**

Westwood notes the Board's statement that "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." Mot. at 2, citing Order at 25. Westwood argues that federal law excludes its steel slag fines from categorization as hazardous waste, but Westwood claims that the Board "could not determine if the slag to be used by Westwood qualified for the federal exclusion." Mot. at 2-3; *see* Order at 27-29. Westwood notes that the Board had also "questioned whether the steelmaking slag fines are hazardous by characteristic, finding that the testing results submitted by Westwood were not performed under the proper testing protocol." Mot. at 3, *see* Order at 29-30.

Desiring to demonstrate conclusively that its steelmaking slag fines are not hazardous, Westwood reports that it performed additional testing. Mot. at 3. Westwood states that it "continues to believe that its petition and related filings demonstrated that the fines are not hazardous, but submit this additional evidence to address the Board's concerns." *Id.* n.3. Westwood argues that "[t]he Board's procedural rules allow for the Board to reconsider new evidence in ruling on a motion for reconsideration." *Id.*, citing 35 Ill. Adm. Code 101.902. Westwood claims that "[t]hese results confirm Westwood's position that the fines are not hazardous." Mot. at 3. Westwood effectively requests that the Board, in light of new evidence contained in the results of this additional testing, reconsider its "finding that it cannot determine that the fines are not hazardous." *Id.*

### **Testing**

Westwood reports that it has a right to purchase slag fines from U.S. Steel's Granite City facility and that it owns slag fines purchased from that facility. Mot. at 3 n.4. Westwood states that it directed Civil & Environmental Consultants (CEC) to conduct tests of the slag fines it owns. *Id.* at 3. In addition, Westwood notes that it intends to purchase additional slag fines now owned by U.S. Steel and located at U.S. Steel's Granite City facility. *Id.* Although Westwood distinguishes the "Westwood slag" it has purchased from the "U.S. Steel" slag now owned by

U.S. Steel, it states that “[b]oth categories of fines were generated at the U.S. Steel Granite City facility.” *Id.* n.5. Westwood states that, because it intends to purchase additional slag fines from U.S. Steel, it considered it “important” to test slag fines from both categories. Mot. at 3. Westwood reports that it “coordinated with U.S. Steel to obtain additional testing of the steelmaking slag fines owned by U.S. Steel and located at the U.S. Steel Granite City facility.” *Id.*

Specifically, Westwood reports that CEC collected “nine representative samples” of the Westwood slag and coordinated with U.S. Steel to collect six samples from the Granite City facility. Mot. at 4. Westwood states that the U.S. Steel samples included slag “generated by different operations, including C fines, desulfurization slag fines, and ladle metallurgy facility (LMF) slag.” Mot. at 7 n.9, citing Exh.1, Table 2A (sample information). Westwood argues that such sampling “addresses the Board’s concerns about representative sampling of the U.S. Steel slag.” Mot. at 7 n.9, citing Order at 33.

Westwood states that “[a]ll samples were submitted to the same laboratory for chemical analysis, using TCLP method 1311 (USEPA publication number EPA-530-SW-846).” *Id.*, citing *id.*, Exh. 1 (CEC Report on Slag Sampling and Analysis). Westwood notes that it submitted as Exhibit 1 to its motion CEC’s report summarizing the test results. Westwood stated that, although it had not submitted the full 152-page report in order to reduce paper use, it would provide the full report if requested by the Board to do so. Mot. at 4 n.6. As noted above under “Procedural History,” a hearing officer order dated May 18, 2010, directed Westwood to file that complete laboratory report and documentation. On June 8, 2010, Westwood filed this information as Exhibits 2 and 3.

