BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:	)	
PETITION OF JO'LYN CORPORATION and FALCON WASTE AND RECYCLING, INC. for an ADJUSTED STANDARD from portions of 35 Ill.Adm.Code 807.103 and 35 Ill.Adm.Code 810.103, or in the alternative, A FINDING OF INAPPLICABILITY.	) AS 04-02) (Adjusted Standard – Land)	

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 10th day of February 2005, the following were filed with the Illinois Pollution Control Board: **Petitioners' Reply** and **Petitioners' Renewed Motion for Expedited Decision,** attached and herewith served upon you.

JO'LYN CORPORATION and
FALCON WASTE AND RECYCLING, INC.

By: _____
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Attorney for Petitioners

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Firm I.D. No. 29558

CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copies of the above-described documents to counsel of record in the above-captioned matter via U.S. Mail at One IBM Plaza, Chicago, IL 60611 on or before 5:00 p.m. on February 10, 2005.

_____
Jeanette M. Podlin

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

6332-002

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SERVICE LIST
AS 04-02
(Adjusted Standard – Land)

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ORIGINAL

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RENEWED MOTION FOR EXPEDITED DECISION

Petitioners Jo'Lyn Corporation and Falcon Waste and Recycling, Inc., by their attorneys Swanson, Martin & Bell, hereby renew their motion for expedited decision of their petition for adjusted standard or, in the alternative, for a finding of inapplicability:

1. Petitioners and the Agency have filed several pleadings with the Board in this matter. A hearing was held on December 22, 2004. Petitioners have filed their post-hearing brief, the Agency has responded, and petitioners have filed a reply. Thus, the record is ready for the Board's consideration.

2. As previously noted, application of petitioners' paving product to the surface requires compaction and the heat of the sun.

3. Petitioners' business is, by its nature, a seasonal business. For optimal results, the process needs the heat of the sun to set the paving. Petitioners are small businesses which need to operate in order to survive.

4. Petitioners respectfully renew their previous motion for expedited decision, and request that the Board reach a determination on this matter as soon as possible to allow petitioners to begin operations as soon as weather permits. Petitioners seek a decision at the Board's March 17, 2005 meeting, if possible.

WHEREFORE, petitioners respectfully ask this Board to act upon its petition as soon as possible.

Respectfully submitted,
JO'LYN CORPORATION and FALCON WASTE AND RECYCLING, INC.

By: _____
One of its attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
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PETITION OF JO'LYN CORPORATION	)	
and FALCON WASTE AND RECYCLING,	)	AS 04-02
INC. for an ADJUSTED STANDARD from	)	(Adjusted Standard – Land)
portions of 35 Ill.Adm.Code 807.103 and	)	
35 Ill.Adm.Code 810.103, or in the	)	
alternative, A FINDING OF	)	
INAPPLICABILITY.	)	

PETITIONERS' REPLY

Petitioners Jo'Lyn Corporation ("Jo'Lyn") and Falcon Waste and Recycling, Inc. ("Falcon") (collectively, "petitioners"), by their attorneys Swanson, Martin & Bell, hereby submit their reply to the Illinois Environmental Protection Agency's (Agency) response to petitioners' post-hearing brief.

INTRODUCTION

Petitioners are disappointed in and puzzled by the Agency's continuing opposition to petitioners' quest for approval to operate their business. Despite the submission of a great deal of information, and petitioners' continuing offers to answer any questions the Agency has, the Agency has chosen to continue its opposition. Most telling, the Agency has failed to identify a single environmental concern in its response. Instead, it submits eleven pages of irrelevant claims, without providing a single persuasive reason for its refusal to support petitioners' request for an adjusted standard.

Once again, petitioners question whether the Agency has lost sight of the Act's basic purpose: protecting the environment. The Act specifically states that one of its purposes is to conserve natural resources by encouraging recycling and reuse. (415 ILCS 5/20(b).) Petitioners recognize that the Agency must consider the environmental

consequences, if any, of a recycling process. However, the Agency has not identified a single environmental concern or problem with petitioners' process. Instead, the Agency has focused on such minutia as whether petitioners' operating manual will have to be revised to reflect a different method of learning when there is sufficient GBSM for a pick up at the supplier. Petitioners join the comments made by Mr. Turley, executive director of the Construction Materials Recycling Association, at hearing, and ask the Board to help the Agency move into the 21st century in the area of GBSM recycling. (Tr. at 175.)

