

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

OCT 27 2005

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
PROPOSED SITE SPECIFIC WASTE)
REGULATION APPLICABLE TO)
SILBRICO CORPORATION)
(35 Ill. Adm. Code Part 810))

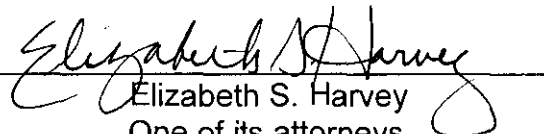
R 06-08
(Site-Specific Rulemaking -- Land)

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 27th day of October 2005, the following was filed with the Illinois Pollution Control Board: **Petitioner Silbrico Corporation's Response to Motion to Dismiss**, which is attached and herewith served upon you.

SILBRICO CORPORATION

By: 
Elizabeth S. Harvey
One of its attorneys

Elizabeth S. Harvey
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CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of Petitioner Silbrico Corporation's Response to Motion to Dismiss to counsel of record in the above-captioned matter via U.S. Mail at One IBM Plaza, Chicago, IL 60611 on or before 5:00 p.m. on October 27, 2005.



Jeanette M. Podlin

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

2049-002

SERVICE LIST
Case No. R 06-08
(Site-Specific Rulemaking -- Land)

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Illinois Department of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787

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STATE OF ILLINOIS
Pollution Control Board

| | | |
|------------------------------|---|------------------------------------|
| IN THE MATTER OF: |) | |
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| PROPOSED SITE SPECIFIC WASTE |) | R 06-08 |
| REGULATION APPLICABLE TO |) | (Site-Specific Rulemaking -- Land) |
| SILBRICO CORPORATION |) | |
| (35 Ill.Adm.Code Part 810) |) | |

RESPONSE TO MOTION TO DISMISS

Petitioner SILBRICO CORPORATION ("Silbrico"), by its attorneys Swanson, Martin & Bell, LLP, hereby responds in opposition to the People of the State of Illinois', by the Attorney General, motion to dismiss this petition for a site-specific rule.

INTRODUCTION

Silbrico filed its petition for site-specific rulemaking on July 19, 2005. On September 1, 2005, the Board found that the petition satisfies the content requirements of the Environmental Protection Act and the Board's procedural rules. Therefore, the Board accepted the proposal for hearing. (See September 1, 2005 order of the Board, attached as Exhibit A.)

On October 7, 2005, the People filed a motion to dismiss the petition. Counsel for Silbrico received the motion to dismiss on October 13, 2005. Pursuant to the Board's procedural rules, a party may file a response to the motion within 14 days after service of the motion. 35 Ill.Adm.Code 101.500(d). Thus, Silbrico's response is due on October 27, 2005.¹ This response is timely filed.

¹ Silbrico is aware that the Board's rules provide that service by mail is presumed complete four days after mailing. That presumption can be rebutted by proper proof. 35 Ill.Adm.Code 101.300(c). Here, the Attorney General's certificate of service states that the motion was mailed on October 7, 2005. However, the motion was not received by Silbrico's counsel until October 13, 2005. There was a federal

ARGUMENT

Silbrico's request for a site-specific rule seeks to allow it to treat the two nonhazardous wastes discussed in its petition – off-specification perlite and fugitive perlite from baghouse dust collections (collectively, the "perlite waste") – as construction and demolition debris for purposes of disposal. The Attorney General makes two claims in support of the motion to dismiss: 1) that the petition should be dismissed for failure to serve the initial petition on the Attorney General; and 2) that the Board lacks statutory authority to grant Silbrico's requested site-specific rule. Both arguments fail.

Silbrico has served the Attorney General and DNR with the petition

The first alleged grounds for dismissal is Silbrico's failure to initially serve the petition on the Attorney General and the Department of Natural Resources (DNR). Silbrico did, through a clerical oversight, omit the Attorney General and DNR from the service list for its petition. The petition has now been served on both the Attorney General and DNR. See cover letters, attached as Exhibits C and D. The petition had already been accepted by the Board as meeting the requirements of the Act and the Board's rules. See Exhibit A. There is no prejudice to the Attorney General, to the People, or to DNR, by this clerical oversight. The initial oversight is not grounds for dismissal, especially after the petition was accepted by the Board.