Westwood first addresses the Westwood slag by stating that testing results “demonstrate that those slag fines are not hazardous by characteristic.” Mot. at 4. Westwood states that “[o]nly barium and chromium were even detected in the slag TCLP extract solution.” *Id.* Westwood argues that the detected levels of barium and chromium were more than 100 times lower than federal hazardous waste criteria and equivalent state regulations. *Id.*, citing Exh 1 at 4, Exh.1, Table 1A; *see* 40 C.F.R. 261.24, 35 Ill. Adm. Code 721.124(b).

Westwood also addresses the U.S. Steel slag by stating that testing results “demonstrate that those fines are not hazardous.” Mot. at 4. Westwood states that, “[a]gain, only barium and chromium were detected in the slag TCLP extract solution.” *Id.* Westwood argues that detected levels of barium and chromium were more than 100 times lower than federal hazardous waste criteria and equivalent state regulations. *Id.*, citing Exh. 1 at 4, Exh. 1, Table 2A; *see* 40 C.F.R. 261.24, 35 Ill. Adm. Code 721.124(b).

Westwood notes CEC’s conclusion based on the results of the testing it performed: “[r]esults from the chemical analysis of the slag, conducted using the appropriate TCLP Test Method 1311, demonstrate that the slag samples collected from the Westwood and Granite City Facilities are not characteristic hazardous wastes under 40 CFR Part 261.24 or Illinois Title 35 Section 721.124(b).” Mot. at 4, citing Exh. 1 at 5 (Section 4.0 Conclusions). Westwood argues that “it is clear that the steelmaking slag fines are not hazardous.” Mot. at 5.

### **Finding of Inapplicability**

Westwood states that it “sought a determination that the raw material used in its production process is not a ‘waste,’ and that therefore Westwood does not need waste permits pursuant to Board regulations.” Mot. at 1. Westwood claims that the Board’s January 7, 2010 order did not reach this determination “because it was not clear that the raw material is not a hazardous waste.” Mot. at 5, citing Order at 26. Westwood argues that its previous filings demonstrate that the steelmaking slag fines it uses in its process are not a “waste.” Mot. at 5 (citations omitted). Westwood further argues that its position finds support in decisions of the Illinois Supreme Court and the Board. *Id.*, citing Alternate Fuels, Inc. v. IEPA, 830 N.E.2d 444 (2005) (AFI); Petition of Jo’Lyn Corp. and Falcon Waste and Recycling, Inc. for an Adjusted Standard, AS 04-2 (Apr. 7, 2005). Westwood claims that additional testing as described above demonstrates conclusively “that the raw material is not hazardous.” Mot. at 5. Westwood requests that the Board proceed on reconsideration to make the finding of inapplicability that it has sought in this proceeding. *Id.*

### **Adjusted Standard**

As an alternative to its request for a finding of inapplicability, Westwood renews its request that the Board grant an adjusted standard from portions of the Board’s waste regulations. Mot. at 1, 6. Westwood notes that it “has argued that the fines are eligible for a non-special waste certification.” *Id.* at 6. Westwood argues that, because the Board could not determine whether the slag fines are hazardous, it “declined to find that the fines can be certified as non-special waste.” *Id.* Arguing that it “has now conclusively demonstrated that the fines are not hazardous,” Westwood requests a determination that the fines can be certified as non-special waste. *Id.*

Westwood addresses the Board’s expressed concern about Westwood’s quality control. Mot. at 6. Westwood notes that subsection four of its proposed adjusted standard language “requires Westwood to comply with all provisions of the Environmental Protection Act.” *Id.* Westwood further notes that it has not objected to more specific language addressing quality control. *Id.* Specifically, Westwood offers the following language to be added to its proposed adjusted standard as subsection five:

Westwood does not use fines which are hazardous by characteristic, or contain asbestos, PCBs, or a listed hazardous waste. Westwood must maintain a quality control program that includes:

- a) Weekly testing of a representative load for its metallic content;
- b) Visual inspection of each load to ensure that no trash or other “non-fine” material is contained in that load;
- c) Before receiving any slag fines from a new supplier, testing, pursuant to TCLP Method 1311, of a representative sample of each source of slag fines from that new supplier;
- d) Interim testing of a representative sample of each source of slag fines, pursuant to TCLP Method 1311, from each existing supplier.