GBSM IS NOT A WASTE

Petitioners have demonstrated that the GBSM is not a waste. Petitioners have pointed to the Agency's May 1993 solid waste determination, finding that GBSM produced by IKO Chicago is not a waste when used as a paving product.[1] The Agency now contends that the May 1993 letter is applicable only to IKO. The Agency is incorrect. There is nothing in the letter that states that the letter is applicable only to IKO: in fact, the letter specifically refers to the use of GBSM "either on site or at the end user's site." (May 1993 letter, paragraph 2 (emphasis added).) The Agency's letter clearly contemplates that the GBSM could be used at another user's (other than IKO) site. That is exactly what it proposed here: using the GBSM, in the manner outlined by the Agency in 1993, as a paving product at a site other than IKO's facility.

The Agency's May 1993 letter specifically refers to use of the GBSM by others. Furthermore, nowhere does the letter state that the determination is applicable only to IKO. Thus, the plain language of the letter supports a finding that the letter is not applicable only to IKO, but is indeed applicable to a user who uses GBSM from IKO in

[1] That May 1993 letter has been previously put into the record as Exhibit D to petitioners' request for adjusted standard, and as Exhibit 5 at hearing. For the Board's convenience, an additional copy of the letter is attached to this reply, as Exhibit O.

the manner laid out in the letter. When interpreting a document, the plain language of that document is controlling. The plain language of the letter, with its reference to use at an "end user's site," demonstrates that the letter is not limited to IKO. However, even if the Board disagrees that the language of the letter is clear, the letter must be interpreted against the Agency. Where there is an ambiguity about the meaning of a document, the document is construed against the party who drafted the document. *Central Illinois Light Company v. Home Insurance Company*, No. 96978, 2004 Ill. LEXIS 2033, *16 (December 4, 2004). Here, the Agency drafted the document, so the document is construed against the Agency's interpretation. The May 1993 letter is not limited to IKO.

The Agency's response implies that there is something improper about petitioners' reliance upon the May 1993 letter. Petitioners reject any suggestion that there is anything inappropriate about their reliance upon a letter drafted and issued by the Agency, applicable to the very GBSM petitioners use in their process. If anything, it is inappropriate for the Agency to repudiate its own determination by attempting to convince the Board that the letter is not "transferable."

Petitioners have further demonstrated that the GBSM is not a waste, because it does not fit the statutory and regulatory definition of waste. Petitioners' interpretation of the definition of waste is supported by the Illinois Supreme Court and the appellate court decisions in *Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency*, No. 96071, 2004 Ill. LEXIS 1616 (October 21, 2004)("*AFI*"). Petitioners and the Agency have noted that there is currently a petition for rehearing, filed by the Agency,

pending before the Illinois Supreme Court.[2] The Agency asserts that the appellate court's decision in *AFI* is distinguishable from the instant case, but does not specifically address the merits of the supreme court decision. Instead, the Agency asserts:

> Without seeing what the court's final order is in that case, the Illinois EPA is in the difficult position of either not being able to further distinguish what may be the court's final order, or cite to a new order that may be more clearly supportive of (or not inconsistent with) the Illinois EPA's position articulate here. Similarly, the Board may want to consider how much reliance it wishes to place on a decision that could be modified or reversed.
>
> (Agency response, p. 3, footnote 1.)

The Agency's comments are disturbing for two reasons. First, the reference to "being able to further distinguish" or refer to a theoretical new opinion that is "more clearly supportive" of the Agency's position is uncomfortably close to a statement that the Agency refuses to recognize the ruling of the highest court in the state. It appears as though the Agency will take any possible action to avoid recognizing that materials which are not discarded (the GBSM in this case, and the plastic materials in *AFI*) are not "waste," despite direction from both the supreme and appellate courts. Such a position is reminiscent, in fact, of the Agency's behavior in *AFI*. Despite the fact that the Board itself had already determined that the plastic material used by AFI was not a "waste" (see *Illinois Power Co. v. Illinois Environmental Protection Agency*, PCB 97-35, 97-36 (January 23, 1997)), the Agency refused to accept that determination and proceeded against AFI in contravention of the Board's ruling. The Agency's statement

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[2] On February 9, 2005, petitioners' counsel was informed by an assistant clerk at the Supreme Court that the court had not taken any action on the petition for rehearing during the Court's January term. That January term has concluded. According to the assistant clerk, it is most likely that the court will not take any action on the petition until the conclusion of the court's March term (late March or early April).

raises concerns that the Agency will refuse to accept (and implement) the Illinois Supreme Court's decision.

