BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
PETITION OF JO'LYN CORPORATION	)	
and FALCON WASTE AND RECYCLING	)	AS 04-02
for an ADJUSTED STANDARD from	)	(Adjusted Standard – Land)
35 ILL. ADM. CODE PART 807 or,	)	
in the alternative, A FINDING OF	)	
INAPPLICABILITY.	)	

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Elizabeth S. Harvey
Swanson, Martin & Bell
One IBM Plaza, Suite 3300
330 North Wabash Avenue
Chicago, IL 60611

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR LEAVE TO FILE INSTANTER and RECOMMENDATION, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: August 20, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
PETITION OF JO'LYN CORPORATION	)	
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MOTION FOR LEAVE TO FILE INSTANTER RECOMMENDATION

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board ("Board") grant the Illinois EPA leave to file instanter its Recommendation to the Petitioners' petition. In support of this motion, the Illinois EPA states as follows:

1. The Petitioners filed a petition for adjusted standard with the Board on April 21, 2004. On May 20, 2004, the Board entered an order requiring the Petitioners to file an amended petition, addressing certain deficiencies identified by the Board. The order also required the Illinois EPA to file its recommendation to the amended petition within 30 days of the filing of the amended petition. Section 104.416(a) of the Board's procedural rules (35 Ill. Adm. Code 104.416(a)) generally allows the Illinois EPA 45 days from the filing of an adjusted standard petition to file its recommendation, unless otherwise ordered by the Board or the Hearing Officer.

2. On July 8, 2004, the Petitioners filed an amended petition with the Board. On July 14, 2004, the Petitioners filed a supplement to the amended petition. The Illinois EPA believes that, pursuant to Section 104.416(a) of the Board's procedural rules and the May 20,

2004 Board order, the Illinois EPA has 30 days from the filing of the supplement to the amended petition to file its recommendation. For reasons explained in its motion, the Illinois EPA then filed a motion for extension of time to file its recommendation on or before August 18, 2004.

3. Due to a heavy case load, the undersigned attorney was not able to complete the preparation of the recommendation until August 20, 2004, the date of this motion.

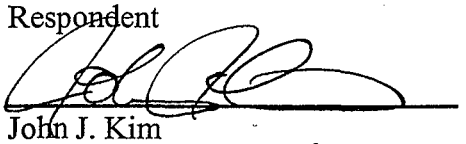
4. The Illinois EPA regrets the delay in the submission of its recommendation, but notes that no hearing has been set in this matter and that this submission still falls within the time otherwise allowed for filing pursuant to Section 104.416(a) of the Board's procedural rules.

5. The Illinois EPA has informed counsel for the Petitioners of this motion.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board grant the Illinois EPA leave to file instanter its Recommendation.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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in the alternative, A FINDING OF	)	
INAPPLICABILITY.	)	

RECOMMENDATION TO PETITION FOR ADJUSTED STANDARD

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 104.416, hereby submits a recommendation to the Illinois Pollution Control Board ("Board") in response to the petition for adjusted standard ("petition") filed by Jo'Lyn Corporation and Falcon Waste and Recycling ("Petitioners"). In support of this recommendation, the Illinois EPA states as follows:

I. INTRODUCTION

The Petitioners are seeking an adjusted standard or, in the alternative, a finding of inapplicability related to request that a determination be made that certain raw material (granulate bituminous shingle material, or "GBSM") used in their production process is not a "waste." If the Board does not agree with the Petitioners' position that the material in question is not a waste, then the Petitioners seek an adjusted standard from portions of the Board's waste regulations.

The Petitioners have filed a petition, amended petition and supplement to the amended petition. Those documents combined form the basis for the Petitioners' request. In the amended petition, the Petitioners identify the specific provisions from the Board's regulations from which

they seek an adjusted standard. The Petitioners state that they seek an adjusted standard from certain definitions found in Section 807.104 of the Board's regulations (35 Ill. Adm. Code 807.104), as well as from certain definitions in Section 810.103 (35 Ill. Adm. Code 810.103).[1] Amended petition, pp. 2-3.

To obtain a positive ruling from the Board, the Petitioners must satisfactorily address all factors set forth in Section 104.406 of the Board's procedural regulations (35 Ill. Adm. Code 104.406) as well as in Section 28.1(c) of the Act (415 ILCS 5/28.1(c)). For reasons set out below, the Illinois EPA recommends that the Petitioners' request be denied.