Such interim testing will be performed at least every six months, or upon significant changes in operating conditions. Mot. at 7.

Westwood also addresses the issue of loads of slag fines that it might reject. Westwood argues that its amended petition “clearly committed to returning any rejected fines to the supplier.” Mot. at 8 (citation omitted).

### **Summary**

Westwood indicates that it has demonstrated through new evidence that its steelmaking slag fines are not a hazardous waste. Mot. at 8. Westwood thus “moves the Board to reconsider its finding that it could not determine if the steelmaking slag fines used in Westwood’s process are hazardous waste.” *Id.* Westwood argues that, because it has demonstrated that the slag fines are not hazardous, it “asks the Board to proceed to determine that the fines are not ‘waste,’ and that Westwood is therefore not subject to the waste provisions of the Illinois regulations.” *Id.* In the event that the Board does not grant its request for a finding of inapplicability, Westwood requests that the Board grant an adjusted standard from specified provisions of Sections 807.104 and 810.103 of the Board’s regulations. *Id.*

### **AGENCY RESPONSE**

The Agency cites the Board’s procedural rule providing that, in ruling on a motion for reconsideration, the Board “will consider factors including new evidence or a change in the law, to conclude the Board’s decision was in error.” Resp. at 1, citing 35 Ill. Adm. Code 101.902. The Agency also cites the Board’s statement that “the intended purpose of a motion for reconsideration is to bring to the court’s attention newly-discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court’s previous application of the existing law.” Resp. at 1, citing Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993). The Agency claims that Westwood has failed to satisfy any of the three criteria for reconsideration and has failed to justify reconsideration of the Board’s January 7, 2010 order. Resp. at 1-2.

The Agency argues that Westwood has not cited any change in applicable law since the Board’s January 7, 2010 order and that Westwood has not contended that the Board misapplied the relevant law. Resp. at 4. The Agency further argues that Westwood’s motion relies solely upon new facts and evidence in the form of additional testing of slag fines. *Id.* at 2.

The Agency argues that the issue of whether the fines are a hazardous waste “was an issue from the outset of this proceeding.” Resp. at 2. The Agency claims that evidence on this issue was sought by the Board in its order requesting additional information and could have been included in Westwood’s amended petition or its response to the Agency’s recommendation. *Id.* at 2, 4. The Agency also claims that this evidence of additional testing was not unavailable. *Id.* at 2, 4. The Agency argues that “this information was available at all times during this proceeding” but was neither sought nor obtained until after the Board issued its order denying Westwood’s petition. *Id.* at 2. The Agency further argues that the additional testing “simply

does not meet the class of information that may properly be reviewed in the context of a Motion to Reconsider.” *Id.* at 4.

The Agency also argues that “[r]econsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probable that a different judgment would be reached.” Resp. at 2, citing Patrick Media Group v. City of Chicago, 626 N.E.2d 1066, 1701 (1st Dist. 1993). The Agency claims that the additional testing, if correct, addresses only the issue of whether the slag fines are characteristic hazardous waste. Resp. at 2. The Agency suggests that, because the Board’s January 7, 2010 order addresses other issues, consideration of the additional testing would lead to a different result. *See id.* at 3.