The Board has the authority to grant Silbrico's requested site-specific rule

The Attorney General seeks to have Silbrico's petition stricken based on its assertion that this Board does not have the authority to grant its request. Motion to Dismiss, p. 2. The Attorney General is mistaken. Because Silbrico seeks to have its

holiday during that period, perhaps thus delaying delivery of the motion. Silbrico's counsel's affidavit, stating that the motion was not received until October 13, is attached as Exhibit B.

perlite waste *treated* as clean construction and demolition debris, rather than *reclassified* as clean construction and demolition debris, Silbrico's request is within this Board's authority. The State's motion should be denied.

Fundamentally at issue in the Attorney General's motion is the scope of 415 ILCS 5/27 (2005), which allows this Board to adopt or amend existing rules. Section 27(a) states:

The Board may adopt substantive regulations as described in this Act. *Any such regulations may make different provisions as required by circumstances for different contaminant sources and for different geographical areas; may apply to sources outside this State causing, contributing to, or threatening environmental damage in Illinois; may make special provision for alert and abatement standards and procedures respecting occurrences or emergencies of pollution or on other short-term conditions constituting an acute danger to health or to the environment; and may include regulations specific to individual persons or sites. In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. The generality of this grant of authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act.*

415 ILCS 5/27(a) (2005) (emphasis added).

As the Attorney General correctly notes, Section 3.160 of the Act defines clean construction and demolition debris (CCDD) as "generated from construction or demolition activities." 415 ILCS 5/3.160 (2005). The Attorney General further correctly explains that an administrative agency can only issue rules and regulations that are authorized by statute and in accord with the policies and language of the statute. See, e.g., *Montgomery Ward Life Ins. Co. v. Dep't of Local Gov't Affairs*, 89 Ill. App. 3d 292, 302, 411 N.E.2d 973, 980 (1st Dist. 1980). However, the Attorney General

misunderstands the relief requested by Silbrico. Silbrico does not seek a site-specific regulation that would conflict with the statute.

Specifically, Silbrico's petition does not request that this Board redefine the Act's definition of clean construction and demolition debris to include perlite and perlite-related waste. Rather, Silbrico requests that this Board issue a site-specific rule recognizing, for Silbrico's benefit only, Silbrico-created perlite waste can be disposed of in a facility that is allowed to accept CCDD. The proposed language of Silbrico's site-specific rule, as set forth in its petition, is:

Section 810.105 Waste Streams from Silbrico Corporation

- a) This regulation applies only to the specified waste streams from Silbrico Corporation's Hodgkins, Cook County, Illinois facility.
- b) This regulation applies to two waste streams from Silbrico's facility: off-specification perlite, and fugitive perlite (collectively, "the specified waste streams").
- c) The specified waste streams may be disposed of in a "clean fill" facility that accepts only "clean construction and demolition debris," as defined at 415 ILCS 5/3.160(b).

Petition for site-specific rule, p. 3.²

Silbrico does not seek a finding that the perlite waste streams are CCDD. Thus, Silbrico is not asking the Board to amend the statutory definition of CCDD through the requested site-specific. Instead, Silbrico asks the Board to adopt a rule recognizing that Silbrico's perlite waste streams are similar to CCDD, such that those perlite waste

² Because of statutory amendments made after Silbrico filed its petition for site-specific rule, Silbrico will propose, at hearing, an amended subsection (c). P.A. 94-0272 added Section 22.51 to the Act, which establishes registration and permitting requirements for "clean construction and demolition debris fill operations." Silbrico will propose an amended subsection (c) which reads "The specified waste streams may be disposed of in a 'clean construction and demolition debris operation' which has obtained the necessary authorization and/or permit pursuant to Section 22.51 of the Act."

streams can be safely and appropriately disposed of at a CCDD operation.³ While this distinction may, at first glance, appear to be slight, the distinction is very important. Section 27(a) of the Act specifically allows the Board to make "different provisions as required by circumstances for different contaminate sources." 415 ILCS 5/27(a) (2005). Silbrico's request for site-specific is exactly the type of thing allowed for by the specific terms of Section 27(a): a different provision as required by circumstances. The Board has the authority, under Section 27(a), to grant Silbrico's requested site-specific rule.

Finally, the Attorney General makes the broad statement that Silbrico's requested rule "could lead to a massive and legislatively unauthorized expansive [*sic*] of the scope of [*sic*] construction and demolition debris regulatory scheme" in Illinois. Motion to Dismiss, p. 4. This statement is needless hysteria. The requested site-specific, if granted, would of course apply only to Silbrico. Any other entity which may seek to dispose of its own waste streams in a CCDD operation would have to propose a site-specific rule to the Board, and demonstrate that such disposal in a CCDD operation is appropriate. That procedure follows exactly the legislature's scheme in the Act: giving the Board the authority, upon adequate proof, to "make different provisions as required by circumstances for different contaminant sources." 415 ILCS 5/27(a) (2005). The motion to dismiss must be denied.

