

ILLINOIS POLLUTION CONTROL BOARD
April 7, 2005

IN THE MATTER OF:)
)
PETITION OF JO'LYN CORPORATION and) AS 04-2
FALCON WASTE AND RECYCLING INC.) (Adjusted Standard - Land)
FOR AN ADJUSTED STANDARD FROM 35)
ILL. ADM. CODE 807.103 AND 35 ILL.)
ADM. CODE 810.103, OR IN THE)
ALTERNATIVE, A FINDING OF)
INAPPLICABILITY)

ELIZABETH S. HARVEY, SWANSON, MARTIN, & BELL, APPEARED ON BEHALF OF PETITIONERS; and

JOHN J. KIM, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

Jo'Lyn Corporation (Jo'Lyn) and Falcon Waste and Recycling, Inc. (Falcon) recycle asphalt shingles into a road-base alternative at their facility in Woodstock, McHenry County. They seek a determination by the Board that the material they would purchase, store, and use at the facility is not a solid waste under the meaning of the Environmental Protection Act (Act). 415 ILCS 5/1 *et seq.* (2002). In the alternative, Jo'Lyn and Falcon request relief from the Board's solid waste regulations as those limits pertain to their operation.

On April 21, 2004, the petitioners filed this petition for a Board determination or an adjusted standard from 35 Ill. Adm. Code 807.103 and 810.103. In the petition, the petitioners waived hearing and requested expedited review. On September 3, 2004, the Illinois Environmental Protection Agency (Agency) filed a recommendation that the Board deny the petitioners' requested relief. On its own motion, the Board scheduled a hearing on the petition, which was held on December 22, 2004.

The Board has expedited this decision, as again requested by the petitioners on February 10, 2005. Based on the hearing record and the other information before it, the Board finds that the material, as purchased and processed by the petitioners into a paving product, is not a waste. The Board, therefore, denies the petitioners' alternative request for an adjusted standard as moot.

PROCEDURAL BACKGROUND

On April 21, 2004, Jo'Lyn and Falcon filed this petition (Pet.), with the Board for an adjusted standard from the Board's solid waste regulations. Falcon is a division of Jo'Lyn. Falcon and Jo'Lyn are both petitioners in this matter, although the petition applies to a single

facility. On April 30, 2004, petitioners published notice of the petition in the *Northwest Herald*, and filed the certificate of publication with the Board on May 5, 2004.

On July 8, 2004, the petitioners filed an amended petition addressing questions in the Board's May 20, 2005 order. On July 14, 2004, the petitioners filed a supplement to the amended petition. Petitioners timely published notice of the amended petition in the *Northwest Herald* on July 26, 2004, and on August 2, 2004, filed the certificate of publication with the Board. The Agency filed its recommendation (Rec.) that the Board deny the petitioners' requested relief on September 3, 2004.

On October 7, 2004, the Board accepted the petitioners' amended petition, denied the motion for expedited review, and sent the parties to hearing on the petition. A hearing was held on December 22, 2004, at which eight exhibits by the parties and one hearing officer exhibit were entered into the record.

The petitioners filed a post-hearing brief on January 14, 2005. The Agency responded on February 3, 2005, and the petitioner's filed a reply on February 10, 2005, accompanied by a new motion for expedited review.

To date the Board has received thirteen written public comments, all in support of the petitioners' request for relief. The list of written public comments includes those from: the Illinois Recycling Association, Mr. Warren A. Furst, Mr. Billie L. Arvidson, Ms. Barbara J. Day, Ms. Alice V. Howenstine, Representative Jack D. Franks, Ms. Jeanette Hamilton, the Harvard Crane and Construction Company, Inc., Senator Pamela J. Althoff, Gallagly Drywall, Inc., Mr. Richard Shields, Mr. & Mrs. Draper, and Mr. William Turley, Executive Director of the Construction Materials Recycling Association.

FACTUAL BACKGROUND

The Facility

The petitioners' facility, located at 1200 North Rose Farm Road, Woodstock, McHenry County, processes granulate bituminous shingle material (GBSM) into dust control and paving applications. The facility employs four people, two that process the material and two drivers that haul the material from IKO Chicago to the Woodstock facility. Am. Pet. at 4. Petitioners state they began operations in 2000 at a facility located at 2 Kennedy Road, Harvard. Am. Pet. at 4. Petitioners' Woodstock facility opened in February, 2001 and is approximately three years old. *Id.* When petitioners learned that the Agency would require a land permit, operations ceased.