The Agency concludes that Westwood has presented no argument that would justify the Board’s reconsideration of its January 7, 2010 order. Resp. at 5. The Agency argues that Westwood “makes no claim that it was unaware of the Board’s consideration of the issue presented for reconsideration.” *Id.* The Agency claims that the Board should deny the Agency’s motion for reconsideration and affirm its opinion and order denying Westwood’s petition. *Id.*

## **DISCUSSION**

### **Standard of Review**

A motion to reconsider may be filed in order “to bring to the [Board’s] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board’s] previous application of existing law.” Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991). The Board’s procedural rules provide that, “[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board’s decision was in error.” 35 Ill. Adm. Code 101.902. A motion to reconsider may also specify “facts in the record which were overlooked.” Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

### **Motion to Reconsider**

With its motion to reconsider, Westwood has submitted to the Board results of testing conducted on various slag fines and using TCLP method 1311. *See* Exh. 1. At the Board’s request, Westwood has also submitted laboratory reports and documentation gathered in the course of that testing. *See* Exhs. 2, 3. At the time the Board issued its order denying Westwood’s amended petition, the Board’s record did not include this evidence. The testing reports and laboratory analysis plainly demonstrate that this testing occurred only after the Board issued its opinion and order on January 7, 2010. *See* 35 Ill. Adm. Code 101.902.

The Board grants Westwood’s motion to reconsider and proceeds below to its reconsideration of the threshold issue of whether steelmaking slag fines are a hazardous waste. The evidence accompanying Westwood’s Motion for Reconsideration bears upon a number of

issues identified by the Board's January 7, 2010 opinion and order. The Board addresses those issues separately in the following subsections of the opinion.

### **Hazardous Waste as a Threshold Issue**

The Board's January 7, 2010 opinion and order states that

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. Order at 25.

Westwood's Motion for Reconsideration renews its request for an adjusted or, in the alternative, a finding of inapplicability. As discussed below, Westwood obtained additional testing on steelmaking slag fines in order to determine whether the slag fines are hazardous.

### **Hazardous Waste Exclusions**

The Board's January 7, 2010 opinion and order found that the information presented by Westwood did not conclusively demonstrate that steelmaking slag fines proposed for use in its process are not excluded from hazardous waste under 40 C.F.R. 261.4(b)(7)(ii). Order at 29. In its motion for reconsideration, Westwood stated that it "continues to believe that the steel slag fines are excluded, by federal law, as a hazardous waste." Mot. at 2. Westwood's motion for reconsideration provides no new evidence regarding application of any exclusion to the steelmaking slag fines. Westwood instead relies on new TCLP test results to demonstrate that the slag fines are not hazardous. Mot. at 3.

### **Characteristic Hazardous Waste**

The Board found that laboratory analyses provided in Westwood's amended petition were not sufficient to demonstrate the slag fines do not exhibit characteristics of hazardous waste. Order at 30. In its motion for reconsideration, Westwood presented a report prepared by CEC to demonstrate that the steelmaking slag fines are not characteristic hazardous waste. Westwood had commissioned CEC to test slag fines owned by Westwood located at Westwood's facility and also to test slag fines owned by U.S. Steel located at the U.S. Steel's Granite City facility. CEC collected 15 representative samples and submitted them for laboratory analysis by the TCLP Method 1311. Mot. at 3-4; Mot., Exh. 1 at 2-3; Exh. 2; Exh. 3. Representative samples included slag generated by different operations, including C fines, desulfurization slag fines, and ladle metallurgy facility (LMF) slag. Mot. at 7; Mot., Exh. 1 at 3; Exh. 2; Exh. 3.

Of the entire TCLP suite of contaminants listed in 35 Ill. Adm. Code 721.124(b), only two analytes, barium and chromium, exceeded detection levels. CEC explained that the levels

detected were more than 100 times less than the hazardous waste criteria defined at 40 C.F.R. 261.24 and 35 Ill. Adm. Code 721.124(b). The barium and chromium levels were also below the National Primary Drinking Water Standard Maximum Contaminant Levels (MCLs) set forth in 40 CFR 141.62(b). Mot. at 4; Mot., Exh. 1 at 4. Based on the results of the testing, CEC concluded that the slag samples do not exhibit the toxicity characteristics of hazardous waste under 40 CFR Part 261.243 or 35 Ill. Adm. Code 721.124(b) and are therefore not characteristic hazardous waste. Mot. at 4; Mot. Exh. 1 at 5.

