


BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED SITE SPECIFIC WASTE) R06-08
WASTE REGULATION APPLICABLE) (Site-specific rulemaking -
TO SILBRICO CORPORATION) land)
(35 Ill. Adm. Code Part 810))

NOTICE OF FILING

TO: Attached service list

PLEASE TAKE NOTICE that we have on November 3, 2005, electronically filed the attached MOTION FOR LEAVE TO FILE REPLY and REPLY TO RESPONSE TO MOTION TO DISMISS with the Clerk of the Illinois Pollution Control Board, copies of which are hereby served upon you.


CHRISTOPHER P. PERZAN
Assistant Attorney General

Office of the Attorney General
Environmental Bureau
188 W. Randolph Street, 20th Floor
Chicago, Illinois 60601
312 814-3532

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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MOTION FOR LEAVE TO FILE REPLY

NOW COMES the PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and for its Motion for Leave to File Reply, states and alleges as follows:

1. The rules of the Illinois Pollution Control Board do not ordinarily contemplate parties filing replies to responses. However, in this instance, for the following reasons, the Attorney General's Office requests leave to file the attached reply.
2. In Petitioner Silbrico Corporation's Response to Motion to Dismiss, the Petitioner makes an argument that appears to change the basis for the Petition. In the Petition, the Petitioner stated that "Silbrico seeks this site-specific rule to allow it to dispose of waste streams as 'clean construction and demolition debris.'" Petition at 6. That language is a fairly unambiguous request for the Board to classify its wastes "as 'clean construction and demolition debris.'"
 3. However, in response to the Motion to Dismiss, the Petitioner now argues that it is not requesting that the Board classify the material as clean construction and demolition debris, but as analogous or similar to clean construction and demolition debris and characterizes the Motion to Dismiss as having misunderstood the Petition. Response at 4-5.

4. The Attorney General hereby requests leave to file the brief attached Reply in order to address this apparent change in rationale for the Petition.

5. This Motion will not prejudice any party to this proceeding, but will ensure that the Board has the benefit of a full and complete discussion of the issues.

WHEREFORE the PEOPLE OF THE STATE OF ILLINOIS requests that the Board grant this Motion for Leave to File Reply and accept the attached Reply.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by LISA MADIGAN, Attorney General of
the State of Illinois

By: 

Christopher P. Perzan
Assistant Attorney General

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Environmental Bureau
188 W. Randolph Street, 20th Floor
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312 814-3532
312 814-2347 (fax)

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REPLY TO RESPONSE TO MOTION TO DISMISS

NOW COMES the Respondent PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and for its Reply to Response to Motion to Dismiss, states and alleges as follows:

I. PETITION IS WITHOUT AUTHORITY WHETHER IT SEEKS TO CLASSIFY MATERIALS AS CCDD OR AS SIMILAR TO CCDD

The Petitioner, in its Response, appears to change the request contained within the Petition. Rather than categorizing the materials as “clean construction and demolition debris” (“CCDD”), as the Petition clearly tries to do (see Petition at 6), the Petitioner now argues that it is only asking the Board to consider its materials “similar” to CCDD. This does not solve the Petitioner’s problem. Under either scenario, the Petition is without authority.

The Petitioner correctly acknowledges in numerous statements that the off-specification and fugitive perlite is clearly a waste, and states that it has historically been disposed of as such. “Waste” is defined at Section 3.535 of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/3.535, and must be managed and disposed of in accordance with requirements of the Act.¹ Some materials within the Act’s definition of

¹ In a related variance proceeding, the Petitioner appears to be confused as to why wastes are required to be disposed of at landfills or other appropriate facilities. See *Silbrico Corporation v. IEPA*, PCB 06-11, Amended Petition for Variance at 3. The Petitioner discusses the Act definitions of industrial process waste and pollution control waste and states that it cannot find a requirement for those wastes to be

CCDD are, if they are reused under limited circumstances, taken out of the definition of waste by operation of Section 3.160(b).

The Petitioner is requesting the Board exempt its waste streams from the regulation as "waste" on the mere basis of an analogy to CCDD. However, no authority for this request exists, whether accomplished by categorizing the wastes as CCDD through a rule, or by creating a new category of manufacturing wastes potentially removed from regulation because they are *similar* to CCDD.

In Section 3.160(b) of the Act the Legislature created a narrow exception to the scope of regulated wastes for certain materials that constituted CCDD and that were managed in specified ways. It did not create a potential third category of materials that can be removed from regulation as wastes if they are "similar" to CCDD. Specifically, the provision relied upon by the Petitioner, Section 3.160(b), provides no basis for the Board to add other materials to its waste exception by regulation if they are found to be *similar* to CCDD. The Petitioner now asks the Board to read such a provision into the Act. If possible, it appears that there is even less authority for this proposition than for the use of a rule to reclassify the manufacturing wastes as CCDD.

