

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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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)

STATE OF ILLINOIS
Pollution Control Board

PC #6

PUBLIC COMMENT

Vulcan Materials Company (Vulcan) submits the following Public Comment in support of its position that IEPA should clarify the definition of "uncontaminated" in its proposed Clean Construction or Demolition Debris ("CCDD") Fill Operations Rule ("Rule").

EXECUTIVE SUMMARY

The current version of the Rule is unworkable because it fails to clarify what is meant by the term "uncontaminated." The definition and interpretation of the word "uncontaminated" is of paramount importance in the Rule because under §1100.103 of the Rule, only uncontaminated materials qualify as CCDD fill. IEPA did not define this critical term in the Rule's text, instead apparently opting for a "we know it when we see it" approach. Absent a clear guideline, responsible members of the regulated community will be forced to guess at the practical meaning of "uncontaminated." To play it safe, a member of the regulated community would have to assume that "uncontaminated" means free from any foreign substances. Yet few, if any, materials meet the definition of uncontaminated in that sense, as IEPA has recognized by promulgating statewide background concentrations for certain contaminants. IEPA's approach to leave the term "uncontaminated" undefined is out of step with similar "clean fill" rules in other states that have incorporated either numerical limits or easily understood definitions as to what is regulated. By contrast, IEPA's Rule creates a "don't ask, don't tell" incentive to avoid testing potential CCDD fill for fear of what the testing will reveal. For these reasons, Vulcan asks this Board to remand the Rule to IEPA so that it may add a definition for "uncontaminated" to the Rule.

As a solution to this problem, Vulcan suggests adoption of a two-pronged approach consisting of performing environmental due diligence on the proposed fill material, and testing the material only if the due diligence turns up evidence that the fill has been impacted by a spill or release. When testing is required, the results would be compared to numerical limits to be established by IEPA, and the material used as clean fill only if the results did not exceed the prescribed limits. This approach is currently in use in Pennsylvania.

BACKGROUND

Vulcan currently operates a Clean Fill Acceptance Program and has been an active participant in discussions between IEPA and the Illinois Association of Aggregate Producers over earlier drafts of the Rule. Vulcan's Program will be subject to the Rule once it becomes effective, and Vulcan considers itself obligated to raise its principal remaining concern about the Rule now.

During this rulemaking, IEPA has repeatedly been made aware of the importance of how it defines "uncontaminated." At the January 26, 2006 hearing on the Rule, an IEPA representative was asked why IEPA had not defined "uncontaminated" in the Rule's text. She responded by noting that the term "uncontaminated" "has been used [in the Illinois Environmental Protection Act, 415 ILCS 5] for 15 years . . ." and thus did not need further definition. Transcript at 20-21. When pressed as to how IEPA had interpreted "uncontaminated" under that law, she responded:

. . . I didn't mean to say that we've been implementing this law for the last 15 years because we have not been implementing the law. The law stood on its own and allowed an exemption from the term "waste" using the term "uncontaminated." *It was a matter of, we knew contaminated [material] when we saw it.* Transcript at 21-22 (emphasis added).¹

DISCUSSION

Vulcan urges this Board to require clarification of the meaning of "uncontaminated," as that term is used in the Rule, for the following reasons.

I. THE RULE IS UNWORKABLE IN ITS CURRENT FORM

The rule is unworkable in its current form for at least three reasons: it is overbroad, it is impermissibly vague, and it creates a perverse incentive to avoid testing proposed clean fill material.

A. THE RULE IS OVERBROAD BECAUSE FEW, IF ANY, MATERIALS ARE "UNCONTAMINATED" IN THE SENSE THAT THEY ARE FREE FROM ANY FOREIGN MATERIAL

Absent a clear definition, one potential interpretation of "uncontaminated" would be that a material is free from foreign material. Such an interpretation would rule out nearly all potential CCDD fill material. Media accounts have made most people aware of the ubiquitous presence of trace quantities of contaminants throughout the environment, and even within animals and people. The Illinois Legislature and IEPA itself have recognized that every county in Illinois contains background levels of certain contaminants. *See,*

¹ In its Opinion and Order dated April 6, 2006, this Board acknowledged that IEPA's plan is to use the "we know it when we see it" approach. Opinion and Order at 4.

e.g., Ill. Admin. Code tit. 35, §742, App. A., Table G (statewide background levels for inorganics.) This IEPA recognition of the existence of statewide background levels for contaminants such as cyanide (0.50-0.51 mg/kg), lead (20.9-36 mg/kg), and mercury (0.05-0.06 mg/kg) is, standing alone, enough to take most material that would otherwise be clean fill outside of IEPA's stated definition of "uncontaminated." (Table G is attached as Exhibit A). As another example, recently on IEPA's website homepage was a link to two recent studies performed in consultation with IEPA documenting the background levels of certain polycyclic aromatic hydrocarbon (PAH) concentration levels in urban areas across Illinois.² In the report IEPA notes, "Parks, roadways, residential yards, non-industrialized properties, etc., are typical background areas."

