

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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DEC 16 2005

STATE OF ILLINOIS  
Pollution Control Board

SILBRICO CORPORATION )  
Petitioner, )  
 )  
v. )  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY )  
Respondent. )

PCB 06-011  
(Variance - Land)

NOTICE OF FILING

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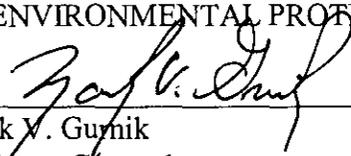
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PLEASE TAKE NOTICE that on this 13<sup>th</sup> day of December 2005, I have filed with the Office of the Clerk of the Pollution Control Board the **RECOMMENDATION** of the Illinois Environmental Protection Agency in the above titled matter, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By:

  
Mark V. Gurnik  
Assistant Counsel  
Division of Legal Counsel

DATE: December 13, 2005  
Illinois Environmental Protection Agency  
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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**RECOMMENDATION**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Respondent"), by its attorney, Mark V. Gurnik, and pursuant to Section 37 of the Act (415 ILCS 5/37 (2004)) and 35 Ill. Adm. Code 104.216, hereby submits its Recommendation regarding Silbrico Corporation's ("Silbrico" or "Petitioner") petition for a variance allowing it to dispose of waste off-specification perlite, and waste fugitive perlite from its baghouse dust collection, at a clean construction and demolition debris ("Clean C&DD") fill operation.

**INTRODUCTION**

Silbrico filed its Variance Petition ("Variance" or "Petition") in this matter on July 19, 2005. The Petition seeks a variance allowing Silbrico to dispose of two of its waste streams, off-specification perlite, and fugitive perlite from its baghouse dust collection, at Clean C&DD fill operations. More specifically, it states that it seeks a variance from Parts 810 through 817 of the Pollution Control Board's regulations, to the extent that those Parts require the disposal of off-specification perlite and fugitive perlite waste streams in a non-hazardous waste landfill. Alternatively, Silbrico requests declaratory relief from the Board that its off-specification perlite and fugitive perlite waste streams are analogous to Clean C&DD and can be disposed of at a Clean C&DD fill operation.

On September 1, 2005, the Illinois Pollution Control Board (“Board”) issued an Order finding that the Petition was insufficient, and directed Silbrico to file an Amended Petition to address issues outlined in the Board Order. The Amended Petition was filed with the Board. The Illinois EPA received the Amended Petition October 31, 2005.

### **INVESTIGATION**

The Environmental Protection Act (“Act”) and the Board’s procedural rules provide that upon receipt of a petition for variance, the Illinois EPA is to investigate the petition and consider the views of persons who might be adversely affected by the granting of the variance (415 ILCS 5/37(a) (2004) and 35 Ill. Adm. Code 104.216(a)). Accordingly, the Illinois EPA provided notice of the Petition on August 4, 2005, to local governmental officials in the area of Silbrico’s facility. It also published a notice of the Petition in the Lawndale Bilingual News, a local newspaper of general circulation in Cook County, on August 4, 2005. No comments or inquiries regarding the Variance Petition were received from the public or from local governmental officials.

The Illinois EPA also reviewed the technical merits of the Petition. Copies of the Petition and the Amended Petition were provided to the Illinois EPA, Bureau of Land, for review and consideration. Comments from the Bureau of Land are incorporated into this recommendation.

### **RECOMMENDATION**

Section 37(b) of the Act (415 ILCS 5/37(b) (2004)) and 35 Ill. Adm. Code 104.216(b) direct the Illinois EPA to provide the Board with a recommendation on the disposition of the Variance Petition. The rule also instructs the Illinois EPA to address a list of topics in its recommendation. In compliance with that instruction, the Illinois EPA states as follows:

1. Investigation of the Petition:

As stated above, the Illinois EPA provided notice of the Petition to local governmental officials. It also published a notice in a newspaper of general circulation in Hodgkins, Cook County, Illinois. No comments or inquiries were received from the public or from local governmental officials. The Illinois EPA, Bureau of Land, also reviewed the Petition and Amended Petition to review the facts, allegations and conclusions set forth by Silbrico. Comments from the Illinois EPA are incorporated into this Recommendation.

2. Location of Nearest Air Monitoring Station:

This Variance deals with the general disposal requirements for two of Silbrico's waste streams. Although Silbrico identifies a few nearby facilities that it might utilize for the disposal of the waste streams, it does not identify a specific facility where it intends to send the waste. Therefore, a determination of the nearest air monitoring station to the ultimate point of disposal for the waste off-specification perlite and the waste fugitive perlite cannot be made until Silbrico clearly identifies the destination for the disposal of the waste streams.