Petitioners state that GBSM is pre-consumer material that contains no asbestos, nails, wood, or other "contaminants" that could adversely impact the environment while storing the product for short periods of time. Am. Pet. at 12. Petitioners state that GBSM may contain a very small amount of fiberglass (about 2%), located in the backing of the shingle. Supp. to Pet. at 2. The petitioners have a temporary purchase agreement to purchase GBSM from IKO Chicago. Pet. Exh. 1.

Petitioners state they applied to the Agency for water and air permits. However, the Agency denied the petitioners' application for an air permit on the grounds that petitioners also require a land permit. Pet. at 2-3. Petitioners state they have approximately 5,376 tons of GBSM at their facility, most of which is sold and awaiting the conclusion of this proceeding to be installed. Am. Pet. at 10-11.

Production Process

The GBSM that the petitioners use is clean and consistent post-production material generated by the roofing shingle manufacturing process, such as punch-outs, mis-colored, or damaged shingles. The petitioners do not use post-consumer material, known as "tear-offs," which may be inconsistent or contain nails or asbestos. Pet. at 2.

Petitioners state they currently purchase GBSM from only one roofing shingle manufacturer, IKO Chicago, Inc., located in Bedford Park. The petitioners state that the material they purchase from IKO Chicago must be free from "contaminants" as provided by a temporary purchase agreement entered into by the parties. Pet. Exh. A. Petitioners state they have purchased and hauled 5,756 tons of GBSM from IKO Chicago from 2000 through 2003. The petitioners state that they purchase GBSM from IKO Chicago for \$5 per ton. Tr. at 104.

On May 18, 1993, in response to a request from IKO Chicago, the Illinois Environmental Protection Agency issued a determination that the GMSM generated by IKO Chicago, and shredded either at the IKO facility or the end-user's site, is not a solid waste when used for specific paving applications. Pet. Exh. D. This declassification remained effective until July 1, 2001.¹ Am. Pet. at 5.

The petitioners state they have used 400 tons of GBSM in test applications. Am. Pet. at 10. The petitioners use a portable horizontal grinder to shred the GBSM into uniform size. According to petitioners, the facility can grind approximately 40 tons per hour, equaling approximately 320 tons of material per day. Am. Pet. at 11. GBSM becomes Eclipse Dust Control (EDC) after the grinding process. Tr. at 73. The material is then applied as a paving product. Pet. at 2. Petitioners explain that because the application process must be done in the summer, petitioners cease activity during the winter. Am. Pet. at 12.

Petitioners assert that the only air emissions at the facility are produced by the muffler on the grinder, and because the grinding process uses a light mist of water, the grinding produces no dust. Am. Pet. at 5.

Eclipse Dust Control Application

Petitioners sell the GBSM they process as a product called Eclipse Dust Control. Petitioners claim that EDC is a paving product can be used on parking lots, driveways, farm lanes, bike and walking paths, and other surfaces. Pet. at 4; Hearing Exh. 4 at 3. Petitioners assert that EDC will last more than five years, needs no seal coating or other maintenance, and

¹ When the Board amended its special waste rules in 1999, it included a provision that all declassifications would remain effective for 2 years. 35 Ill. Adm. Code 808.101.

costs approximately \$0.45 per square foot installed. Pet. Exh. B. In addition to dust control, petitioners state that other advantages to EDC is reduced cracking compared to blacktop or concrete, and reduced noise. Am. Pet. at 7.

When installing EDC, petitioners first evaluate a site and then fill low areas with grade 9 stone to bring the surface to a level base, maintaining a slight arch for drainage. Am. Pet. at 9. Petitioners apply the shingle chips at a 4 to 6 inch thickness, prior to compacting, with either a black top spreader or a bobcat with a blade attachment. Am. Pet. at 9. The GBSM is then compacted to a finished 2-3 inch thickness using a 10-ton vibratory roller. *Id.* The heat of the sun completes the bonding process of the EDC. Tr. at 7; Mot. for Expedited Dec. at 1. Petitioners estimate that 16.667 tons of GBSM is needed to install a 1000 square foot EDC driveway. Pet. Br. at 11.

Attached to the petition, are several installation quotes and contracts between Falcon and various customers illustrating that there is a market for Eclipse Dust Control. Pet. Exh. E.

THE HEARING

At the hearing, two witnesses testified on behalf of the petitioners. First, Mrs. Kathy Powles, vice-president of Jo'Lyn and president of Falcon, testified regarding the operations at the facility, the specifications of EDC, and applications of the product. Second, Mr. Foulkes, of IKO, testified about the components of the GBSM and the history of IKO's experiences with the Agency regarding GBSM.