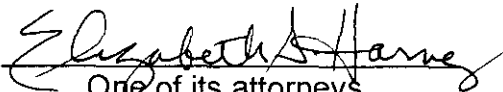
³ The justification for allowing the perlite wastes to be disposed of at a CCDD operation is set forth in the petition for site-specific rule.

CONCLUSION

Silbrico had complied with the service requirements of Section 102.208 of the Board's procedural rules. Further, the Board has the statutory authority, pursuant to Section 27(a), to grant Silbrico's proposed site-specific rule. Therefore, the motion to dismiss must be denied.

Respectfully submitted,

SILBRICO CORPORATION

By: 
One of its attorneys

Dated: October 27, 2005

Elizabeth S. Harvey
Michael J. Maher
Swanson, Martin & Bell, LLP
One IBM Plaza, Suite 3300
330 North Wabash Avenue
Chicago, Illinois 60611
Telephone: (312) 321-9100

ILLINOIS POLLUTION CONTROL BOARD
September 1, 2005

IN THE MATTER OF:)
)
PROPOSED SITE SPECIFIC WASTE) R06-8
REGULATION APPLICABLE TO) (Rulemaking - Water)
SILBRICO CORPORATION (35 ILL. ADM.)
CODE PART 810))

ORDER OF THE BOARD (by T.E. Johnson):

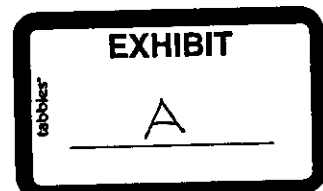
On July 19, 2005, the Board received a rulemaking proposal submitted by Silbrico Corporation (Silbrico) pursuant to Section 27 of the Illinois Environmental Protection Act (Act). 415 ILCS 5/27 (2004). Silbrico seeks a site-specific rule allowing it to dispose of nonhazardous, inert waste generated at a manufacturing facility located in Cook County at a "construction and demolition debris" facility. The petition was accompanied by a motion to waive the 200-signature requirement of 35 Ill. Adm. Code 102.202(f). Silbrico simultaneously filed a petition for variance concerning the same manufacturing facility that the Board docketed as PCB 06-11.

Silbrico was founded in 1946 and is located at 6300 River Road, Hodgkins, Cook County. Silbrico manufactures products using perlite, a volcanic rock that expands up to 20 times when heated. Silbrico's product line includes insulation, filter aids, filler and soil conditioner. Perlite soil conditioner is the little white kernels found in potting soil. Wastes are generated from off-specification product and fugitive emissions captured by the bag house and housekeeping. Wastes are currently disposed of at a non-hazardous waste landfill. Pet. at 1.

Silbrico asserts that due to the inert and nonhazardous characteristic of the off-specification perlite and the fugitive perlite (collectively waste perlite), it seeks to dispose of these wastes at a "clean fill" facility that accepts only clean construction and demolition debris. Pet. at 1-2. Silbrico asserts that allowing the disposal of the waste perlite at a "clean fill" facility would save valuable space in municipal waste landfills and result in significant cost savings, while posing no environmental violation or threat. Pet. at 2. The petition for variance seeks authorization for Silbrico to dispose of the waste while the petition for site-specific rule is pending. *Id.*

Silbrico proposes that the site-specific rule be added to Part 810 as new section 35 Ill. Adm. Code 310.105. Pet. at 2. Silbrico intends the regulation to allow the waste perlite from its Hodgkins facility to be disposed of in a "clean fill" facility that accepts only "clean construction and demolition debris" as defined at 415 ILCS 5/3.160(b) (2004). Pet. at 3.