Based on the evidence Westwood supplied to demonstrate that the steelmaking slag fines are not hazardous waste, the Board finds Westwood's request for relief is properly filed under the Board's nonhazardous waste provisions of Subchapter i. 35 Ill. Adm. Code 807-832.

### **Special Waste**

The Board's January 7, 2010 opinion and order found that Westwood's petition also did not provide evidence that the steelmaking slag fines from U.S. Steel or from any future potential suppliers have a non-special waste certification or sufficient documentation required by Section 22.48(b) of the Act. Order at 30-31. Westwood argues that the steelmaking slag fines are eligible for a non-special waste certification because the fines, "even if considered industrial process waste, do not fit into any of the categories (i.e., liquid waste, contains asbestos or PCBs, delisted hazardous, decharacterized hazardous waste or a waste resulting from shredding recyclable metals) which would prohibit the generator from self-certifying the waste as a non-special waste." Am. Pet. at 5, citing 415 ILCS 5/3.475(c)(1) (2008).

With the new evidence submitted in its motion for reconsideration, Westwood argues that it "has now conclusively demonstrated that the fines are not hazardous. Thus, Westwood asks the Board to determine that the fines can be certified as non-special waste." Mot. at 6. Westwood states that it will only use slag fines which have a non-special waste certification from the supplier. Am. Pet. at 5. Westwood is amenable to a specific condition of its requested relief that would require Westwood to obtain a non-special waste certification from its slag suppliers. Mot. at 6.

As the Board stated previously, Section 22.48 of the Act provides in pertinent part that:

- (a) An industrial process waste or pollution control waste not within the exception set forth in subdivision (2) of subsection (c) of Section 3.475 of this Act must be managed as special waste unless the generator first certifies in a signed, dated, written statement that the waste is outside the scope of the categories listed in subdivision (1) of subsection (c) of Section 3.475 of this Act.
- (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).

Although Westwood asks the Board to determine that the fines can be certified as non-special waste, the Board notes that the non-special waste certification is a self-certification process by the generator, and not a Board determination. The Board will include as a condition of the requested relief that Westwood must use only steelmaking slag fines which have an Illinois non-special waste certification from the generator.

### **Quality Control**

The Board's January 7, 2010 opinion and order found that Westwood lacked clearly established quality procedures to ensure the slag fines received at its facility are not hazardous waste and are viable to produce a saleable product. Order at 31-33. In its motion for reconsideration, Westwood committed to new and additional sampling and analysis of incoming loads of steelmaking slag fines for hazardous waste characteristics. Westwood proposed to test representative initial samples from each new supplier and to test interim samples from existing suppliers at least every six months or upon significant changes in the generator's operating conditions. Mot. at 7. Westwood also described requirements to screen incoming loads for metallic content and non-fine material. *Id.*

Westwood indicated that it "does not object to including more specific language regarding the quality control of the slag fines." Mot. at 6. Specifically, Westwood proposed the following requirements:

Westwood does not use fines which are hazardous by characteristic, or contain asbestos, PCBs, or a listed hazardous waste. Westwood must maintain a quality control program that includes:

- a) Weekly testing of a representative load for its metallic content;

- b) Visual inspection of each load to ensure that no trash or other “non-fine” material is contained in that load;
- c) Before receiving any slag fines from a new supplier, testing pursuant to TCLP Method 1311, of a representative sample of each source of slag fines from that new supplier;
- d) Interim testing of a representative sample of each source of slag fines, pursuant to TCLP Method 1311, from each existing supplier. Such interim testing will be performed at least every six months, or upon significant changes in operating conditions.” Mot. at 7.

The Board finds that the proposed inspection, sampling, and analysis proposed above will contribute to ensuring that Westwood’s slag fines are not characteristic hazardous waste, do not contain contaminants that need to be removed in Westwood’s production process, and produce a saleable product. The Board will include the proposed conditions as part of the requested relief.