II. RELEVANT CASELAW

The Petitioners cite to a number of different cases in support of their contention that a finding of inapplicability or, in the alternative, an adjusted standard is warranted. In their petition, the Petitioners address the case of Alternate Fuels, Inc. v. Illinois EPA, 337 Ill. App. 3d 857, 786 N.E.2d 1063 (5th Dist. 2003) ("AFI"). The Petitioners argue that the court's holding in

[1] The Illinois EPA notes that included among the definitions in Section 807.104 that are the subject of the Petitioners' request are those of "solid waste" and "waste." Those definitions are taken, verbatim, from statutory definitions found in Sections 3.470 and 3.535 of the Environmental Protection Act ("Act") (415 ILCS 5/3.470, 3.535), respectively. Although the Board has in the past considered matters that involve the question of whether the material under review is a waste, in this specific instance the Petitioners are seeking direct regulatory relief (provided by an adjusted standard) from what is clearly identified as a statutory definition. Thus, a very persuasive argument could be made that as to the portion of the request that would involve relief from the definitions of "solid waste" and "waste" in Section 807.104, the request is inappropriate since an adjusted standard cannot be granted to relieve a statutory obligation or standard. Also, the Petitioners are seeking an adjusted standard from the definition of "solid waste" as found in Section 810.103 of the Board's regulations. That definition provides, in part, that consideration of whether a material is a waste includes a review of Section 721 of the Board's regulations. The Petitioners argue that Section 721.102 is not applicable to the present request. Petition, pp. 6-7. However, given that one of the definitions that is the subject of the request for adjusted standard includes an incorporation of regulations found in Part 721, the Board should at the very least give some consideration to those provisions. In particular, the Illinois EPA draws the Board's attention to Section 721.102(e)(2)(A) (35 Ill. Adm. Code 721.102(e)(2)(A)), which provides that materials that are solid wastes (even if recycled) if the materials are used in a manner to produce products that are applied to the land. Here, the Petitioners propose to accept a certain material for processing ("recycling" per their argument) and then use as an asphalt replacement or enhancer. This use obviously contemplates application of the product to land. Therefore, considering that Section 721.102(e)(2)(A) of the Board's regulations is part of Part 721, and Part 721 is directly referenced in a definition from which an adjusted standard is sought, the Board may take that provision into consideration when weighing the Petitioners' request. Doing so further supports the Illinois EPA's position that the Petitioners' request should be denied since the material is a waste.

AFI is consistent with their position; namely, that GBSM is not a waste based on the Petitioners' proposed use and processing of the material. However, AFI is easily distinguishable for several reasons.

In AFI, the appellate court was reviewing a scenario in which an intermediate party (Alternate Fuels, Inc., or "AFI") was accepting triple-rinsed plastic containers and processing the plastic for later use by a separate utility in the utility's energy production activities. As part of the court's review, an analysis of the definition of the statutory definition of "waste" was undertaken. The court decided that, in that particular instance and based upon the facts presented there, the materials delivered to AFI for recycling into alternate fuels are not discarded, are not waste, and are not subject to permit and local siting procedures. AFI, 337 Ill. App. 3d at 866, 786 N.E.2d at 1069-1070.

But a careful review of the court's decision yields that it is distinguishable from the present case. First, the appellate court detailed facts surrounding the manner in which AFI would be accepting the plastic containers for processing. Those facts include requirements that suppliers of the components to sign a contract as evidence of their agreement to provide only materials free of nonconforming items, and that suppliers must perform a fuel analysis on the materials to show that they meet specifications set forth in an operating permit issued to the end-user utility. AFI, 337 Ill. App. 3d at 860, 786 N.E.2d at 1065.

Compare those requirements with the proposal of the Petitioners here. There is no statement that there will be any level of quality control similar to the AFI fact pattern, other than the Petitioners making the statement that they plan to pursue GBSM from multiple providers. Amended petition, pp. 11-12. All that the Petitioners state on this point is that there are other shingle manufacturers in the state who are potential sources for GBMS (other than IKO Chicago,

with whom an apparent business relationship has been struck) and that no contracts with any other sources have been entered into.[2] The Petitioners also state that they would be limited to the use of GBSM that meets the definition contained in the adjusted standard. Amended petition, p. 11, fn. 8. The definition of GBSM as provided in the petition is that GBSM consists of post-production material generated at the end of the manufacturing of roofing shingles, such as tabs, punchouts, and miscolored or damaged shingles. Petition, p. 2. That definition by its terms does not ensure uniformity in content or quality control. Also, contrasted with the AFI facts, there are no standards here set forth by permit or regulation that will be adhered to, merely those proposed by the Petitioners.