3. Agency Comments on facts presented in the Petition:

The Board requested Silbrico to describe dust control measures used to prevent the waste fugitive perlite from becoming airborne and blowing off of the disposal site. As part of its response, Silbrico concludes that regulations adopted by the Board for the operation of clean construction and demolition debris fill operations will address dust controls for the clean fill operations (Amended Petition at P.5). These rules are currently not in place. It is rather premature and speculative to say exactly what requirements the rules will contain or when they will be adopted. While the final version of the rules may very well contain dust control

requirements for Clean C&DD fill operations, the deadline for adopting the rules is September 1, 2006. Rules can go through many changes between the time they are proposed and when they are ultimately adopted, and it is uncertain whether the new rules will include dust control requirements sufficient to deal with fine light materials like waste fugitive perlite.

Silbrico also cites to Legislative Declarations in Section 20(d)(4) of the Act (415 ILCS 5/20(d)(4) (2004)) in support of its request for approval of its request to dispose of its perlite waste streams in a Clean C&DD fill operation (Amended Petition at P. 4). The citation is inappropriate because Section 20(d)(4) deals with hazardous waste monofills. Clean C&DD fill operations are not monofills, nor are they permitted to accept any hazardous wastes.

4. Additional Relevant Facts to the Disposition of the Petition:

The Illinois EPA is not aware of any additional allegations or facts that are relevant to this proceeding. The Illinois EPA also is not aware of any past and pending enforcement actions in the State of Illinois involving Silbrico.

5. Illinois EPA estimate of Compliance Costs for the Petitioner:

Silbrico has stated that it currently spends \$40,000 to \$50,000 per year disposing of its waste off-specification perlite and waste fugitive perlite at non-hazardous waste landfills. It has also stated that it anticipates that its costs will decline 50% by disposing of the same waste in a Clean C&DD fill operation. The Illinois EPA will defer to Silbrico's figures regarding the estimated cost of compliance.

6. Estimated injury due to a grant of the Variance upon public:

The injury that the granting of the Variance requested by Silbrico would have is to the regulatory framework of the Act and Board regulations. The Variance seeks Board approval to

dispose of waste in a manner and at a location that is otherwise prohibited by the Act. The Illinois Legislature has determined that Clean C&DD, if used as specified in the Section 3.160 of the Act, is not a waste (415 ILCS 5/3.160 (2004 as amended)). Furthermore, Clean C&DD fill operations do not require local siting approval. Yet the disposal of waste in one of these facilities would subject the site to the regulatory controls intended to ensure that a landfill is properly located, designed and operated. Expanding the list of materials that can be placed in a Clean C&DD fill operations goes beyond what the Illinois Legislature has approved through its definition of Clean C&DD at Section 3.160 of the Act (415 ILCS 5/3.160 (2004 as Amended)). Granting the Variance will also frustrate the local siting approval process by allowing wastes to be placed in facilities that have not sought and obtained local siting approval.

7. Analysis of Applicable Federal Law.

The Illinois EPA is not aware of any federal laws or regulations applicable to the Petition or Silbrico's waste streams that would be inconsistent with the requested Variance.

8. Status of Pending Permits or Permit Applications:

The Illinois EPA has no permit applications pending for Silbrico's waste streams, and is not aware of any permits associated with or affected by the requested Variance.

9. Allegations of facts relevant to conditioning a grant of Variance:

Although the Illinois EPA recommends denial of the Variance, if the Variance is granted, conditions regarding the control of dust from the waste are needed. There are no regulatory dust control requirements for Clean C&DD fill operations at this time. The Illinois EPA recommends that if the Variance is granted, the waste off-specification perlite and the waste fugitive perlite should only be allowed to be disposed of at facilities with written dust control procedures in

place and being implemented.

10. Supporting Documents or Legal Authorities:

The Illinois EPA has not included any additional supporting documentation to support its recommendation. All legal citations have been provided in the text of this recommendation.

11. Agency Recommendation:

The Illinois EPA recommends that the Variance requested by Silbrico be denied. The Board has stated that "...a variance is... by its very nature, a temporary reprieve from compliance with the Board's regulations, and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter." General Business Forms, Inc. v. Illinois EPA, PCB 95-155, Page 2 (July 18, 1996). Furthermore, the Board has found that where a petitioner is currently in compliance with the Act and Board regulations, it is presumed that continued compliance is neither arbitrary nor unreasonable. JLM Chemicals, Inc v. Illinois EPA, PCB 95-98, Page 7 (September 7, 1995). Silbrico is not seeking a variance to allow it time to return to compliance. It has admitted that it is currently in compliance with all requirements for the disposal of its two waste streams involved in this Variance request. (Petition at Pages 4 and 5). It also commits to resuming disposal of the waste streams in a non-hazardous waste landfill if its request for a Site Specific Rulemaking for the disposal of the waste streams in a Clean C&DD fill operation is denied. (Petition at Page 7). Silbrico's primary justification for seeking permission to drop out of compliance is that it would be more convenient and less costly to dispose of the perlite waste streams in a Clean C&DD fill operation than at a non-hazardous waste landfill. Essentially, Silbrico is asking for the relief sought under its Site Specific Rule, Proposed Site Specific Waste Regulation Applicable to Silbrico Corporation (35 Ill. Adm. Code

810), PCB R06-08, prior to any ruling upon whether the Site Specific Rule will be granted or denied. The Illinois EPA does not believe that this is a satisfactory justification for Silbrico's requested Variance.