In its statement of reasons, Silbrico asserts that the continued disposal of the waste perlite at a nonhazardous waste landfill imposes an unreasonable hardship on Silbrico. Pet. at 5. Silbrico asserts that the both forms of waste perlite are nonhazardous waste streams that pose no threat to the environment. Pet. at 6. Silbrico asserts that no environmental harm or impact on human health will result if disposal in a "clean fill" facility is allowed. Pet. at 7. Silbrico



contends that perlite is a naturally occurring rock and that the expansion product does not add any chemical or constituents to the rock. Pet. at 6. Further, Silbrico asserts that the Illinois Environmental Protection Agency (Agency) has already determined that the waste perlite is not a treat to human health or the environment when landfilled in a nonhazardous waste landfill. *Id.*

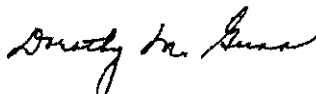
Silbrico asserts that benefits of disposal in a "clean fill" facility include conservation of valuable space in nonhazardous waste landfill, flexibility in arranging for disposal sites, reduced trucking distances, reduced chances of traffic accident and less air pollution based on fewer miles traveled. Pet. at 7. Silbrico estimates that it will see a cost savings of at least \$20,000 to \$25,000 per year if a site-specific rule is adopted. *Id.* Silbrico contends that the benefits coupled with the fact that disposal in a "clean fill" facility has no environmental impost and poses no threat to human health or safety, support the grant of the requested rule. *Id.* Silbrico asserts that compliance with the general rule is economically unreasonable especially when balanced against the benefits of the rule and the lack of environmental impact. *Id.*

Silbrico's proposal, including its statement of reasons and the full text of the proposed rule language, is available through the Clerk's Office in Chicago (312-814-3620) and on the Board's Web site (www.ipcb.state.il.us) using the Clerk's Office On-Line or "COOL."

The Board finds that the proposal satisfies the content requirements of the Act and the Board's procedural rules for rulemaking proposals. The Board grants Silbrico's motion to waive the signature requirement, and accepts the proposal for hearing. The assigned hearing officer is directed to proceed expeditiously under the rulemaking provisions of the Act (415 ILCS 5/27, 28 (2004)) and the Board's procedural rules. 35 Ill. Adm. Code 102.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 1, 2005, by a vote of 5-0.



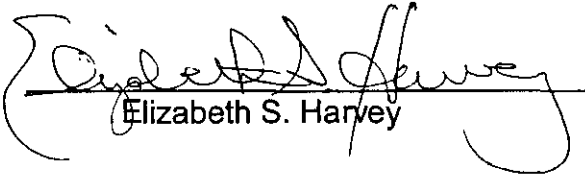
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

AFFIDAVIT

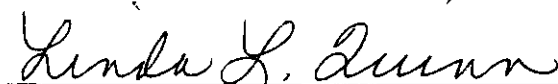
I, Elizabeth S. Harvey, being over the age of 21 and having been duly sworn on oath, hereby state the following, based on personal knowledge:

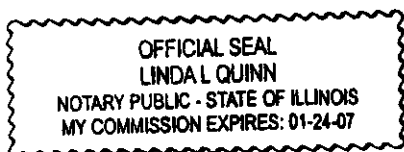
1. I am counsel for petitioner Silbrico Corporation in *In re Proposed Site Specific Waste Regulation Applicable to Silbrico Corporation*, pending before the Board as R06-08.
2. The Attorney General's motion to dismiss that petition was received in my office on October 13, 2005.
3. If called upon, I am competent to testify to these matters.

FURTHER AFFIANT SAYETH NOT.


Elizabeth S. Harvey

SUBSCRIBED and SWORN to before me this 26th day of October, 2005.


Notary Public



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October 14, 2005

Division Chief
Environmental Enforcement
Office of the Attorney General
188 West Randolph Street
20th Floor
Chicago, Illinois 60601

COPY

**Re: *Proposed Site Specific Waste Regulation
Applicable to Silbrico Corporation***
R06-08

Division Chief:

Pursuant to 35 Ill. Adm. Code 102.208 and 101.304(g)(3), enclosed please find a copy of Silbrico's petition for site-specific rule, pending before the Pollution Control Board.

Please call me if you have any questions.

Very truly yours,

SWANSON, MARTIN & BELL, LLP

COPY

Elizabeth S. Harvey

ESH:jp

Enclosure

cc: Christopher P. Perzan
Office of the Attorney General
(w/enc.)



SWANSON, MARTIN & BELL, LLP

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October 26, 2005

COPY

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Illinois Department of Natural Resources
524 S. Second Street
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**Re: *Proposed Site Specific Waste Regulation
Applicable to Silbrico Corporation***
R06-08

Office of Legal Services:

Pursuant to 35 Ill. Adm. Code 102.208 and 101.304(g)(3), enclosed please find a copy of Silbrico's petition for site-specific rule, pending before the Pollution Control Board.

Please call me if you have any questions.

Very truly yours,

SWANSON, MARTIN & BELL, LLP

COPY

Elizabeth S. Harvey

ESH:jp

Enclosure

