

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

NOV 22 2005

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)

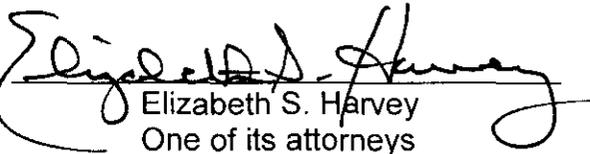
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 22nd day of November 2005, the following were filed with the Illinois Pollution Control Board: **Petitioner Silbrico Corporation's Response to Motion for Leave to File a Reply and Motion for Leave to File Surreply, and Silbrico's Surreply**, attached and herewith served upon you.

SILBRICO CORPORATION

By: 
Elizabeth S. Harvey
One of its attorneys

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

CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of Petitioner Silbrico Corporation's Response to Motion for Leave to File a Reply and Motion for Leave to File Surreply, and Silbrico's Surreply 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 November 22, 2005.



Jeanette M. Podlin

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.

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

Mark V. Gurnik, Assistant Counsel
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Department of Commerce and Economic Opportunity
Office of Legal Counsel
620 East Adams Street
Springfield, Illinois 62701-1615

Christopher P. Perzan
Environmental Enforcement
Office of the Attorney General
188 West Randolph Street
20th Floor
Chicago, Illinois 60601

John Kittle, Hearing Officer
Illinois Pollution Control Board
2125 South First Street
Champaign, Illinois 61820

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

RECEIVED
CLERK'S OFFICE

NOV 22 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)

RESPONSE TO MOTION FOR LEAVE TO FILE A REPLY AND
MOTION FOR LEAVE TO FILE SURREPLY

Petitioner SILBRICO CORPORATION ("Silbrico"), by its attorneys Swanson, Martin & Bell, LLP, hereby responds to the Attorney General's motion for leave to file a reply. As part of its response, Silbrico seeks leave to file the attached surreply.

1. On November 3, 2005, the Attorney General filed a motion for leave to file a reply to Silbrico's response to the Attorney General's motion to dismiss this petition for site-specific rule. Silbrico received that motion on or about November 10, 2005.¹

2. The Attorney General seeks leave to file a reply to Silbrico's response. The Attorney General asserts that Silbrico's response "appears to change the basis for the Petition," and thus seeks to respond to that alleged change in rationale.

3. Silbrico disagrees that its response in any way changed the basis for the site-specific petition. However, Silbrico has no objection to the filing of the Attorney General's reply, if Silbrico is allowed to file the attached surreply.

4. The surreply is necessary for Silbrico to address the arguments in the Attorney General's reply. In addition to misunderstanding Silbrico's position, the reply includes additional arguments not made in the motion to dismiss. Silbrico seeks the

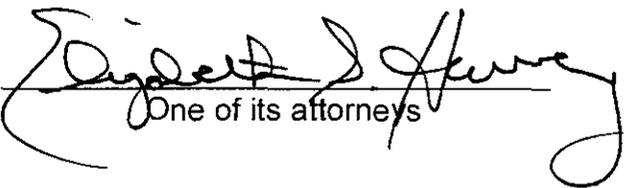
¹ The Board's rules allow for a response to a motion within 14 days of service of that motion. 35 Ill.Adm.Code 101.500(d). Therefore, this response is timely filed.

opportunity to respond to those additional arguments. Silbrico will be prejudiced if it cannot respond to the Attorney General's claims.

5. Silbrico agrees with the Attorney General that the filing of the reply and Silbrico's surreply will "ensure that the Board has the benefit of a full and complete discussion of the issues." Therefore, Silbrico has no objection to the filing of the Attorney General's reply, if Silbrico is similarly allowed to file the attached surreply. If the Board decides not to allow Silbrico to file the surreply, Silbrico objects to the Attorney General's motion for leave to file a reply.

Respectfully submitted,

SILBRICO CORPORATION

By: 
One of its attorneys

Dated: November 22, 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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

NOV 22 2005

STATE OF ILLINOIS
Pollution Control Board

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

SILBRICO'S SURREPLY

Petitioner SILBRICO CORPORATION ("Silbrico"), by its attorneys Swanson, Martin & Bell, LLP, hereby submits its surreply to the Attorney General's reply. The filings address the Attorney General's motion to dismiss Silbrico's petition for site-specific rule.