### **Representative Sampling**

The Board found the two samples presented in Westwood’s amended petition for analysis were insufficient for demonstrating a representative sampling of all of the types of steelmaking slag fines Westwood intends to process. In addition, the Board found Westwood did not provide a sampling protocol to ensure that initial representative samples are taken of each type of steel slag from each supplier, interim representative samples are taken to ensure consistency, or new samples are taken of slag that results from significant changes in operating conditions. Order at 34.

In its motion for reconsideration, Westwood committed to new and additional sampling as described in the proposed conditions above. Mot. at 7. The Board finds that the sampling and analysis proposed above by Westwood will ensure that initial representative samples are taken from each type of steel slag from each supplier and interim samples are taken to ensure consistency and to identify any inconsistencies resulting from significant changes in the generator’s operating conditions. The Board includes the proposed conditions as part of the requested relief.

### **Rejected Loads**

Previously, the Board had found that Westwood was not definitive about the disposition of loads rejected after purchase: whether the rejected loads would be returned to the supplier, disposed of in a landfill, or treated in some other fashion. Order at 35. In its Motion for Reconsideration, Westwood clarified and reiterated that it would return any rejected fines to the supplier, and Westwood has proposed a condition requiring Westwood to return rejected fines to the supplier. Mot. at 7-8. The Board finds that Westwood’s clarification along with the proposed condition ensures that rejected fines will be returned to the supplier and will not become orphan loads. The Board will include this requirements as a condition as part of the requested relief.

**AFI**

The Agency argues that the slag is a waste under the “two categories test” established in AFI. Rec. at 6. The Agency noted that the Supreme 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.” Order at 36-37, Rec. at 6, *citing* AFI, 830 N.E.2d at 444, 456.

Westwood explained that its production process will result in a non-metallic fraction (calcium magnesium silicate) that Westwood currently plans to transport off-site for disposal. Pet. at 8. Westwood states that roughly one-third (by weight) of the steelmaking slag fines will become usable product, while the remaining two-thirds will be the non-metallic fraction of calcium magnesium silicate.

Since two-thirds of slag fines must be removed and discarded, the Agency argues that the slag is a waste under the “two categories test” as a “‘waste’ from which contaminants may be removed.” Rec. at 6. The Agency characterizes the two-thirds of the slag removed during Westwood’s process as contaminants. Rec. at 7. 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.

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. 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. Westwood argued 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 calcium magnesium silicate as part of the chemical composition of the fines. Resp. at 6-7. Westwood also states, “[t]he fines are not a ‘spent material,’ which is defined as a ‘material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.” Am. Pet. at 4 quoting 721.101(c)(1) (emphasis in original).

The Board discusses below why the calcium magnesium silicate is not a contaminant under the “two categories test” and why accumulation of the waste calcium magnesium silicate at Westwood’s facility does not make it a “pollution control facility.”

The Board finds that calcium magnesium silicate is part of the chemical composition of the slag fines and is not a “contaminant.” Therefore, the calcium magnesium silicate resulting from Westwood’s process does not constitute removal of a contaminant. Similarly, the court in AFI found that AFI was not removing contaminants. In AFI, the court noted,

AFI was not removing contaminants from the triple-rinsed containers or from wood. The contaminants had been removed by the triple-rinsing process before they arrived at AFI's facility and there is no indication in the record of proposed removal of contaminants from wood. Therefore, the solid at issue is a 'material.' We next consider whether this material was otherwise discarded or if it was 'collected, separated or processed and returned to the economic mainstream in the form of raw materials or products.' AFI processes the plastic containers and returns the materials as a 'product' into the economic mainstream, as demonstrated by the contract with Illinois Power. Under the Act, the materials are, therefore, not discarded. AFI, 830 N.E. 2d at 456.

