

ILLINOIS POLLUTION CONTROL BOARD
December 15, 2005

IN THE MATTER OF:)
)
PROPOSED SITE SPECIFIC PERLITE) R06-8
WASTE 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) seeking a site-specific rule for its manufacturing facility located at 6300 River Road, Hodgkins in Cook County. Silbrico wants a rule allowing it to dispose of what it characterizes as its nonhazardous, inert perlite waste at a “construction and demolition debris” facility. The Board accepted the proposal for hearing on September 1, 2005.

On October 7, 2005, the Illinois Attorney General’s Office (AGO) filed a motion to dismiss. On October 24, 2005, the Illinois Environmental Protection Agency (Agency) filed a response to the motion to dismiss. Silbrico filed a response to the motion on October 27, 2005. On November 3, 2005, the AGO filed a motion for leave to file a reply to Silbrico’s response, accompanied by a reply. On November 22, 2005, Silbrico filed a motion for leave to file a reply, accompanied by a surreply.

For the reasons set forth below, the Board denies the AGO’s motion to dismiss this rulemaking.

AGO’S MOTION TO DISMISS

In its motion, the AGO asserts that the Board’s rules provide that a rulemaking petition may be dismissed for failure to comply with content requirements or for inadequacy. Mot. at 1. The AGO contends that Silbrico’s petition should be dismissed because its service list includes neither the Department of Natural Resources (DNR) nor the AGO. Mot. at 2.

The AGO asserts that the petition should be dismissed as without statutory authority because Silbrico seeks to have its manufacturing process waste reclassified as producing clean construction and demolition debris. Mot. at 2. The AGO argues that this creates a conflict between the proposed rule and the statutory definition of clean construction and demolition debris. *Id.* The AGO argues that nowhere in the petition does Silbrico even claim that the materials in question are generated from construction or demolition activities, but that the petition specifically asserts that wastes are generated during the manufacturing process. Mot. at 3. The AGO contends that because the material Silbrico seeks to reclassify is not generated by construction or demolition activities, and thus not within the definition of Section 3.160(b) of the Environmental Protection Act (Act), the rulemaking petition cannot be granted consistent with the statute. *Id.*

The AGO maintains that Silbrico cannot amend a statute through a site-specific regulation, and that Silbrico is asking the Board to expand the scope of Section 3.160(b) of the Act through a regulation. Mot. at 3. The AGO concludes that the petition is fatally flawed and asks that the Board dismiss Silbrico's petition. Mot. at 4.

RESPONSES TO MOTION TO DISMISS

The Agency concurs with the AGO's argument that Silbrico has failed to comply with the service requirements contained in the Board's rules. Ag.Resp. at 1. Further, the Agency believes that granting Silbrico's requested rule would be an expansion of the definition of construction and demolition debris as set forth in the Act, and therefore agrees with the AGO that the petition, if granted, would result in an invalid rule. Ag.Resp. at 2.

Silbrico acknowledges that through a clerical oversight, the AGO and the DNR were omitted from the service list for its petition. Resp. at 2. Silbrico asserts that the petition has now been served on both parties. *Id.* Further, Silbrico argues that there is no prejudice to the AGO, the DNR or the citizens by this clerical oversight, and that the oversight is not grounds for dismissal especially as the petition was accepted by the Board. *Id.*

Silbrico asserts that the rulemaking is within the Board's authority as it seeks to have the perlite waste treated as clean construction and demolition debris, not reclassified as clean construction and demolition debris. Resp. at 3. Silbrico contends it does not seek a site-specific regulation that would conflict with the statute. Resp. at 4. Silbrico argues that it, instead, requests that this Board issue a site-specific rule recognizing, for Silbrico's benefit only, that Silbrico created perlite waste can be disposed of in a facility that is allowed to accept clean construction and demolition debris. *Id.*

Silbrico stresses that it is not seeking a finding that perlite waste streams are clean construction and demolition debris, and thus is not asking the Board to amend the statutory definition. Resp. at 4. Instead, Silbrico contends, it is asking the Board to adopt a rule recognizing that its perlite waste streams are similar to clean construction and demolition debris such that the streams can be safely and appropriately disposed of at a clean construction and demolition debris operation. Resp. at 4-5.

Silbrico concludes that the rule, if granted, would apply only to Silbrico, would not expand the scope of the construction and demolition debris regulatory scheme, and follows exactly the legislature's scheme outlined in the Act that gives the Board the authority to make different provisions as required by circumstances for different contaminant sources. Resp. at 5.