These recognized statewide background levels have been part of the analysis in various IEPA programs, such as the Tiered Approach to Corrective Action Objectives (TACO) rule. The Illinois Legislature has explicitly stated within the text of the Environmental Protection Act that "this Section shall not require remediation of regulated substances to levels that are less than area background levels." 415 ILCS 5/58.5; *see also* Ill. Admin. Code tit. 32, §332.170(d) (direct radiation exposure "shall be reduced to background levels"); Ill. Admin. Code tit. 35, §307.2400 (allowance for background levels in non-metal bearing waste streams); Ill. Admin. Code tit. 35, §725.213 (defining "release" as "a statistically significant increase . . . in hazardous constituents over background levels"). Because the presence of background quantities of contamination is well recognized, IEPA must recognize the existence of background contaminants in this case.

B. IEPA'S "WE KNOW IT WHEN WE SEE IT" APPROACH IS IMPERMISSIBLY VAGUE

The absence of a definition for "uncontaminated" is an indication not of IEPA's inability to define it, but of its unwillingness to do so. The "we know it when we see it" test is usually applied to subject matters that defy quantification, such as obscene material. A test for "contamination" is much easier to propose, because such a thing can be numerically quantified. Indeed, in Part II of this comment, Vulcan notes several approaches successfully in use in other states. "Inability to describe [a thing] in general terms . . . suggests that there is no definition - and '*I know it when I see it*' is not a rule of any kind . . ." *United States v. Miller*, 891 F.2d 1265, 1273 (7th Cir. 1989) (Easterbrook, J., concurring) (emphasis added).

Even if IEPA has the experience to "know contaminated [material] when we [see] it," the average member of the regulated community may not. Ruling out the impractical option of consulting IEPA to ask whether every individual load of fill is "uncontaminated," the recipient of such loads would have no idea whether the fill satisfied the regulations or not. And it is black-letter law that if a governmental pronouncement leaves the public uncertain of the conduct it prohibits, it violates the Due Process Clause. *See, e.g., Chicago v. Morales*, 527 U.S. 41, 56 (1999); *United Disposal of Bradley, Inc. v. Pollution Control Board*, 842 N.E.2d 1161, 1166 (Ill. Ct. App. 2006)

² *See* <http://www.epa.state.il.us/land/site-remediation/urban-area-pah-study.pdf>.

“A regulation is unconstitutionally vague and violates due process if it leaves the community regulated unsure of what conduct is prohibited or fails to provide adequate guidelines to the administrative body charged with its enforcement.”).

C. IIEPA’S RULE CREATES A PERVERSE INCENTIVE TO AVOID TESTING CCDD FILL

Currently, before Vulcan accepts “clean fill” (typically soil) for disposal in one of its quarries, it engages in a rigorous due diligence and verification program. The final element of Vulcan’s program is periodic testing of received material to ensure that the fill soil meets TACO Tier I, Class 2 standards (residential, no use of groundwater). Not surprisingly, Vulcan periodically detects compounds, including PAHs, in received material, although at levels below the TACO, Tier I, Class 2 cleanup standards. Under the proposed Rule in its current form, regulated entities might be reluctant to conduct such a program for the fear of finding any foreign material in the soil-as they undoubtedly would, given the ubiquitous nature of certain substances in the modern era. *See, e.g.*, Ill. Admin. Code tit. 35, §742, App. A., Table G. Companies with an established, high-quality program such as Vulcan would actually be placed at a competitive disadvantage. The likely result would be that less fill material would be tested - and that less truly harmful material would be detected and removed, as occurs under Vulcan’s program. This result would be suboptimal from both environmental and economic perspectives.

II. EXPERIENCE IN OTHER STATES SHOWS THAT “UNCONTAMINATED” WOULD NOT BE DIFFICULT TO DEFINE

Many states that have promulgated formal “clean fill” policies similar to the proposed Rule have developed much more detailed descriptions of the qualifying material. These include:

- Due diligence and follow-up testing if necessary (Pennsylvania): Pennsylvania uses a two-pronged approach requiring prospective users of clean fill to perform due diligence on the proposed fill material. If the due diligence does not reveal evidence that the fill material has been affected by a spill or release, the material may be managed as “clean fill” without further testing. If due diligence shows that a spill or release may have affected the material, the user must test the material and compare the results to numeric standards published in the policy. If contaminant levels in the fill do not exceed the prescribed levels, the material may be managed as clean fill. If contaminant levels exceed the prescribed levels, the material must be managed as regulated fill and cannot be used as clean fill. *See* Pennsylvania Department of Environmental Protection (“PaDEP”) “Management of Fill Policy” (April 24, 2004).³
- Risk-based standards (Connecticut): Some states link the definition of “clean fill” to pre-existing risk-based cleanup standards akin to Illinois’ TACO standards. For example, in Connecticut, “clean fill” includes “polluted soil . . . [which] has

³ Attached as Exhibit B.

been treated to reduce the concentration of pollutants to levels which do not exceed the applicable pollutant mobility criteria and direct exposure criteria established in . . . the Regulations of Connecticut State Agencies” RCSA §22a-209.