Nothing in the general rulemaking authority of Section 27 creates sufficient authority for this proposed rule. The Petitioner ignores the first sentence of Section 27 in quoting the provision in the Response. Response at 3. Section 27 provides for substantive regulations "as described in this Act." 415 ILCS 5/27. Again, there is no provision in the Act for exempting wastes that are *similar* to CCDD. Section 27 is not

disposed of in a landfill. To clear this up, industrial process waste and pollution control waste are two components of special waste, which is a subcategory of waste. Special wastes are subject to certain management requirements in addition to those applicable to other wastes. All wastes, as defined in Section 3.535, must be disposed of at a facility which meets the requirements of the Act and Board regulations. See 415 ILCS 5/21(a), (d) & (e). That includes special and non-special wastes.

blanket authority for the proposal of any regulation; regulations have to be consistent with the provisions in the Act. Where the Act sets out clear statutory standards for the regulation of wastes with a limited exception, the Petitioner cannot through a rule seek to create a new exception to the statutory scheme where one is not provided for in the Act.

The Petitioner is simply incorrect in asserting that there would be no conflict between the proposed rule and the Act. The conflict would explicitly arise if the Board issues a rule stating that a waste does not have to be disposed of as a waste when, under the Act, it is a waste and must be managed as such. That is exactly what the Petitioner's proposed language does: *it provides that "waste streams" may be disposed of at a facility that is not required to have a waste management permit or meet requirements of a solid waste management facility.* Petition at 3. Such language would set up an explicit conflict between the rule and the Act.

The fact that this request is characterized as site-specific does not make a difference and is somewhat misleading. This Petition would impermissibly expand the *authority* to remove materials from regulation as wastes. To grant this Petition, the Board would have to find within the Act the authority to "delist" wastes if they are similar to clean construction and demolition debris. This expansion of authority is unauthorized, whether it extends to one site alone, or to multiple sites. Furthermore, the Petition really isn't site-specific. Petitioner does not identify or limit disposal to any specific disposal site. Presumably it would be able to dispose of these materials at any "clean fill" site.²

² In a related variance petition, the Board previously pointed out that the Petitioner did not define a "clean fill" facility. *Silbrico Corporation v. IEPA*, PCB 06-11 (September 1, 2005). The lack of definition is also an issue in the present matter, which the AGO reserves the right to address should the Board allow this Petition to proceed.

With regard to another issue related to the pending variance, the Petition states that this site-specific rulemaking would be unnecessary if the Board grants the variance. Petition at 2, note 1. Since the Petitioner clearly seems to be requesting permanent relief, this statement appears to be incorrect, as

The Petition is site-specific only as to where the materials are generated, but is not site-specific as to where or how the Petitioner will dispose of the materials.

Finally, the Petitioner characterizes the Attorney General's concerns regarding the potential precedential value of this Petition as "hysteria." With all due respect, as the Office of the Attorney General, unfortunately, has had extensive enforcement experience at construction and demolition debris sites throughout this State, it is likely in a better position than Silbrico Corporation to assess the potential scope and impact of the expansion of the waste exemption sought in the Petition. These concerns are not merely theoretical. Materials that would otherwise be wastes do not become CCDD by any action of the Board. Parties simply manage their materials in accordance with the statutory language in order to take advantage of the waste exemption for CCDD. No Board action is necessary. If the proposed exemption were found to exist and extended to "similar" materials, why would it not also be self-implementing for similar materials? The Petitioner would likely state that its proposal limits the new exemption to site-specific decisions made by the Board. But there is no such provision in the Act. Similarly, this Petition would not, by definition, result in a rule of general applicability requiring a party to seek a Board determination that a waste is exempted from regulation as similar to CCDD.

Even if all subsequent parties were to seek site-specific rulemakings declaring their materials to be "similar" to CCDD, that still would constitute an unauthorized expansion of the waste exception in Section 3.160(b) of the Act. The Act does not

variances are limited in the length of time they may be in effect. However, the Petitioner seems to acknowledge that in the Amended Petition for Variance by noting that the variance would last until the disposition of the site-specific rulemaking. Therefore, a dismissal of this Petition for lack of authority would also appear to be dispositive as to the variance petition as well.

provide a mechanism, with appropriate standards and procedures, which would authorize the Board to determine that certain materials are sufficiently "similar" to CCDD and exempt them from regulation as wastes. The Petition asks the Board to go too far in attempting to set up a new waste exemption scheme. This simply further illustrates the lack of authority for this Petition.

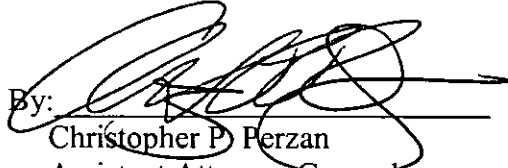
II. CONCLUSION

The Petition is without sufficient authority and would result in an invalid rule. For the reasons stated in the Motion to Dismiss and in this Reply, the Board should dismiss the pending Petition.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney General
of the State of Illinois

By:

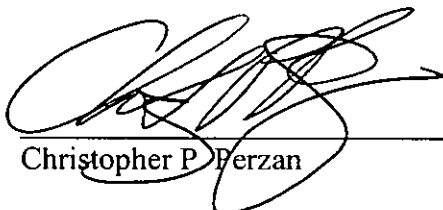


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CERTIFICATE OF SERVICE

I, Christopher P. Perzan, hereby certify that I have served the attached MOTION FOR LEAVE TO FILE REPLY and REPLY TO RESPONSE TO MOTION TO DISMISS upon the parties listed in the attached Service List by depositing the same in the U.S. Mail on November 3, 2005 on or before 5 pm at 100 W. Randolph Street, Chicago, Illinois.



Christopher P Perzan