On the basis of this authority, the Board finds that the steelmaking slag fines are "materials" that "are collected, separated or processed and returned to the economic mainstream in the form of raw materials or products."

The Board notes that, unlike the calcium magnesium silicate which is an intrinsic part of the slag fines, other items identified by Westwood would be considered contaminants: fines with hazardous waste characteristics, listed hazardous waste, asbestos, PCBs, trash, or other non-fine material. Westwood stated that "it is in Westwood's best interests to ensure a clean, consistent supply of steelmaking slag fines for its operation. Only a clean supply of fines, without hazardous characteristics, asbestos, PCBs, trash or other non-fine material, will allow Westwood to operate its facility efficiently and economically." Mot. at 7. Westwood indicated in its amended petition that it would reject loads containing a large amount of non-fine material, or would simply remove the non-fine items depending on the circumstances such as whether the non-fine material was a single piece of wood. Am. Pet. at 7.

The Board finds that Westwood's process for visually examining the incoming loads for trash or other "non-fine" material and its practice of removing those items from the incoming load or rejecting the load altogether provides assurance that contaminants will not be introduced into Westwood's production process that would need to be later removed.

Westwood is not specific as to how it will store calcium magnesium silicate until it is transported offsite for disposal. The Board notes that although the definition of "pollution control facility" includes "any waste storage site", the Act states that "sites or facilities used by any person conducting a waste storage ...for wastes generated by such person's own activities, when such wastes are stored...within the site or facility owned, controlled or operated by such person" are not pollution control facilities. 415 ILCS 5/3.330. The Board notes that the calcium magnesium silicate would be generated by Westwood's own activities, so storage of the calcium magnesium silicate at Westwood's facility may not meet the definition of a "pollution control facility." Westwood, of course, retains the ability to return the calcium magnesium silicate the economic mainstream rather than dispose of it; however a new finding of inapplicability or non-solid waste determination may be necessary.

### **Existence of Market**

The Agency states that Westwood has not established that an open market exists for its products. Rec. at 8.

The Board notes U.S. Steel's comment that the steel industry works to develop processes to remove metal from slag for recycling the metal content. U.S. Steel explains that the "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." PC 1 at 1. U.S. Steel states that, "[e]ven though U. S. Steel lacks the capability to utilize slag fines in its operation, the fines are still very valuable given their metallic content. We depend 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.* at 2.

Westwood indicates that it has had discussions with other possible purchasers of its product, but has not yet entered into any formal contracts because Westwood cannot assure when its facility will be permitted and operational. Am. Pet. at 7. However, Westwood continues to assert that the product will be sold on the open market to steel manufacturers. *Id.* at 8.

The Board notes that in AFI, the Court stated that, "due to the issuance of the violation notice, AFI's primary investors withdrew their support, and its primary supplier withdrew from the agreement in July 1998. AFI thereafter halted its manufacturing operations." AFI, 830 N.E.2d at 449. The Board observes that, even though AFI lost its primary investors and suppliers and halted manufacturing, the court upheld the decision that the materials used by AFI in its manufacturing process were not wastes. The Board notes that Westwood has a valid contract with U.S. Steel, its primary supplier and purchaser. Pet., Exh. A. Westwood has also received a quote from another potential supplier, Stein, Inc. Pet. at 7.

Based also on the comment from U.S. Steel that its facility depends on operations such as Westwood, interest from other potential buyers, and the quality control and assurance measures made conditions of the Board's order, the Board finds that Westwood has sufficiently demonstrated that a market for its products exists.

### **Conditions**

Westwood proposed several conditions in its amended petition and motion for reconsideration. Although the Board deems the request for an adjusted standard as moot below, the Board will include the proposed conditions with the requested relief. Although the Board did not impose conditions on the relief granted in AFI and JoLyn, the Board will do so here to ensure quality control where steelmaking slag fines may exhibit variability due to changes in suppliers or changes in the generator's operating conditions.