Several members of the public attended the hearing and presented oral public comments. Ms. Beverly Meuch, of Lou Marchi Total Recycling Institute, commented on behalf of the petitioners. Tr. at 64. Mr. Lowe commented that in his opinion EDC is very useful and economical. Tr. at 66. Mr. Murray, the Heartland Township commissioner, stated that Heartland Township still has quite a few miles of gravel road where EDC could be used to keep dust down. Tr. at 67. Ms. Neimann, solid waste coordinator for McHenry County, stated that the current solid waste management plan for the county supports recycling to keep waste out of the landfills. Tr. at 67-68. Ms. Stevens and Ms. Marsh also commented in favor of the petition. Tr. at 69-70.

Mr. William Turley, executive director of Construction Materials Recycling Association, stated his organization has been working with the United States Environmental Protection Agency (USEPA) and various states to promote the recycling of asphalt shingles. Tr. at 173-74. Mr. Turley commented that the state should not limit the thickness of the applied material, and the term "clean" is an industry term to mean the manufacturer's waste. Mr. Mitchell, executive director of the Illinois Recycling Association, was sworn in and testified that in his opinion, a finding of inapplicability is more appropriate than an adjusted standard here, because the petitioners' conduct is more a recycling than waste disposal operation. Tr. at 178. Mr. Mitchell stated that innovative processes such as shingle recycling take hard-to-recycle-material out of landfills and into a productive economy "in an environmentally friendly way." Tr. at 180.

PETITIONERS' REQUEST FOR FINDING OF INAPPLICABILITY

The petitioners maintain in the petition, at hearing, and in post-hearing briefs, that GBSM is not a waste, because they collect and process the material from the manufacturer IKO Chicago into a paving product. Reply at 2. Petitioners assert that the GBSM they purchase is not discarded, but is returned to the economic mainstream as a useful paving product. The petitioners further contend that their Woodstock facility should not be treated in the same way as a landfill or transfer station when assessing protection of the environment. Pet. at 10. The petitioners argue that GBSM is not a waste for two primary reasons: (1) the Agency has already determined that GBSM is not a waste when used for a paving product; and (2) the petitioners' position is supported by a recent Illinois Supreme Court decision.

1993 Agency Solid Waste Determination

The petitioners first contend that in 1993, the Agency determined that GBSM produced by IKO is not a waste when used for specific paving applications as defined in the determination. Pet. Br. at 3; Pet. at 3, Exh. D. The determination was issued specifically to IKO for the GBSM that IKO produced. Pet. at 3, Exh. D; Resp. at 4-6. The petitioners contend that the Board should adopt the Agency's determination and find that GBSM is not a waste. Pet. Br. at 3.

Alternate Fuels, Inc. v. IEPA (2004)

In support of their argument, the petitioners rely on the recent Illinois Supreme Court decision in Alternate Fuels, Inc. v. Director of the IEPA, No. 96071, 2004 Ill. LEXIS 1616 (Oct. 21, 2004) (AFI). Pet. Br. at 4. In AFI, the court held that because the plastic materials AFI processed and sold for use as fuel are not "discarded," they do not constitute a waste under the meaning of the Act and Board regulations. The court further found that, consequently, AFI is not a pollution control facility requiring permitting and local siting review. *Id.*

THE AGENCY'S RECOMMENDATION TO DENY PETITIONERS' REQUEST

The Agency maintains post-hearing, as it did in its recommendation, that GBSM is a waste. Thus, argues the Agency, the Board should deny petitioners' request for a finding of inapplicability.

Agency's Solid Waste Determination

The Agency states the May 18, 1993 solid waste determination is not relevant because that letter was issued only to IKO based upon a specific request supported by specific information. Ag. Resp. at 2. According to the Agency, the May 1993 letter did not contemplate IKO selling their GBSM to a third party, or the possibility of a third party processing the GBSM in a way similar to the process described in the determination letter. Ag. Resp. at 3.

Alternate Fuels, Inc. (2004)

The Agency states that AFI is factually and legally distinguishable from the facts at hand. Ag. Resp. at 3. Thus, even the Supreme Court's affirmation of AFI in October 2004 is not persuasive, argues the Agency. Ag. Resp. at 3.

The Agency contends that the petitioners receive and process "discarded material" within the plain meaning of the definition of "waste" under section 3.535 of the Act. 415 ILCS 5/3.535 (2002). According to the Agency, GBSM is a "waste" discarded by its manufacturer, IKO. Because the GBSM that the petitioners receive is a waste, asserts the Agency, the petitioners' facility is a pollution control facility and must meet all of the associated permitting requirements. As part of the permitting process, a pollution control facility must obtain local siting approval, which requires public hearings and allows for public comment on the facility's application.