Second, the statement that the Board may "wish to consider" how much reliance it should place on the *AFI* decision sounds somewhat threatening to the Board. There is no evidence that the supreme court decision will indeed be modified or reversed. As noted in petitioners' post-hearing brief, the supreme court's October 2004 decision is effective and states the law in Illinois. "[T]he filing of a petition for rehearing does not alter the effective date of the judgment of a reviewing court unless that court allows the petition for rehearing." *PSL Realty Company v. Granite Investment Company*, 86 Ill.2d 291, 427 N.E.2d 563, 570, 56 Ill.Dec. 368 (1981). *See also Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 734, 260 Ill.Dec. 541 (2001). The Board should follow the law in Illinois, as stated by the Illinois Supreme Court in *AFI*, and find that GBSM is not a "waste."[3]

REQUEST FOR ADJUSTED STANDARD

The Agency also continues to object to petitioners' request for an adjusted standard. Although the Agency baldly states that there are "serious issues" that remain unresolved, the Agency has failed to specify a single environmental concern in its reply. Instead, the Agency attempts to make large issues out of small concerns, without demonstrating how those concerns have any environmental impact.[4]

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[3] To do otherwise would improperly allow the Agency (or any other party dissatisfied with a supreme court decision) to delay the effect of the court's opinion simply by filing a petition for rehearing. The law, as stated by the supreme court, is that the effective date of an opinion is not impacted by the filing of a petition for rehearing. *PSL Realty Company*, 427 N.E.2d at 570.

[4] Additionally, although the Agency claims (on page 3 of its response) that there is missing information from the adjusted standard "checklist," the Agency fails to identify any missing information from that "checklist." Petitioners have provided all of the information required to support an adjusted standard.

IDOT standards for recycled asphalt pavement (RAP)

The Agency claims that there is somehow a problem with the adjusted standard because Ms. Powles did not identify or discuss Illinois Department of Transportation (IDOT) standards applicable to recycled asphalt pavement (RAP). It is true that petitioners have not discussed IDOT's standards for RAP: that is because those standards are not applicable to petitioners' product, Eclipse Dust Control (EDC). The question asked of Ms. Powles, by a member of the Board's technical staff, was whether there are any regulatory restrictions on using EDC on roadways. Ms. Powles properly answered "no." (Tr. at 73.) There is nothing sinister or missing from Ms. Powles' answer: she was asked if there are restrictions on EDC, and she said that there are not. The IDOT standards referenced by the Agency do not apply to EDC: the fact that EDC shares some components with RAP does not make the two pavements the same. Petitioners are aware that IDOT has standards for RAP, but have not addressed those standards because they are not applicable to EDC. IDOT has not promulgated any standards or restrictions for EDC, nor has any other regulatory or technical entity.

The Agency states, without any support whatsoever, "[t]hat the [p]etitioners were unaware of the IDOT road standards (or possibly knew of the standards and chose not to acknowledge them) is in and of itself problematic, and certainly warrants denial of the adjusted standard." (Agency response, p. 5, footnote 4.) Petitioners ask the Board to strike that sentence of the Agency's response, as lacking any support and as improperly implying that petitioners had a reason to hide the IDOT standards. Petitioners are aware of the IDOT road standards: they simply aren't applicable to EDC. The attack on petitioners' motives is particularly offensive. The hearing officer specifically found that

all witnesses (including Ms. Powles) were credible. (Tr. at 184.) There is no evidence to support the Agency's statement, and it should be stricken.

It is also important to note that, even if there were IDOT standards applicable to EDC, only state-owned roads must conform to IDOT specifications. Thus, even assuming (for the sake of argument only: there is no evidence of this) that EDC could not be applied to state-owned roads, there are thousands of miles of roads (including township roads), as well as driveways and parking lots, which are not subject to IDOT standards. Those roads, driveways, and parking lots are appropriate places for the application of EDC.

Most importantly, the Agency has failed to provide any connection between its speculation about IDOT standards for another paving product and any environmental concern about EDC. Simply put, there is no environmental concern. The Agency's assertions should be rejected.

The operating manual

The Agency also takes issue with Ms. Powles' testimony about the operating manual. Petitioners submitted the operating manual as a written record of the procedures petitioners follow in their process, to demonstrate that petitioners operate under specific procedures. The Agency's only stated concern about the operating manual is whether the manual might be revised if petitioners worked with a supplier other than IKO. This concern is simply irrelevant, and is not linked to any environmental concern or issue. It is common practice for any business entity, like petitioners, to review their procedures to be more efficient and as experience teaches better ways to perform their activities. There is no requirement in the adjusted standard provisions

that the petitioner never improve their process, or that their operating manual be "frozen in time."