Also, the Petitioners claim that GBSM is uniform in composition. Id. In their supplement to the amended petition, the Petitioners provide information as to the percentage of ingredients in IKO Chicago's GBSM. Supplement to amended petition, p. 2. However, that breakdown is representative only of IKO Chicago's GBSM, and does not provide any guarantee that GBSM that may be purchased from other potential sources would be similar in percentage (or material, for that matter). Thus, for factual reasons alone, the AFI opinion is distinguishable in that it

Also, the AFI decision was based in large part on the appellate court's recognition of the Board's opinion in the related cases of Illinois Power Company v. Illinois EPA, PCB 97-35, 97-36 (consolidated) (January 23, 1997). The AFI court twice cited favorably to the Board's Illinois

[2] The Petitioners also argue that, consistent with the Illinois EPA's "solid waste determination" dated May 18, 1993, the Board should find that the GBSM is not a waste. The Illinois EPA disputes that argument for several reasons. First and foremost, the letter was issued not to the Petitioners but to IKO Chicago. There is nothing within the letter that indicates it was intended to be transferable. In fact, the letter clearly states that any use of the material inconsistent as described in the letter subjects the material to any applicable regulations. Since the letter qualifies the use of the GBSM to either on-site (i.e., at IKO Chicago's facility) or at the end user's site, it is inapplicable for the Petitioners' purposes since their contemplated use of GBSM does not meet either of those criteria. Also, by the Petitioners' own admission, their proposed processing and use of GBSM is not the same as that specified by the letter. Amended petition, p. 8. The May 1993 letter should therefore not be considered by the Board in this matter.

Power, the first time for the proposition that the Board found that the alternate fuel produced by AFI from the empty plastic containers was not waste within the meaning of the Act. AFI, 337 Ill. App. 3d at 860, 786 N.E.2d at 1065. Later, the AFI court relied on the Illinois Power case to bolster AFI's argument that the material delivered to AFI's plant was not waste. AFI, 337 Ill. App. 3d at 866, 786 N.E.2d at 1069.

In both those instances, the reliance on Illinois Power is not applicable to the case now under review by the Board.[3] The appellate court stated that in Illinois Power the Board decided that the alternate fuel produced by AFI was not waste. However, the ruling issued by the Board in Illinois Power should be kept in its proper context. In Illinois Power, the Board considered the very narrow question of whether Illinois Power was a pollution control facility that would require Illinois Power to obtain local siting approval. Illinois Power, p. 15. As a part of reaching resolution on that question, the Board decided that the alternate fuel accepted by Illinois Power was not a waste. Id.

To reach that decision, the Board looked to a number of different cases and the facts surrounding AFI and Illinois Power. Initially, the Board distinguished a number of previous decisions that involved a review of whether a material was "discarded" by noting those that past decisions (wherein the Board found that the material in question was not a waste) all involved petitioners that were the actual generators of the material in question that maintained control of the material. Illinois Power, p. 12-13. The Board then discussed the applicability of one case in particular, In the matter of: Petition of Illinois Wood Energy Partners, LP, For An Adjusted Standard From 35 Ill. Adm. Code 807 Or, In The Alternative, A Finding Of Inapplicability, AS 94-1 (December 1, 1994) ("IWEP"). In IWEP, the Board ruled on a petition for adjusted

[3] As the Petitioners noted in their petition, the AFI decision has been accepted by the Illinois Supreme Court for review. Petition, p. 2. While it is impossible to guess what result will come of that decision, it is at the very least possible that the appellate court's decision, and reliance on the Illinois Power case, may be questioned or reversed.

standard very similar to the present situation. A petition was filed to obtain either an adjusted standard from Part 807 or, in the alternative, a finding of inapplicability of that Part. The petitioner was Illinois Wood Energy Partners, LP ("IWEP"), and it sought a favorable ruling in regards to its proposal to accept wood materials from different sources for processing to produce wood chips that would ultimately become "produced wood fuel." IWEP, p. 3. Thus, IWEP was the intermediary in the picture, accepting material from the generators, then processing the material for later sale to end-users as fuel. Here, the Petitioners are proposing the very same situation—they would accept GBSM from the generators (e.g., IKO Chicago), then would process the GBSM to produce a product (Eclipse Dust Control) that would be sold to end-users. Before IWEP would accept the material from the generators, it had to meet all specifications in IWEP's own wood fuel procedure. Id. Factually then, the present situation is on-point with IWEP.

The Board decided in IWEP that the wood material being utilized by IWEP was a waste for several reasons. As opposed to other cases decided by the Board in which a material was not found to be "discarded" and thus a waste, the wood material being utilized by IWEP was not generated by IWEP. It was accepted from off-site generators, then further refined to conform to IWEP's own specifications of produced wood fuel. The wood material was not immediately used or stored to be used, in that it was not a part of the generator's ongoing process. The Board concluded that the wood material was a waste. IWEP, p. 9.