In its recommendation, the Agency stated that unlike in AFI, the petitioners have not demonstrated: (1) the existence of a contractual arrangement regarding the content of material; (2) compliance of material to permit specifications; (3) an analysis performed on material by generators for review and approval by an intermediate processor; or (4) whether there will be any level of quality control. The Agency states that the petitioners are precluded from citing AFI in support of their argument because the court in AFI was never asked whether the material being accepted by AFI was a waste. Rec. at 8.

The Agency states that the facts at hand are distinguishable from cases where the Board has made a finding of inapplicability in the past. The Agency contends that in cases where the Board found that the material in question was not a waste, the petitioner was the actual generator of the waste that maintained control of the material. Rec. at 6; citing Illinois Power Co. v. IEPA, PCB 97-35, 97-36 (Jan. 23, 1997). The Agency states, however, that materials accepted from off-site generators and not part of the generators' ongoing process are considered "discarded" and, therefore, a waste. *Id.* The Agency states that, in accordance with caselaw, because the petitioners are not the generators of GBSM, the GBSM is not part of any ongoing process. *Id.* at 6-7. The Agency concludes that here the Board must consider GBSM "discarded" by another party, and thus, a "waste." *Id.* at 9.

ISSUES DISCUSSED AT HEARING AND POST-HEARING

The Agency stated that even after reviewing the amended petition and supplemental information, Agency had several unanswered concerns and problems with the petitioners' request for a finding of inapplicability. Resp. Br. at 3-4, 10. In its recommendation, the Agency sought information such as an equipment list, an operating procedure, and timeframes for storage before and after grinding. Rec. at 9. The Agency stated that the petitioners did not provide information about the test applications such as the location of the test sections, the dates of application, or whether noise and dust were eliminated. Rec. at 10. The Agency also sought information explaining quality control procedures, whether any physical or chemical testing would be performed and if EDC contained toxic substances, and a comparison of installed EDC to asphalt or other materials utilized for paving surfaces. *Id.*

After reviewing the hearing testimony and post-hearing briefs the Agency stated that the petitioners still had not adequately addressed the issues of quality control and whether petitioners

plan to accept GBSM from sources other than IKO Chicago. Below the Board sets forth the issues discussed at hearing and in post hearing briefs.

Petitioners Employ Methods to Control Quality

Quality control includes operating in accordance with certain procedures. *See* Hearing Exh. 2. Petitioners state there are three separate visual inspections of the GBSM: (1) at the IKO facility; (2) at the petitioners' facility upon delivery; (3) and when the GBSM is loaded into the grinder. Pet. Br. at 12. Petitioners state they have never encountered GBSM that contained debris or foreign material, but petitioners note they do have the right to reject a load in the event GBSM is non-conforming. Pet. Br. at 12, Exh. A; Tr. at 84-89, 99-101. Petitioners further stated they control the quality of the GBSM accepted at the facility by visual inspections and by requesting Material Data Safety Sheets from any additional potential supplier prior to contracting.

The operating manual also provides for quality control at the installation site, prescribing methods for grading and filling the subbase and applying and compacting the EDC. Hearing Exh. 2 at 6. Petitioners state they will only sell and install EDC where it will wear well. Reply at 10.

Limitations on the Application of EDC

The Agency argues a finding of inapplicability of the Board's solid waste rules is not warranted. Ag. Resp. at 4, 10. Regarding the application of GBSM, the Agency states that petitioners have not adequately researched all relevant and applicable roadway construction standards and guidelines. Ag. Resp. at 5. Ms. Powles testified at hearing that the only limitations for the application of GBSM would be high volume roadways. Tr. at 72-73. The Agency states, however, that the Illinois Department of Transportation (IDOT) has specific standards for road construction that the petitioners have not addressed. Ag. Resp. at 5. The Agency claims the record contains no evidence that EDC can meet IDOT standards. *Id.* at 9.

The petitioners state they did not discuss IDOT's standards because they apply to recycled asphalt pavement (RAP), not EDC. The petitioners state that the two pavements, RAP and EDC, are not the same. Further, petitioners assert, IDOT has promulgated no standards or restrictions for EDC, nor has any other regulatory or technical entity. Reply at 6. Petitioners state that even if IDOT standards were applicable, only state-owned roads must conform to IDOT standards; township roads, driveways, and parking lots are not subject to IDOT standards and would be appropriate places for the installation of EDC. *Id.* at 7.

The petitioners also state they will not promote EDC for installation on feedlots. Tr. at 51. While petitioners maintain that there is no harmful exposure to livestock from EDC, petitioners will not market EDC for feedlots so as to allay any concerns about potential health effects. *Id.* Petitioners also do not intend to use GBSM in hot mix asphalt. Tr. at 52.

