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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS  
Pollution Control Board

In the Matter of: )  
)  
Clean Construction or demolition ) R06-19  
Debris Fill operations Under P.A. 94-272 ) (Rulemaking-Land)  
(35 Ill. Admin. Code 1100/Docket R2006-19) )

P.C. #8

PUBLIC COMMENT

Land Reclamation Services, Inc. ("Land Reclamation") respectfully submits the following comment on the proposed regulations currently pending before the Illinois Pollution Control Board (the "Board"). Land Reclamation is of the opinion that in their current form, the proposed regulations are impermissibly vague and are likely to create litigation rather than provide workable standards for the operators of facilities subject to those regulations.

As discussed in more detail below, Land Reclamation suggests that: (1) the IEPA be required to state a specific definition of the word "uncontaminated" which takes into account existing background levels of impurities already present in the environment as well; and (2) that the proposed rule be revised to make clear that clean fill operators who accept loads after engaging in proper PIF/FID testing will not be required to remove those loads from their facilities.

**A. The Meaning of The Word "Uncontaminated" and Its Possible Interpretation Under the Existing Proposed Regulations.**

Section 5/3.160 of the Illinois Environmental Protection Act (the "Act") defines "Clean Construction Demolition Debris", in pertinent part, as follows:

(b) "Clean construction or demolition debris" means uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed asphalt pavement, or soil generated from construction or demolition activities.

The Act itself contains no definition of the word "uncontaminated." The Illinois Environmental Protection Agency's current regulations provide no interpretation of the meaning of that word. Nor do the proposed regulations regarding the disposal of Clean Construction Demolition Debris ("CCDD") contain a definition of the term "uncontaminated."

Indeed, rather than give guidance to clean-fill operators regarding the nature of

the materials they may accept, the proposed regulations, if implemented, will both increase uncertainty and litigation. As of April 6, 2006 the proposed regulations contain the following procedure which owner operators must follow when accepting putative CCDD at a former quarry or mine:

#### Section 1100.205 Load Checking

The owner or operator must institute and conduct a load checking program designed to detect attempts to dispose of waste at the facility. At a minimum, the load checking program must consist of the following components:

##### a) Routine Inspections

1) An inspector designated by the facility must inspect every load before its acceptance at the facility utilizing an elevated structure, a designated ground level inspection area, or another acceptable method as specified in the Agency permit. In addition to a visual inspection, the inspector must use an instrument with a photo ionization detector utilizing a lamp of 10.6 eV or greater or an instrument with a flame ionization detector, or other monitoring devices approved by the Agency, to inspect each load. **All instruments shall be interpreted based on the manufacturer's margin of error. Any reading in excess of background levels using any of these instruments must result in the rejection of the inspected load. In addition, any reading in excess of background levels on any monitoring device used by the Agency during an Agency inspection must result in the rejection of the inspected load.**

(emphasis added).

An examination of this proposed regulation reveals, that any given load will be subject to the following minimum procedures upon its arrival:

- (1) Each load will be subject to PID/FID screening;
- (2) The results of that screening will be interpreted based upon the manufacturer's stated margin of error;
- (3) If the screening shows readings in excess of background levels (taking into account the margin of error) the load will be rejected;
- (4) If the IEPA chooses to inspect the load it must be rejected if **any monitoring device** used by the IEPA gives a reading in excess of background levels.

The regulation in its current form does not address under what circumstances the IEPA will perform further testing of materials received by a clean fill facility. Nor does the regulation state what standards the IEPA will apply in determining whether or not such materials will be deemed "contaminated" within the meaning of the Act when it performs its own testing.

While the language of the proposed regulation appears to recognize that metropolitan areas, such as Chicago, will have heightened levels of background impurities that should be taken into account in operating a PIF/FID instrument, the regulation never specifically states that a clean fill operator is permitted to accept materials that contain such background levels of impurities. Nor for that matter, does the proposed regulation state that it is permissible to accept loads that fall within the margin of testing error inherent in any PIF/FID machine.

Ultimately, the proposed regulation provides no reasonable means for the operator a clean fill facility that is subject to its terms to insure that he is complying with the rule. If a clean fill operator accepts a load that does not trigger his properly calibrated PID/FID instrument, it is nonetheless possible that the IEPA will then arrive, subject that same load to testing based upon more stringent standards nowhere stated in the proposed regulations, and require the landfill operator to remove the load or loads at considerable expense.

In fact, the proposed regulations place no limits on the extent of the testing that may be performed by the IEPA. The proposed regulations declare that "any reading in excess of background levels **on any monitoring device used by the agency**" can lead to a load's rejection. Given this language, the IEPA might take the position that it can proceed to subject the load to further, more stringent testing – including the use of laboratory procedures – and that any level of impurities discovered by that testing should lead to rejection. Such a practice would lead to the hapazard imposition of liability on clean fill owners, and challenges to the regulation on the grounds that it was impermissibly vague.

### **B. Creating A Workable Testing Procedure.**

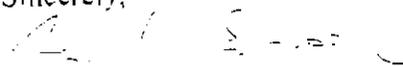
Land Reclamation believes that specific criteria for determining what constitutes clean fill should be formulated prior to allowing the present proposed regulations to go into effect, and that determination of these standards will require further analysis by the IEPA in conjunction with clean fill operators. At a minimum, however, Land Reclamation is of the opinion that any regulation put in place should contain a safe harbor provision that would insure that a clean fill operator could be certain that his or her acceptance of fill material would not lead to the need for removal or remediation in the future. By way of example only, Land Reclamation sets out the following possible "safe harbor" provision, based upon the current proposed regulations:

Material will be deemed to be CCDD, and not subject to removal or

remediation based upon subsequent testing, if: (1) it has passed inspection by the site operator using a properly calibrated PID/FID meter taking into account the error rate of that meter and background levels of contamination; and (2) in the event of an on-site inspection by the IEPA, that load also passes inspection by the IEPA using a PID/FID meter of no greater sensitivity than that previously used by the site operator.

While such a provision would certainly require further consideration and review, creating such a safe harbor could provide the certainty the current regulation lacks. In conjunction with a specific standard defining the term contamination, it could help create certainty and reduce litigation over a proposed regulation that is too vague to withstand scrutiny.

Sincerely,



Michael A. Rakov  
Attorney for Land Reclamation Services, Inc.

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Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Rakov". The signature is fluid and cursive, with a large initial "M" and "A".

Michael A. Rakov  
Attorney for Land Reclamation Services, Inc.