The fact pattern in IWEP is almost identical to the facts here. The Petitioners are accepting GBSM from an off-site generator (or generators), and will process the material to conform to their own (versus permit or regulation-imposed) standards. The Petitioners note that GBSM may be stockpiled in amounts as much as 5,000 tons for several months during the lull in

the Petitioners' business cycle. Amended petition, pp. 11-12. The GBSM is therefore not a part of any ongoing process, since that term as used by the Board only involved the generator's processes, and even if imputed to the Petitioners is not applicable since the Petitioners' operations are not constant and continuous.

The Board in highlighted this reliance on the intermediate involvement of a petitioner in Illinois Power. There, the Board distinguished earlier cases in which a material was found not to be a waste since the petitioner seeking that finding was the generator of the waste, whereas in IWEP the material was not generated by IWEP's manufacturing process. Illinois Power, p. 13. The Board stated that past decisions that a material was not a waste centered around the fact that the material was generated by the company using the material and was part of its ongoing process. Id.

The Board then went on to conclude that the alternate fuel product (i.e., not the material being accepted by AFI, but rather the material being produced and sold to Illinois Power by AFI) was not a waste since it was a "valuable energy product" that exhibited no characteristics of being discarded when utilized under conditions of Illinois Power's proposal. Illinois Power, p. 14. The Board then distinguished IWEP by noting that Illinois Power was not manufacturing the alternate fuel necessitating on-site handling and separating of waste material to conform to the specifications of the alternate fuel. Id. The Board further noted that Illinois Power was not transforming the containers on-site, but rather simply receiving the alternate fuel after it had been processed. Also, the Board found that Illinois Power and AFI (operating then under the name of "REI") had sufficient control over the material to preclude an unknown contaminant from entering into the alternate fuel. Illinois Power, p. 15. Thus the Board concluded the alternate fuel was not a waste.

That case is wholly different from the present matter. Here, the petitioner is not an end-user of the Petitioners' product, but rather is the intermediate party that accepts off-site generated material for processing and later transfer/sale to the ultimate end-user. Also, the material in question here is not the end product after intermediate processing (as was the alternate fuel in Illinois Power), but rather is the material accepted from off-site generators for intermediate processing (as was the wood material in IWEP).

Therefore, the Illinois Power case is clearly not applicable here, but the IWEP case is applicable and controlling given that it is factually identical to the Petitioners' situation. Accordingly, any conclusion drawn from, or reliance upon, the Illinois Power case by the AFI court is inapplicable to the present situation since the underlying facts in Illinois Power are distinct from the facts at hand. The AFI court noted that it found no real distinction between the product at the time it entered AFI's facility and the product after it left, because the material is at all times destined to become alternative fuel that is not discarded. AFI, 337 Ill. App. 3d at 866, 786 N.E.2d at 1069.

That conclusion cannot be arrived at here, since the facts relied on by the court in AFI (e.g., the contractual arrangement regarding content of material, compliance of material to permit specifications, analysis performed on material by generators for review and approval by intermediate processor) have not been demonstrated here. It is very possible that had the Board in Illinois Power been asked to review the question of whether the material being accepted by AFI/REI was a waste, it may have decided consistent with the IWEP case that the material was a waste based on the factual considerations described in the Illinois Power decision. That question was obviously not raised and thus not addressed, but that fact alone precludes the Petitioners from citing favorably to either the Illinois Power or AFI decisions. Consistent with the analysis

and findings in IWEP, the Board should find that the GBSM described by the Petitioners is a waste.

III. SECTION 104.406 FACTORS

For the reasons more fully set forth below, the Illinois EPA does not believe the Petitioners have satisfactorily provided information required by Section 104.406 of the Board's procedural rules.

A. Section 104.406(a) – Standard from which adjusted standard is sought

The Illinois EPA has already raised concerns regarding the Petitioners' attempt to seek an adjusted standard from a statutory definition and the consequence of asking for an adjusted standard for a regulatory definition that incorporates other regulatory standards that must thus be considered. See, footnote 1. Those arguments and comments are incorporated here.

B. Section 104.406(b) – Regulation of general applicability

The Illinois EPA does not take issue with the Petitioners' comments on this topic.

C. Section 104.406(c) – Level of justification

The Illinois EPA does not take issue with the Petitioners' comments on this topic.