Operating Manual and Alternative Suppliers

The Agency also remains skeptical about the petitioners' operating manual. At hearing Ms. Powles testified the petitioners hoped to use at least one other supplier of GBSM, yet was unsure about whether she would have to change the operating manual, which was tailored specifically for interaction with the IKO facility. Ag. Resp. at 6. The Agency states that the petitioners' intention to use other suppliers of GBSM is even more of a reason not to rely on the solid waste determination, based exclusively on information and data provided by IKO, to characterize the GBSM. Ag. Resp. at 6. Testimony shows that Owens Corning is the only other potential supplier of GBSM in Illinois, but, the Agency contends, the petitioners have not confirmed that Owens Corning or any other company would be a supplier. Ag. Resp. at 6-7.

The fact that the operating manual may be revised to reflect, for example, changes in the way petitioners schedule GBSM pick ups is not related to any environmental issue or concern about performance of EDC. The petitioners state the Agency's arguments about the operating manual are irrelevant and not related to any environmental concern. The petitioners state nothing prevents them from changing or improving their production process. Reply at 7-8.

According to the petitioners, they have not yet identified an additional supplier because they cannot operate until they are granted a finding of inapplicability, an adjusted standard, or comply with the Board's solid waste regulations. Petitioners state they do want to be able to purchase from other suppliers, but that the identity of a potential additional supplier is irrelevant as long as any GBSM purchased complies with the definition of GBSM in the granted relief. Reply at 8-9. Further, petitioners state they would review Material Data Safety Sheets before entering into a contract with any other GBSM manufacturers. Tr. at 105.

Thickness and Performance

The petitioners assert they have created two test sections of Eclipse Dust Control. The first one was installed in 2000 in Harvard, Illinois. Tr. at 41. The second site was done approximately two years ago in the Heartland Township, McHenry County. Petitioners state there has been no cracking in the test applications. Tr. at 42. The petitioners state that blacktop or concrete roadway can crack during the contractions and expansions caused by the changes in weather, but EDC has not cracked in the four-year-old test section. Tr. at 48.

The Agency was also concerned with the petitioners' request that the adjusted standard contain no specific thickness specification. The Agency states this again deviates from the solid waste determination letter that specifies an applied thickness of 5-6 inches. Ag. Resp. at 7. The Agency also notes Ms. Powles' testimony that test sections of EDC performed very well in full sun, but broke up slightly in shaded areas. Tr. at 41-43, 95. The Agency states that for these reasons, the Board should not grant the petitioners' requested relief.

The petitioners state the Agency has identified no environmental concern or other reason to deny the requested relief because of Ms. Powles' testimony that EDC slightly breaks up in shaded test areas. Reply at 10. Petitioners state they believe they will be able to develop EDC that can be used in shady places and the requested relief should not be denied simply because petitioners are continuing to develop their product. Reply at 10. Petitioners state they would only sell and install EDC where testing has demonstrated it will wear well. Reply at 10.

Third Party Installation

Petitioners state they have not yet sold EDC for installation by the customer. Pet. Br. at 13. However, petitioners claim they could foresee customers, such as townships or small paving contractors, that would purchase EDC for their own installation. Therefore, petitioners would like to have the option to sell EDC without installation. *Id.*

In response to the petitioners' statement that they would allow customers to purchase EDC and install it themselves, the Agency states that use also falls outside of the specific parameters of application provided for by the solid waste determination. Ag. Resp. at 10. The Agency states the 1993 solid waste determination language does not account for the possibility that a third party could perform the installation. *Id.*

The petitioners reply that the Agency's May 1993 letter specifically refers to the use of GBSM at an "end user's site." According to the petitioners, the plain language of the letter demonstrates that the letter is not limited to IKO. Reply at 3.

Environmental Benefit

Petitioners contend the primary factor that justifies their requested relief is environmental benefit. Pet. at 11. Petitioners assert that the GBSM recycling process provides numerous environmental benefits by recycling clean GBSM into a useful paving product, which the petitioners claim itself has environmental benefits. Accordingly, petitioners argue that the factors relating to the Eclipse Dust Control production process are substantially and significantly different than those pertaining to activities conducted by pollution control facilities that are regulated under the Section 807 regulations. Pet. at 12.

Petitioners argue that granting the requested relief will not result in any adverse impact on health or the environment. Pet. at 13. Rather, petitioners argue that the requested relief would have a positive impact on the environment. Petitioners contend that clean GBSM, which would otherwise require landfilling, will be recycled into a useful paving product which provides benefits such as noise and dust suppression. *Id.* Petitioners state that no chemicals are added and there are no residuals from the process. Tr. at 24.