The fact that the operating manual might be revised to reflect, for example, an additional or different way for petitioners to know when there is enough GBSM to pick up from the supplier is not related to any environmental issue or concern about performance of the EDC. Petitioners currently use (or will use, when allowed to operate again) a web-camera to watch the box of GBSM tabs at the IKO facility. Petitioners could just as easily be informed by phone call, facsimile, e-mail or other means of communication that there was sufficient GBSM for a pickup. Such a change would have literally no impact on any environmental or product performance issues. The Agency is grasping at straws.

Use of additional GBSM supplier

The Agency further complains that petitioners might, in the future, use an additional supplier of GBSM, but that petitioners have not specifically identified the potential additional supplier. Again, the Agency is searching desperately for some argument to support their position. Once again, the Agency has identified an irrelevant issue.

Petitioners have not yet specifically identified an additional supplier because petitioners have not been able to operate due to the Agency's position that GBSM is a waste. It defies logic, and good business practice, to assert that petitioners should approach potential suppliers and discuss a business relationship based only upon "let's have a business relationship when I obtain, sometime in the future, approval from the Pollution Control Board to conduct my business." More importantly, the identity of a

potential additional supplier is irrelevant, as long as any GBSM obtained from an additional supplier complies with the definition of GBSM contained in the language of the adjusted standard.[5]

Thickness of the applied EDC, and location in sun

The Agency also complains about the thickness of the applied EDC, and about the performance of the EDC in a shaded area. Both concerns are unfounded, and have no environmental consequence.

Petitioners would prefer that the adjusted standard not specify a particular thickness of the EDC, to allow petitioners to continue to improve their product. The Agency shows continuing confusion about the applicability of the May 1993 letter to the adjusted standard. Petitioners have pointed to the May 1993 letter as support for their position that GBSM is not a waste when used as a paving product. The May 1993 letter is not directly applicable to the adjusted standard petition itself. (The May 1993 letter has been offered in the context of demonstrating that GBSM is not a waste. If the Board finds that GBSM is not a waste, no adjusted standard is needed.) Thus, there is no conflict for petitioners to seek, in the context of an adjusted standard, the ability to provide flexibility in the thickness of the paving product. However, if the Agency is willing to concede that the May 1993 letter is applicable to petitioners, so that no adjusted standard is necessary, petitioners will agree to comply with the exact parameters (including thickness) specified in the May 1993 letter.

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[5] The Agency asserts that GBSM from a supplier other than IKO would need a waste determination similar to that issued to IKO in May 1993, because the May 1993 letter was based on specific information from IKO. The Agency is confused about the interplay of the adjusted standard and the May 1993 letter. If the Board grants the proposed adjusted standard, petitioners would be able to use GBSM which meets the definition in the adjusted standard. The May 1993 waste determination would, in effect, be superseded as to petitioners. No waste determination would be required. The Agency should have no objection to this, since it has taken the position that the May 1993 letter is not applicable to petitioners.

The Agency further points to Ms. Powles' testimony that the EDC is slightly broken in the shaded portion of a test section. However, the Agency has failed to connect the slight wear in the shaded portion with any environmental concern or other legitimate reason to deny the requested adjusted standard. It is a long stretch from the fact that the pavement was "slightly broke up" (Tr. at 95) in the shaded area to a conclusion that the EDC is not environmentally sound or is an inappropriate product. Petitioners have stated, from the beginning of this case, that they currently sell the EDC for application in sunny areas. As part of their product development, petitioners applied one test section that had a shaded area. Petitioners believe that they will be able to develop EDC which can be used in shaded areas. The adjusted standard should not be denied simply because petitioners are continuing to develop their product. Petitioners will only sell and install EDC in appropriate places where testing has demonstrated that the EDC will wear well. This makes sense from a business perspective, because petitioners have no incentive to sell a product which does not satisfy its customers. However, petitioners should have the flexibility to install the EDC in shaded areas, if and when such installation is appropriate, as long as that application complies with the requirements of the proposed adjusted standard.

Issues addressed in petitioners' post-hearing brief

The Agency then tries to attack several issues addressed in petitioners' post-hearing brief. The Agency's claims share a common thread: they reflect no environmental concerns, but are attempts to muddy the waters. For example, the Agency once again asserts its incorrect claim that petitioners (and possibly third-party customers) are trying to fit within the May 1993 letter. Stated one more time:

petitioners believed, and continued to believe, that the May 1993 letter demonstrates that GBSM is not a waste when used as a paving product. However, the May 1993 letter is not the basis for petitioners' adjusted standard request. Petitioners have been able to use some of the information developed in connection with that May 1993 letter to demonstrate that an adjusted standard is appropriate, but the letter itself is not controlling in the context of an adjusted standard. The Agency has confused the issue of "is GBSM a waste" with the issue of "shall an adjusted standard be granted." Those issues are not the same.