The Illinois EPA is also concerned that Silbrico's Petition seeks to effectively amend the requirements and definitions of the Act through a variance rather than seeking to amend the Act through the Illinois Legislature. The Illinois Legislature has given the Board the authority to "...grant individual variances beyond the limitations prescribed in this Act, whenever it is found ... that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a) (2004). This authority does not extend to amending the Act and its statutory definitions. The Illinois Legislature adopted the definition of Clean C&DD in the Act (415 ILCS 5/3.160 (2004 as Amended)) and limited it to certain materials generated from construction and demolition activities. The definition does not include all inert or innocuous materials. Industrial process wastes or pollution control wastes are outside the definition. Granting Silbrico's requested Variance would effectively result in the expansion of the definition through action of the Board rather than the Illinois Legislature.

Silbrico's Petition also creates a serious problem with the regulatory status of any Clean C&DD fill operation that would accept its waste streams. The Act states that no person shall cause or allow the open dumping of any waste. (415 ILCS 5/21(a) (2004)). Open dumping is defined as the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. (415 ILCS 5/3.305 (2004)). Section 21(d) also prohibits any person from conducting any waste-storage, waste treatment or waste disposal operation without a permit granted by the Agency. (415 ILCS 5/21(d) (2004)). Placement of

waste in a Clean C&DD fill operation , which is not a sanitary landfill, would be a violation of Sections 21(a) and 21(d) of the Act. Clean C&DD, if used as set forth in the definition at Section 3.160(b) of the Act (415 ILCS 5/3.160(b) (2004 as Amended)), will not be considered a “waste.”

This exemption does not extend to industrial process wastes or pollution control wastes.

Without expanding the statutory definition of Clean C&DD, and the waste exemption, Silbrico’s waste streams would still be “wastes.” A Clean C&DD fill operation that accepts industrial process waste or pollution control wastes would be a pollution control facility as defined at 415 ILCS 5/3.330 (2004). It would also be required to comply with local siting approval requirements and the location, design or operational standards for sanitary landfills adopted by the Board.

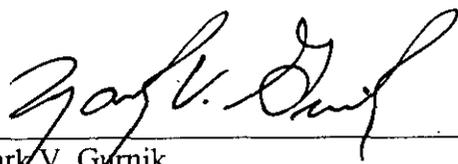
Lastly, Silbrico asks for alternative declaratory relief. It requests that if the Variance is denied, the Board declare that its waste off-specification perlite and waste fugitive perlite are analogous to Clean C&DD. The Illinois EPA believes that this relief is also inappropriate. The definition for Clean C&DD is clear. Clean C&DD must be generated from construction or demolition activities. 415 ILCS 5/3.160(b) (2004 as Amended). If the Illinois Legislature was willing to have the definition encompass all inert wastes and materials from any source, it could have written the definition to include those waste streams. Likewise, if the Illinois Legislature wanted to allow any inert waste to be disposed of in a Clean C&DD fill operation, it could have included language in Section 22.51 of the Act (415 ILCS 5/22.51 (2004 as amended)) to that effect, but it did not. The Board has adopted a definition for “inert waste” at 35 Ill. Adm. Code 810.103, and rules and standards for the design of inert waste landfills. It seems more appropriate for Silbrico’s wastes to be placed in an inert waste landfill instead of contorting the

definition for Clean C&DD and overriding the Legislature to allow industrial process waste and pollution control waste to be placed in a Clean C&DD fill operation.

**CONCLUSION**

The Illinois EPA recommends that Silbrico's Variance Petition be denied. Silbrico is currently in compliance with the Act and Board regulations regarding the disposal of its two waste streams involved in the Petition. It needs no relief to allow it to return to compliance. Furthermore, its waste streams, an industrial process waste and a pollution control waste, are not within the scope of the definition for Clean C&DD as adopted by the Illinois Legislature. Granting the Variance would expand the definition of Clean C&DD beyond what the Illinois Legislature intended. Therefore, the Illinois EPA recommends that the requested relief be denied.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By:   
Mark V. Gurnik  
Assistant Counsel  
Division of Legal Counsel

DATE: December 13, 2005  
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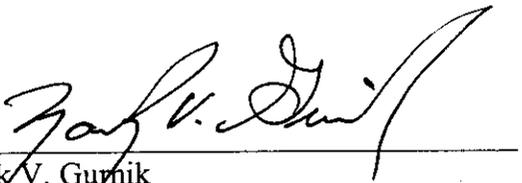
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**PROOF OF SERVICE**

I, Mark V. Gurnik, as an attorney, hereby certify that I caused the attached **Recommendation** to be served upon all parties listed on the attached Notice of Filing via first class U.S. mail on December 13, 2005, from 1021 North Grand Avenue East, Springfield, Illinois, 62794-9276.

  
\_\_\_\_\_  
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