Other States Allow the Use of GBSM for Paving Applications

At hearing, the petitioners discussed several additional issues to justify their request for an adjusted standard. According to Mr. Foulkes of IKO Chicago, other states have been allowing the use of GBSM for paving applications since the early 1990s. Pet. Br. at 6-7. At hearing, Mr. Foulkes testified that Delaware, Indiana, and Ohio approved the use of GBSM in the early 1990s, and to date no state has since revoked its approval. Pet. Br. at 7; Tr. at 147. Mr. Foulkes stated that all of its products out of IKO's Wilmington, Delaware and Franklin, Ohio facilities are recycled. Tr. at 147. However, because Illinois has not allowed the use of GBSM for paving applications, IKO Chicago is forced to landfill most of its GBSM. Pet. Br. at 7.

GBSM is Non-Toxic and Non-Hazardous

The petitioners also state that GBSM is non-toxic and not an environmental concern. Pet. Br. at 8. According to the petitioners, GBSM is not hazardous because it is not a listed waste, derived from any hazardous waste treatment, or a mixture of any hazardous waste. Pet. Br. at 9. The petitioners state that according to IKO's January 29, 1993 submittal to the Agency, the analytical results of Toxicity Characteristic Leaching Procedure (TCLP) tests were below the regulatory criteria for all parameters. Pet. Br. at 8; citing 40 C.F.R. Part 261. Mr. Foulkes testified that the ingredients used by IKO have not changed appreciably since that time. Tr. at 144. The only difference is essentially the shape of the shingles. Pet. Br. at 9. The TCLP analysis for the GBSM in 1993 showed no toxicity under the Resources Conservation Recovery Act (RCRA) standards.

BOARD DISCUSSION

The Board finds that the information that the petitioners provided in the petition, at hearing, and in post-hearing briefs, when applied using the approach provided by the Court in AFI, demonstrates that GBSM is not a waste as used by the petitioners to produce EDC. Because any solid waste determination must be fact and product specific, the Board begins by discussing the issues raised by the parties at hearing and in post-hearing briefs. Next, the Board reviews past Board decisions and recent Illinois caselaw regarding the applicability of Board solid waste rules. Finally, the Board makes a solid waste determination regarding GBSM as used by the petitioners to produce EDC.

Facts Discussed at Hearing and in Post-Hearing Briefs

The Board could not have reached a solid waste determination without the information and testimony presented at hearing. The Board finds the Agency's 1993 solid waste determination is not directly applicable because it was issued by the Agency and because IKO Chicago, not the petitioners, was the recipient. Nonetheless, although not directly applicable, the Board finds the solid waste determination letter instructive. In 1993, the Agency found that GBSM used in the same manner as the petitioners propose here was not a waste based on the toxicity and performance data provided by IKO. The petitioners entered the same data into this record. The petitioners state this data is representative of all GBSM.

The petitioners have also supplemented the record with information regarding two test sites installed in 2000 and 2002. According to the petitioners, the sites have held up well under frequent use, only slightly breaking up in some shady areas. The petitioners' state the surface reduces both noise and dust. The petitioners also state that there is a market for EDC, pending the outcome of this petition.

The Board finds that the petitioners have adequately shown that their process will not cause environmental harm. The petitioners have provided documentation of TCLP tests that show the GBSM that IKO Chicago produces is not a hazardous waste. Further, the application of EDC actually results in the environmental benefits of reduced dust and noise pollution as well as recycling a material that would otherwise be landfilled.

Applicable Board Decisions and AFI

By way of background, the Board will first outline its own decisions, then discuss AFI in detail.

Board Decisions

The Board's past waste rulings have focused on the actions and intentions of a material's generator. The Board has interpreted the meaning of "other discarded material" in other instances where material that has been recovered and reused in determining whether special waste hauling regulations apply that material. Safety-Kleen Corp. v. IEPA, PCB 80-12 (Feb. 7, 1980); *aff'd* IEPA v. PCB and Safety-Kleen Corp., No. 80-650 (2nd Dist. 1981); Southern California Chemical Co., Inc. v. IEPA, PCB 84-51 (Sept. 20, 1984); R.R. Donnelley & Sons Co. v. IEPA, PCB 88-79 (Feb. 23, 1989). In those cases, the Board found that since the petitioners, the generators of the material, maintained control over the material in question, and the material was to be reused and not discarded, it was not a waste subject to special waste hauling requirements.