ARGUMENT

The Attorney General claims the Board lacks authority to grant Silbrico's petition for site-specific rule, regardless of whether Silbrico seeks to classify its waste streams as "clean construction and demolition debris" (CCDD), or as similar to CCDD. Once again, the Attorney General's arguments misunderstand Silbrico's position and, in some cases, show a lack of understanding of the Board's processes.

There are, fortunately, three issues on which the Attorney General and Silbrico are in agreement. First, Silbrico's off-specification perlite and fugitive perlite are indeed wastes.¹ Second, those two waste streams do not fall under the definition of CCDD.

¹ The Attorney General improperly addresses, in its reply, several issues from the pending variance proceeding. *Silbrico Corporation v. IEPA*, PCB 06-11. Addressing the variance petition in the context of this site-specific proceeding is improper and irrelevant, and all references to the variance petition should be ignored. However, Silbrico must address the substantive claim raised by the Attorney General. The Attorney General asserts that Silbrico is "confused as to why wastes are required to be disposed of at landfills or other appropriate facilities." Reply, at footnote 1. It is the Attorney General who is confused. The references in the amended petition for variance are made in response to the Board's inquiry regarding regulatory provisions which require the landfilling of industrial process wastes and pollution

Third, regulations adopted by the Board, pursuant to Section 27 of the Act, must be consistent with the provisions of the Act. Unfortunately, those are apparently the only issues on which the Attorney General and Silbrico agree. The Attorney General continues to misunderstand or mischaracterize Silbrico's position.

The issue here is really quite simple: does Section 27(a) of the Act allow the Board to hear petitions for site-specific rule which seek approval of an alternate method of disposal of a waste, where that alternate method is established by statute? Silbrico believes that Section 27(a) does indeed give the Board that authority.

Section 27(a) limits the Board's rulemaking authority to "substantive regulations as described in the Act." In Section 22 of the Act, the legislature has granted the Board broad authority to adopt regulations to promote the purposes of Title V: Land Pollution and Refuse Disposal. (See 415 ILCS 5/22.) New Section 22.51 of the Act, which establishes requirements for "CCDD fill operations" is part of Title V of the Act. Thus, the Board has the specific authority to adopt regulations relating to CCDD fill operations. As stated in Section 27(a), the generality of the Board's authority to adopt regulations "as described in the Act" is "limited only by the specifications of particular classes of regulations elsewhere in this Act." (415 ILCS 5/27(a).) Silbrico's requested site-specific rule seeks to allow the disposal of its two perlite waste streams 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." (See Petition for site-specific, p. 3, with modification explained in footnote 2, page 4 of Silbrico's response in opposition to the

control wastes. Silbrico's statements in its amended variance petition address the apparent lack of a specific regulation which requires the landfilling of such wastes. The Attorney General has not pointed to any regulation with that requirement. Additionally, the Attorney General fails to note that Silbrico specifically states that "there is no dispute... that these two waste streams must currently be so disposed." Amended petition for variance, page 3.

motion to dismiss.) Silbrico's requested site-specific rule falls within the Board's rulemaking authority under Sections 22 and 27(a) of the Act.

The Attorney General continually asserts that the requested site-specific rule is in conflict with the Act, but never explains or demonstrates that conflict. Saying that there is a conflict between the two does not create a conflict. Indeed, there is no conflict. Silbrico seeks a rule which, if granted, would allow it to dispose of two waste streams in a regulated CCDD operation. Regulated CCDD operations are specifically provided for, and regulated by, Section 22.51 of the Act. Silbrico contends that its two perlite waste streams are similar to CCDD, so that those wastes can be safely disposed of at a CCDD operation. There is no conflict between the proposed rule and the Act.

The Attorney General apparently misunderstands the category broadly termed site-specific rules, when it claims that Silbrico's requested rule "really isn't site-specific" because it does not identify or limit disposal to any specific disposal site. The category of rules known as "site-specific" rules is based upon the second sentence of Section 27(a), which specifically allows the Board to "make different provisions as required by circumstances for *different contaminant sources*." (415 ILCS 5/27(a) (emphasis added).) Thus, a "site-specific" rule is not always technically site-specific in the sense of one physical disposal site: it is "site-specific" in the sense that it applies only to one "contaminant source." Here, Silbrico seeks a rule which applies only to the two perlite waste streams from Silbrico's facility in Hodgkins, Cook County, Illinois -- a "contaminant source." (See Petition for site-specific, p. 3, with modification explained in footnote 2, page 4 of Silbrico's response in opposition to the motion to dismiss.) This

request is well within the scope of the Board's Section 27(a) authority to adopt a rulemaking a "different provision" for "different contaminant sources."