The Agency has completely failed to respond, in a meaningful and supportable way, to the evidence presented by petitioners on the extensive testing performed on the IKO GBSM, on the experiences in other states[6], and on the beneficial uses of EDC. All of the testing performed on the GBSM has demonstrated that the material is not hazardous. Other states have allowed the use of GBSM as a paving product for more than ten years, without treating the GBSM as a "waste." The EDC developed by petitioners is a well-designed paving product which holds up under use, and has no environmental drawbacks. In fact, the EDC has environmental benefits even beyond reusing GBSM, because EDC is an excellent dust suppressant. This is an important benefit, given the ongoing problems with particulate emissions in northern Illinois. Petitioners urge the Board to look past the Agency's continued spurious and irrelevant attacks on petitioners and their process.

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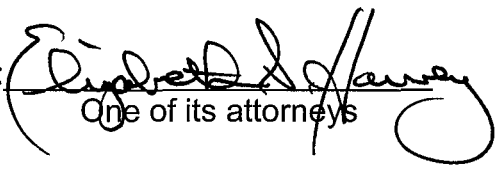
[6] The section of the Agency response entitled "experiences in other states" is simply an attack on Mr. Foulkes' testimony that IKO has been forced to landfill the large majority of its GBSM since the Agency has taken the position that the May 1993 letter is not applicable to third-parties. It is very surprising that the Agency does not understand that IKO has been forced to landfill the GBSM only for lack of a market, which has resulted from the Agency's repudiation of its May 1993 letter. The Agency never addresses the fact that other states have allowed the use of GBSM in paving products for more than ten years.

CONCLUSION

Petitioners are left with the belief that the Agency has lost sight of its role: to protect the environment. Instead of identifying a single articulated environmental concern with the use of GBSM as a paving product, the Agency continues to raise irrelevant and extraneous claims which do not impact either the environment or the durability or effectiveness of the EDC. The public has demonstrated its support through public comments and attendance at hearing. Not a single member of the public has expressed opposition or even a concern. Petitioners have demonstrated that GBSM is not a "waste." In the alternative, if the Board finds that GBSM is a waste, petitioners ask the Board to grant the requested adjusted standard, based upon the evidence and testimony submitted by petitioners.

Respectfully submitted,

JO'LYN CORPORATION and
FALCON WASTE AND RECYCLING, INC.

By: 
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State of Illinois
ENVIRONMENTAL PROTECTION AGENCY

Mary A. Gade, Director
2200 Churchill Road, Springfield, IL 62794-9276
217/524-3300

May 18, 1993

RECD MAY 20 1993

IKO Chicago, Inc.
Attn: Reynold R. Hagel
6600 S. Central Avenue
Bedford Park, Illinois 60638

Re: 0310125096 -- Cook County
IKO Chicago, Inc.
Log No. S-147
State Permit File
Solid Waste Determination: Granulated Bituminous Shingle Material (GBSM)

Dear Mr. Hagel:

The Agency has evaluated your request for a solid waste determination for granulated bituminous shingle material (GBSM) generated by the Bedford Park facility and has determined that it is not a solid waste when utilized for the following applications:

1. GBSM Shingle Chips may be used to form a pavement surface for unpaved, muddy, soft, or dusty roadways. The Shingle chips shall be applied at a sufficient thickness (5-6") to ensure a cohesive, durable roadbed.

2. GBSM Ground Chips are divided into the following categories:

   a. Course ground chips (1/2" x 1/2" to 5" x 5") may be used to form a pavement surface for unpaved roadways (see 1. above). Also, these chips may be used to form a pavement sub-base material for road construction projects. Once again, the chips should be applied at a sufficient thickness to provide a stable base structure.

   b. Fine ground chips (<1/2" x 1/2") may be used as an ingredient in hot mix paving compounds (hot mix asphalt).

   Both the coarse ground chips and the fine ground chips may be produced (shredded) either on-site or at the end user's site, but must be utilized in the manner(s) described above.

While use of this material may be exempt from the permit requirements of 35 Ill. Adm. Code Subtitle G, Section 807.201 such use cannot violate any other provisions of the Act or the rules and regulations adopted thereunder. Any material not used as described above is subject to the regulations as they apply. Also, if at any time during this period the process which generates this waste changes, resampling and analysis must be performed and submitted to the Agency for reevaluation.

If you have any questions regarding this information, please contact Scott Hacke at 217/524-3267.

Very truly yours,

Lawrence W. Eastep, P.E., Manager
Permit Section
Division of Land Pollution Control
Bureau of Land

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