In its petition, Westwood proposed the following conditions for the adjusted standard.

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.

In its Motion for Reconsideration, Westwood proposed the following additional language to the proposed adjusted standard.

5. Westwood does not use fines which are hazardous by characteristic, or contain asbestos, PCBs, or a listed hazardous waste. Westwood must maintain a quality control program that includes:
  - a. Weekly testing of a representative load for its metallic content;
  - b. Visual inspection of each load to ensure that no trash or other “non-fine” materials is contained in that load;
  - c. Before receiving any slag fines from a new supplier, testing pursuant to TCLP Method 1311, of a representative sample of each source of slag fines from that new supplier;
  - d. Interim testing of a representative sample of each source of slag fines, pursuant to TCLP Method 1311, from each existing supplier. Such interim testing will be performed at least every six months, or upon significant changes in the generator’s operating conditions. Mot. at 7.

In addition to the proposed language, the Board notes that Westwood is amenable to a specific condition of the relief that would require Westwood to obtain a non-special waste certification from its slag suppliers. Mot. at 6. Westwood states, “Westwood will utilize only slag fines which have a certification from the supplier that the fines are not special waste.” Am. Pet. at 5. The Board will include this provision as a condition in the order.

In its amended petition, Westwood indicated that it would also agree to a condition requiring Westwood to reject and return a load to the supplier if it finds that the steelmaking slag fines exhibit a characteristic of hazardous waste or contain asbestos, PCBs, or a listed hazardous waste. Am. Pet. at 14. The Board includes this provision as a condition below.

In JoLyn, the Board noted that “once petitioners no longer process and return GBSM [granulated bituminous shingle material] to the economic mainstream in the form of a raw

material or product, the GBSM is then considered ‘discarded,’ and thus, a waste.’ AS 04-2 Opinion at 14, 4-7-2005. Here, the Board, consistent with AFI and JoLyn, places a similar condition upon Westwood’s relief.

### **ORDER**

The Board finds that the steelmaking slag fines Westwood Lands Inc. processes at its facility on 4 Caine Drive, Madison, Madison County, to produce coarse and fine metallic fractions in bulk, nugget, and briquette form to be used in steel manufacturing are not, under the following conditions, a waste. The Board grants Westwood’s requested relief and exempts the steelmaking slag fines meeting these conditions from the Board’s solid waste regulations. Having made this determination, the Board denies Westwood’s alternative request for an adjusted standard from the Board’s solid waste regulations as moot.

1. Westwood must use only steelmaking slag fines.
2. For purposes of this order, “steelmaking slag fines” are 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 must retain 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 must operate the facility in compliance with other provisions of the Environmental Protection Act.
5. Westwood must not use fines which are characteristic hazardous waste, or contain asbestos, PCBs, or a listed hazardous waste. Westwood must reject and return a load to the supplier if it finds that the steelmaking slag fines exhibit a characteristic of hazardous waste or contain asbestos, PCBs, or a listed hazardous waste.
6. Westwood must maintain a quality control program that includes:
  - a. Weekly testing of a representative load for its metallic content;
  - b. Visual inspection of each load to ensure that no trash, asbestos, PCBs, listed hazardous waste, or other “non-fine” material is contained in that load;
  - c. Before receiving any slag fines from a new supplier, testing pursuant to TCLP Method 1311, of a representative sample of each source of slag fines from that new supplier;

- d. Interim testing of a representative sample of each source of slag fines, pursuant to TCLP Method 1311, from each existing supplier. Such interim testing will be performed at least every six months, or upon significant changes in operating conditions.
7. Westwood must only use steelmaking slag fines which have an Illinois non-special waste certification from the generator.
8. If Westwood ceases to process and return the steelmaking slag fines to the economic mainstream in the form of a raw material or product, the steelmaking slag fines are considered "discarded," and, thus, a waste.

IT IS SO ORDERED.

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



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board