D. Section 104.406(d) – Description of Petitioners' activities

The Illinois EPA finds that even with the additional information provided by the Petitioner in the amended petition and supplement to the amended petition, certain questions still remain. For example, the petitioner has not provided specific information regarding the facility in terms of locations of the staging area, measuring area, and grinding and storage areas. A site map, equipment list and written operating procedure would be advisable, as would time frames for storage prior to and after grinding. The Petitioners did not clarify how the two different sites identified in the amended petition (pages 3-4) are being utilized. Regarding the test results that

were described in the amended petition (pages 6-7), there is no information as to the exact location of the test sections, the dates of application, the application rates, placement specifications, or method used to determine that noise and dust were eliminated.

The Petitioners did not provide information explaining quality control procedures (to the extent they may exist) that would ensure the quality of the GBSM used as feed stock, nor did they explain whether any physical or chemical testing would be performed to ensure the consistency of the material. Also, testing or measuring of the material as to placement and compaction procedures and results were not provided.

The Petitioners did not provide a comparison of their product to an appropriate material now being used routinely in road construction, including a comparison of the ASTM or DOT specifications of the product to the Petitioners' product characteristics.

The Petitioners did not provide any evaluations or test results as to content of toxic substances in the Eclipse Dust Control (or in comparison to such substances existing in now-used road material), including polynuclear aromatic hydrocarbons in the Eclipse Dust Control and impact on air emissions at the grinding or paving site.

The Petitioners did not provide any information that demonstrates use of their product would not have any adverse impact to cattle at a feed lot or on meat produced from such cattle. There may be additional health risks present from the use of this material on walking or bicycle paths due to inhalation of particles or vapors.

E. Section 104.406(e) – Compliance alternatives

The Petitioners have identified certain costs associated with compliance with the regulations of general applicability, but have not provided the specific costs called for in the regulations (i.e., overall capital costs as well as the annualized capital and operating costs).

F. Section 104.406(f) – Proposed adjusted standard

The Illinois EPA reiterates its arguments and concerns over the Petitioners obtaining an adjusted standard from a regulation that is taken, verbatim, from a statutory definition, as that would result in the improper granting of relief from a statutory provision.

G. Section 104.406(g) – Impact on the environment

The Illinois EPA has raised a number of unanswered questions and concerns in paragraph D. above that are incorporated here.

H. Section 104.406(h) – Justification

The Illinois EPA does not dispute the Petitioners' statement that no level of justification is specified for this situation. However, the Illinois EPA does contest the Petitioners' statement that the proposed adjusted standard is justified by the GBSM processing for reasons set forth above.

I. Section 104.406(i) – Consistency with federal law

The Illinois EPA does not take issue with the Petitioners' comment on this topic other than to again note that adjusted standards are not an acceptable mechanism for obtaining relief from a statutory provision.

J. Section 104.406(j) – Hearing

The Illinois EPA does not take issue with the Petitioners' comment on this topic.

K. Section 104.406(k) – Supporting documents

The Illinois EPA contests the relevancy and applicability of the Illinois EPA's May 1993 letter. Also, the documents related to the receipt of a grant from DCEO is not relevant to the matter under review here and thus should not be considered; the grant was not awarded based on any of the factors that will guide the Board in resolving the Petitioners' request.

IV. SECTION 28.1(C) FACTORS

The Illinois EPA does not believe that the Petitioners have satisfactorily addressed all the statutory requirements imposed by Section 28.1(c) of the Environmental Protection Act ("Act") (415 ILCS 5/28.1(c)).

A. Factors are different than those relied on by the Board

The Petitioners have not demonstrated that the factors before them (and now before the Board) are substantially different or unique from circumstances before any other entity that seeks to process a waste material. That the Petitioners are claiming that their process is a recycling operation is not relevant, since the regulations from which they seek an adjusted standard were promulgated with the purpose and intent of applicability with all provisions of the Act.

B. Existence of factors that justify an adjusted standard

The Petitioners have not demonstrated any factors that exist to justify an adjusted standard, other than a desire to avoid having to comply with otherwise applicable regulatory provisions.

C. Adverse environmental or health effects

As noted above, the Illinois EPA identified numerous examples of potential problems or concerns that may relate to adverse environmental or health effects that were not addressed or resolved by the Petitioners.

D. Consistency with federal law

The Illinois EPA does not take issue with the Petitioners' comment on this topic other than to again note that adjusted standards are not an acceptable mechanism for obtaining relief from a statutory provision.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board deny the Petitioners' request for an adjusted standard or, in the alternative, a finding of inapplicability.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
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Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: August 20, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on August 20, 2004, I served true and correct copies of a MOTION FOR LEAVE TO FILE INSTANTER and RECOMMENDATION, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
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