The Attorney General also spends almost a whole page claiming that somehow this proposed rule, applicable only to Silbrico's two waste streams from Silbrico's facility, will cause an explosion of other waste generators improperly using CCDD operations for disposal. (Reply, p. 4.) With all due respect, the Attorney General has apparently confused Silbrico's request for a site-specific rule with enforcement issues which may arise as a result of others, improperly and without authorization, using CCDD operations for disposal of non-CCDD. The Attorney General's experience in enforcement is simply irrelevant to the issue here: does the Board have the authority to grant Silbrico's proposed rule? There have been no claims, to Silbrico's knowledge, that Silbrico has somehow violated any provision of the Act or the regulations. Whether or not others, unrelated to Silbrico, ignore the provisions of the Act and regulations has no bearing on the Board's authority to grant the requested rule.²

Perhaps the Attorney General's curious focus on others using the "waste exemption" possibly granted to Silbrico grows out of its continued insistence on calling Silbrico's proposed site-specific rule a "waste exemption." Silbrico is not requesting a "waste exemption": it is requesting a rule that would allow it (and only it) to dispose of two specific waste streams in a CCDD operation authorized by statute. Simply put, Silbrico's request, by its specific terms and proposed language, is limited to Silbrico's two perlite waste streams. It would not apply to any other generator of any type of

² It is inappropriate to attempt to link Silbrico's request with any entity which may dispose of waste in violation of the Act. Silbrico has complied with all statutory and regulatory provisions, and is indeed pursuing this site-specific in order to remain in compliance with the Act. If the requested rule is not granted, Silbrico will, of course, continue to dispose of its perlite waste streams in a permitted nonhazardous landfill.

waste. Silbrico is puzzled by the Attorney General's assertion that there is no provision in the Act which would limit the "new exemption" to site-specific decisions made by the Board. The Attorney General is simply incorrect. This is a request for a site-specific rule. If granted, it would apply ONLY to Silbrico, and not to others. The requested rule would not create a broad "waste exemption." Any other generator attempting to use Silbrico's site-specific rule as justification for disposal of waste in a CCDD operation would be subject to enforcement by the Attorney General.

Finally, Silbrico must address the Attorney General's second footnote regarding Silbrico's variance petition. (Reply, footnote 2 at pp 3-4.) As noted above, addressing the variance petition in the context of the pending motion to dismiss the site-specific petition is inappropriate, and should be ignored. However, the statements demonstrate a lack of comprehension of Silbrico's requests, so Silbrico will address those statements in order to clarify the record.

The Attorney General claims that Silbrico has made inconsistent statements about the need for the site-specific rule if the variance is granted, and vice versa. This is incorrect. Silbrico's variance petition seeks alternate relief: either 1) a finding that Silbrico's two perlite waste streams are analogous to CCDD, and can be disposed of in a CCDD operation, or 2) a variance which would temporarily allow Silbrico to so dispose of those waste streams while the site-specific is pending. The first request is in the nature of a declaratory judgment, which has long been an accepted request in a variance petition. If, and only if, the Board should grant the first requested relief (a finding that the waste streams are analogous to CCDD and can be disposed of as such), that relief would be a permanent declaration, and the site-specific rule would be

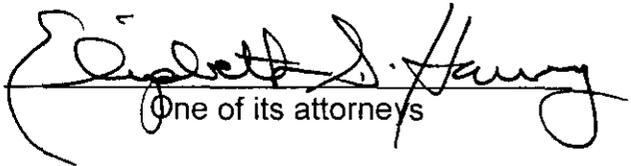
unnecessary. If, however, the Board does not grant that first requested relief, Silbrico has sought the temporary relief of a variance, while the site-specific rule is pending. In that case, the site-specific petition would be necessary. This is merely the concept of alternative relief.

CONCLUSION

The Board has the authority to grant Silbrico's requested site-specific. Therefore, the motion to dismiss must be denied.

Respectfully submitted,

SILBRICO CORPORATION

By: 
One of its attorneys

Dated: November 22, 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