AGO REPLY

In its November 3, 2005 motion for leave to file a reply, the AGO requests leave to file a reply to address an apparent change in the rationale for the petition raised in Silbrico's response. Mot. at 1-2. The AGO contends that its reply 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. Mot. at 2.

In its reply, the AGO asserts that the petition is without authority whether it seeks to classify materials as clean construction and demolition debris or as similar to clean construction and demolition debris. Reply at 1. The AGO contends that although the petition clearly tries to categorize the material as clean construction or demolition debris, Silbrico is now arguing that it is only asking the Board to consider its materials as similar. *Id.* The AGO argues that under either scenario, the petition is without authority. *Id.* The AGO argues that Section 3.160(b) of the Act creates a narrow exception to the scope of regulated wastes for certain materials that constituted clean construction or demolition debris. Reply at 2. The Act does not, continues the AGO, create a potential third category of materials that can be removed from regulation as wastes if they are similar to clean construction or demolition debris. *Id.*

The AGO argues that Section 27 of the Act is not blanket authority for the proposal of any regulation, but that regulations have to be consistent with the Act. Reply at 3. The AGO argues that the fact that the request is characterized as site-specific does not make a difference and is somewhat misleading. *Id.* The AGO asserts that the petition would impermissibly expand the authority to remove materials from regulation as wastes and that to grant the 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. *Id.* The AGO contends this expansion of authority is unauthorized whether it extends to one site alone or to multiple areas. *Id.*

The AGO asserts that materials that would otherwise be wastes do not become clean construction or demolition debris by any action of the Board, and that if the proposed exemption were found to exist and extended to similar materials, why would it not also be self-implementing for other similar materials. Reply at 4. The AGO argues that even if all subsequent parties were to seek site-specific rulemakings declaring their materials to be similar to clean construction and demolition debris, that it would still constitute an unauthorized expansion of the waste exception in Section 3.160(b) of the Act. *Id.* The AGO concludes that Silbrico asks the Board to go too far in attempting to set up a new waste exemption scheme. Reply at 5.

SILBRICO SURREPLY

In its November 22, 2005 motion for leave to file a reply, Silbrico requests leave to file a surreply to address arguments made in the AGO's reply. Silbrico asserts that it does not have an objection to the AGO's motion for leave to file a reply if it is allowed to file a surreply. Mot. at 1-2. Silbrico argues that its surreply is necessary to address arguments not made in the motion to dismiss, and that Silbrico will be prejudiced if it cannot respond to the claims made by the AGO. Mot. at 1-2.

In the surreply, Silbrico asserts that the AGO's arguments misunderstand Silbrico's position and, in some cases, show a lack of understanding of the Board's processes. Surr. at 1. Silbrico argues that the issue is quite simple – does Section 27(a) of the Act allow the Board to hear petitions for site-specific rules seeking approval of an alternate method of disposal of a waste where that alternate method is established by a statute. Surr. at 2. Silbrico contends that

Section 27(a) limits the Board's rulemaking authority to substantive regulations as described in the Act. *Id.* Silbrico asserts that Section 22 of the act grants the Board broad authority to adopt regulations to promote the purposes of Title V: Land Pollution and Refuse Disposal, and that Section 22.51 of the act is a part of this title. *Id.* Silbrico concludes that the Board has the specific authority to adopt regulations relating to clean construction or demolition debris fill operations. *Id.*

Silbrico contends that its requested rule seeks to allow the disposal of its two perlite waste streams in a clean construction and demolition debris operation that is properly regulated pursuant to Section 22.51 of the Act. *Surr.* at 1-2. Silbrico reiterates that there is no conflict between the proposed rule and the Act. *Surr.* at 3.

Silbrico argues that the AGO apparently misunderstands the category termed site-specific rule when it claims that Silbrico's proposal isn't site-specific because it does not identify or limit disposal to any specific disposal sight. *Surr.* at 3. Silbrico contends that the category of rules known as site-specific is based on the second sentence of Section 27(a) that allows the Board to "make different provisions as required by circumstances for different contaminant sources." *Id.*, citing 415 ILCS 5/27(a) (2004). A site-specific rule, explains Silbrico, is not always technically site-specific in the sense of one physical disposal site, but in the sense that it applies only to one contaminant source. *Surr.* at 3.