In R.R. Donnelley, on a motion to reconsider, the Board further concluded that even though R.R. Donnelley did not maintain complete control over the material (used oil) it was generating, it did have knowledge to whom it was selling the used oil, and the used oil was subsequently sent directly for reuse without further treatment, processing or storage. The Board determined that the material was not a solid waste.

In the special waste cases discussed above, the Board decided that the material was not a waste or solid waste based on the fact that the material was generated by the company using the material and was part of its ongoing process. In contrast, the wood material utilized in Wood Energy, was not generated by Wood Energy as part of its manufacturing process. Therefore, the Board found the produced wood fuel was and continued to be a solid waste and that Wood Energy was a solid waste management facility governed by the Part 807 regulations. In re Petition of Wood Energy Partners, L.P. for an Adjusted Standard from 35 Ill. Adm. Code 807 or, in the alternative, a finding of inapplicability, AS 94-1 (Dec. 1, 1994)

The Board again considered the issue of whether a material being received by a facility is either a solid waste or raw material in Illinois Power. Illinois Power, PCB 97-35, 97-36. In Illinois Power, agricultural containers are processed into an alternate fuel used by Illinois Power through a coordinated effort between Illinois Power and Resourceful Environmental Ideas, Inc. (REI). A company called Tri-Rinse, Inc. triple rinses agricultural containers in accordance with U.S. EPA and the Illinois Department of Agriculture guidelines. The containers are then inspected, processed, and purchased by Illinois Power for use at the Baldwin Power Station. *Id.* at 3.

In its analysis of the facts, the Board changed its approach slightly in distinguishing Illinois Power from Wood Energy. In Wood Energy, the Board relied on the following factors in determining the material at issue was a waste: (1) the material was customarily thrown away or

discarded; (2) the material was generated off-site and did not result from the petitioner's own processes; and (3) the petitioner planned to purchase the material from a third party. In Illinois Power, the Board was persuaded by Illinois Power's argument that the material was a "valuable energy product" and exhibited no characteristics of being discarded when used as Illinois Power proposed. The Board's decision was more fact-specific than in Wood Energy, relying on the following facts: (1) that Illinois Power did not process the containers on-site; (2) that the materials were non-hazardous; and (3) that all of the parties involved, Illinois Power, REI, and Tri-Rinse, had sufficient control over the materials to preclude unknown contamination from entering into the materials. The Board concluded that the alternate fuel was not a waste.

AFI

The supreme court used yet another approach in AFI, focusing on the material's end use rather than the original generator's action or intent. Alternate Fuels, Inc. v. IEPA, 2004 Ill. LEXIS 1616 (2004). REI, the company involved in Illinois Power, changed its name to Alternate Fuels, Inc. Alternate Fuels, Inc., v. IEPA, 337 Ill. App. 3d 857, 786 N.E. 2d 1063 (5th Dist. 2003) (AFI I). AFI places triple-rinsed plastic agricultural containers into a granulating machine that shreds the plastic into small pieces. AFI contracted with Illinois Power to provide alternate fuel that meets certain specifications. AFI also contracted with its suppliers that they provide any materials free of nonconforming items and that the materials are not hazardous. *Id.* at 860. Suppliers had to provide AFI with test results showing that the materials meet the required specifications. AFI also visually inspects the materials to check for compliance with the agreement.

The supreme court did not rely on any Board precedent in finding that the materials AFI handled were not a waste and that AFI was, therefore, not a pollution control facility. Giving the applicable statutory language its plain and ordinary meaning, and giving effect to the legislature's intent, the court in AFI made two findings particularly applicable to the facts at hand. First, the court compared AFI's facility to the statutory definitions for "recycling center" and "pollution control facility." After comparing the two definitions, the court found that "AFI's facility retained more characteristics of a 'recycling center' than a 'pollution control facility.'"

Next, the court expressly rejected the Agency's argument, the same as the Agency argues here, that "discarded" is defined solely from the viewpoint of the generator and that "any material which is not being utilized for its intended purpose" of the generator is considered "discarded." Rather, the court looked at the Act's various uses of the term "discarded material" and determined that the Act focuses more "on the 'material' itself as it passes between entities" rather than on the generator's intended purpose of the materials. The court concluded that the proper inquiry is whether the materials are returned to the economic mainstream.

After applying the facts in AFI, the court found the materials AFI uses are not discarded and, therefore, not a waste. In affirming the appellate court, the supreme court held that AFI was not a pollution control facility requiring a permit and would not require local siting approval. The appellate court had stated in conclusion that "an interpretation of the Act in this manner best supports the Act's most basic purpose, protecting the environment of our state." AFI I, 337 Ill. App. 3d at 866.