- Detailed description (Delaware): Other states use a specifically worded definition of “clean fill.” For example, in Delaware, “clean fill” must be, among other things, “nondecomposable” and “environmentally inert.” Delaware “Regulations Governing Solid Waste,” §3, available at <http://www.dnrec.state.de.us/DNREC2000/Divisions/AWM/hw/sw/swreg.htm>.
- Numeric standards (Oregon): In draft regulations promulgated May 1, 2006, the Oregon Department of Environmental Quality (“ODEQ”) proposed numerical contaminant screening levels for open-water and upland disposal of dredged sediment. ODEQ also noted that “if a suspected contaminant is also a naturally occurring substance (e.g., arsenic or lead), you may use a site-specific background level as the screening level instead of the risk-based level in Table 1.” See http://www.deq.state.or.us/news/publicnotices/uploaded/060501_3447_UplandDisposalGuidance-PublicCommentDraft.pdf.

III. IEPA’S REGULATIONS SHOULD EMBODY THE PENNSYLVANIA TWO-PRONGED APPROACH DESCRIBED ABOVE, AND THIS BOARD SHOULD REMAND THE RULE TO IEPA FOR DETERMINATION OF APPROPRIATE NUMERICAL LIMITS

Of the various approaches currently in use in other states, Vulcan believes that IEPA should adopt Pennsylvania’s. The two-pronged approach of due diligence with follow-up testing if necessary strikes the appropriate balance between environmental protection and the economic infeasibility of testing every load of proposed fill material. It would be cost-prohibitive for many small clean fill operators to conduct detailed environmental testing on every load of clean fill. If the requisite due diligence showed evidence of a spill or release affecting the fill, the party evaluating the fill could simply choose to decline the fill rather than conducting the testing.

The relevant part of Pennsylvania’s policy is reproduced below:

FILL DETERMINATION

1) To determine whether fill is clean or regulated, a person must perform environmental due diligence.⁴

- a) If due diligence shows no evidence of a release of a regulated substance, the material may be managed as clean fill under this policy.
- b) If due diligence shows evidence of a release, the material must be tested to determine if it qualifies as clean fill. Testing must be performed in accordance with Appendix A.

⁴ Analytical assessment, testing or sampling is only required if visual inspection or reviews of historic property use indicates evidence of a release of a regulated substance.

- i) If testing reveals that the material contains concentrations of regulated substances that are below the residential limits in Table FP-1a and b, the material must be managed as clean fill.
 - ii) If testing reveals that the material contains concentrations of regulated substances that exceed the limits in Table FP-1a and b, the material must be managed as regulated fill.
- 2) A person may not blend or mix materials to become clean fill. Materials that contain regulated substances that are intentionally released may not be managed under this policy.

The Pennsylvania policy defines “environmental due diligence” as “investigative techniques, including, but not limited to, visual property inspections, electronic data base searches, review of ownership and use history of property, Sanborn maps, environmental questionnaires, transaction screens, analytical testing, environmental assessments or audits.” Accompanying guidance makes clear that it is up to the fill user to determine which of these methods to use. Vulcan believes that this definition of “environmental due diligence” reflects the appropriate level of effort necessary to determine whether a particular fill qualifies as “clean fill.”

However, Vulcan understands that IEPA would very likely need additional time to develop “second prong” numerical standards analogous to Pennsylvania’s Table FP-1a⁵ and b,⁶ and therefore proposes that this Board remand the Rule to IEPA so that such a process may take place. The establishment of such standards would also necessarily determine the requisite level of environmental testing, because the test will have to show that the material meets the standards. Vulcan, and other stakeholders, would welcome the opportunity to engage in a dialog with IEPA to resolve the appropriate numerical standards and test procedures.

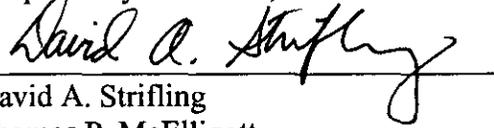
CONCLUSION

The Rule in its current form is unworkable because it does not define “uncontaminated.” This renders the Rule overbroad and impermissibly vague, and creates a perverse incentive to avoid testing the material. Vulcan is ready and willing to work with IEPA to clarify the term “uncontaminated,” and suggests adoption of the Pennsylvania approach, modified as necessary for use in Illinois. Vulcan urges this Board to require IEPA to clarify the meaning of “uncontaminated” to avoid rendering the Rule unconstitutionally vague.

⁵ Clean Fill Concentration Limits for Organics.

⁶ Clean Fill Concentration Limits for Metals and Inorganics.

Respectfully submitted,

A handwritten signature in black ink, reading "David A. Strifling", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned states that a true and correct copy of the foregoing PUBLIC COMMENT, was served on the individuals listed on the Board's Notice list, as reflected on the Board's website on June 2, 2006, below by mailing the same via the United States postal service, Milwaukee, Wisconsin on June 2, 2006.

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