Silbrico maintains that it is not seeking a waste exemption, but instead is seeking a rule that would allow it (and only it) to dispose of two specific waste streams in a clean construction of demolition debris operation. *Surr.* at 4. Silbrico asserts that if the rule proposal is granted, it would only apply to Silbrico, not to others, and would not create any broad waste exemption. *Surr.* at 5.

DISCUSSION

Initially, the Board observes that, since the filing of Silbrico's petition, the Agency has filed a rulemaking proposal to implement Section 3.160(b) of the Act. The Board accepted that proposal for hearing on December 1, 2005. *See In the Matter of: Clean Construction or Debris Fill Operations Under PA 94-272*, R06-19 (Dec. 1, 2005).

The Board grants the AGO's motion for leave to file a reply and Silbrico's motion for leave to file a reply. The AGO's reply and Silbrico's surreply are both accepted. The motion to dismiss raises two issues: Silbrico's failure to comply with the Board's rules because its service list did not include the DNR or the AGO, and whether or not the Board has statutory authority to promulgate the rule sought by Silbrico.

Generally, for the purposes of ruling on a motion to dismiss, all well-pled facts contained in the pleading must be taken as true, and all inferences from them must be drawn in favor of the non-movant. *Import Sales, Inc. v. Continental Bearings Corp.*, 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991); *Callaizakis v. Astor Development Co.*, 4 Ill. App. 3d. 163, 280 N.E.2d 512 (1st Dist. 1972); *see also Univ. Prof'ls, Local 4100 v. Stukel*, 344 Ill. App. 3d 856, (1st Dist. 2003).

As to the first issue, the Board finds that no prejudice resulted from Silbrico's initial lack of service. Both the DNR and AGO have now been served, and the only substantive activity to date on this case stems from a motion to dismiss filed by the AGO itself. Were the Board to grant a motion to dismiss on this ground, Silbrico would, presumably, refile with proper service. In the interests of administrative economy, and in light of the fact that proper service was ultimately effectuated, the Board will not require Silbrico to re-file its rulemaking petition.

It should also be noted that dismissal of a site-specific rulemaking is addressed in Section 102.212 of the Board's procedural rules. *See* 35 Ill. Adm. Code 102.212. Section 102.212 contemplates the dismissal of a site-specific rulemaking proposal if the proponent does not satisfy the content requirements of Section 102.210, or for a variety of other reasons, but does not provide that the failure to comply with the service requirements of Section 102.208 is grounds for dismissal.

The AGO next asserts that the petition should be dismissed as without statutory authority because Silbrico seeks to have manufacturing process waste reclassified as clean construction and demolition debris or, in the alternative, that the proposed rule would constitute an unauthorized expansion of the waste exception in Section 3.160(b) of the Act.

The Board finds that it has the authority to grant Silbrico relief from the otherwise applicable requirements of its waste disposal rules. But, during the rulemaking process the Board and participants often devise alternative regulatory language that better fits the Board's existing regulatory scheme.

At this point, the Board is not prepared to say that it lacks the authority to adopt the rule Silbrico is proposing. The plain language proposed by Silbrico does not attempt to reclassify its perlite waste as clean construction or demolition debris. Rather, the language first limits the regulation to the two perlite waste streams from Silbrico's Hodgkins facility, and then provides that "the specified waste streams may be disposed of in a "clean fill" facility that accepts only "clean construction and demolition debris." Pet. at 3.

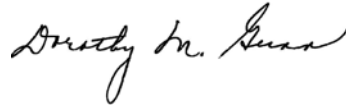
The proposed rule would merely allow Silbrico to dispose of its perlite waste in a facility that is allowed to accept clean construction and demolition debris, it would not reclassify that material as clean construction or demolition debris. Under that same rationale, the Board is not persuaded that the rule, if ultimately enacted, would constitute an unauthorized expansion of the waste exception in Section 3.160(b) of the Act. That said, however, after hearing the Board could well determine that the same ends are better accomplished in another manner. For example, the Board has previously granted relief from landfill regulations rather than reclassify a material. *See Proposed Alternative Standards for Coal Combustion Power Generating Facilities Waste Landfills*; 35 Ill. Adm. Code Part 816, R96-1 (Aug. 15, 1996).

CONCLUSION

The motion to dismiss is denied. However, the AGO has raised issues that are properly before the Board. All parties are welcome to address these issues further during the pendency of this rulemaking.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 15, 2005, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board