Board Analysis

The Board recognizes, as both the petitioners and the Agency note in post-hearing briefs, that the Agency has petitioned the Supreme Court for rehearing on AFI. Nonetheless, the Supreme Court decision is precedential and binding on the Board unless and until it is modified by the Supreme Court.

The Board finds AFI supportive of the petitioners' request for a finding that GBSM is not a waste. The Act defines "waste" as:

'Waste' means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations" 415 ILCS 5/3.535 (2002).

Under the AFI analysis of whether something is a waste, the Board must first determine whether GBSM is a "material," and then whether it is "discarded." According to the court in AFI, while the legislature has not defined the term "discarded materials," the legislature has indicated what it is not:

"Recycling, reclamation or reuse" means a method, technique, or process designed to remove any contaminant from waste so as to render such waste reusable, or any process by which materials that would otherwise be disposed of or discarded are collected, separated, or processed and returned to the economic mainstream in the form of raw materials or products. 415 ILCS 5/3.380 (2002)

The Board finds that the petitioners, again like in AFI, are not removing any contaminant from waste. In fact, no contaminants are removed from the GBSM at all. Therefore, the GBSM is a "material." Further, the Board finds that GBSM, like the alternate fuel in AFI, can be reused and recycled and returned to the economic mainstream for sale as EDC. Because the petitioners collect, process, and return GBSM to the economic mainstream in the form of a product called EDC, the GBSM is not "discarded."

The Board finds AFI shows that substantially different factors apply to the petitioners' operation than the factors the Board relied upon in adopting the solid waste regulations at Parts 807 and 810 of the Board's rules. Rather the petitioners' facility has more characteristics of a "recycling center" than a "pollution control facility." For example, the Act defines a "recycling center" as:

a site or facility that accepts only segregated, nonhazardous, nonspecial, homogenous, nonputrescible materials, such as dry paper, glass, cans, or plastics, for subsequent use in the secondary materials market. 415 ILCS 5/3.75 (2002).

Here, Jo'Lyn and Falcon have demonstrated that they purchase only nonhazardous, nonspecial materials for subsequent use as EDC. The process removes no contaminants and produces no residuals. Like the petitioner in Illinois Power, petitioners Jo'Lyn and Falcon have also shown they maintain control over the quality of the materials they purchase and process ensuring that no unknown contaminants enter the material. Therefore, based on the facts at hand, the Board finds GBSM is not a discarded material, and therefore, not a waste when it is processed into EDC and returned to the economic mainstream as a paving product. The Board's finding that GBSM is not a waste as used by the petitioners furthers a stated purpose of the Act. Title V of the Environmental Protection Act provides:

It is the purpose of this Title . . . to promote the conservation of natural resources and minimize environmental damage by . . . encouraging and effecting the recycling and reuse of waste materials 415 ILCS 5/20(b) (2002).

In the interests of encouraging recycling and returning a material difficult to recycle into the economic mainstream "in an environmentally friendly way," as stated by Mr. Turley at hearing, the Board finds that GBSM is not a waste as used by the petitioners to produce EDC.

Several factors are critical to the Board's finding that GBSM is not a waste as it is used by the petitioners. First, IKO Chicago has shown that the GBSM is not "hazardous" under the Board's Part 721 regulations. The petitioners' contract for the purchase of GBSM with IKO Chicago does not require the manufacturer to provide proof that the materials are not hazardous, yet IKO Chicago has provided such proof in this proceeding. Therefore, the Board requires that the petitioners must be able to show that any GBSM they accept does not meet the characteristics of a "hazardous waste" under the Board's Part 721 regulations. Second, the petitioners have shown that EDC is to be used only as a paving product and that it performs as a cohesive, durable roadbed. Third, the petitioners stated they use only "clean" GBSM. The term "clean" means GBSM that is consistent post-production, pre-consumer material containing no asbestos that is generated at the end of the manufacturing of roofing shingles, such as tabs or punchouts, and miscolored or damaged shingles. The Board also notes that once the petitioners no longer process and return GBSM to the economic mainstream in the form of a raw material or product, the GBSM is then considered "discarded," and thus, a waste.

ORDER

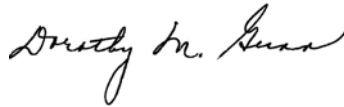
The Board finds that the GBSM the petitioners process to produce EDC to be used as a paving product is not a waste. The Board grants Jo'Lyn and Falcon's requested relief and exempts the GBSM that the petitioners use to produce EDC at their Woodstock facility from the Board's solid waste regulations. The Board denies the petitioners' alternative request for an adjusted standard from the Board's solid waste regulations as moot.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706.

Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 7, 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