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JUN 27 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
CLEAN CONSTRUCTION OR DEMOLITION)
DEBRIS FILL OPERATIONS UNDER P.A.)
94-272 (35 ILL. ADM. CODE PART 1100))

R06-19
Rulemaking - Land

PCH#10

NOTICE OF FILING

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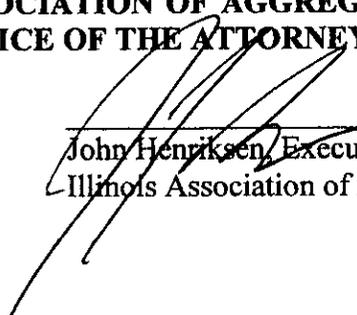
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the **ILLINOIS ASSOCIATION OF AGGREGATE PRODUCERS RESPONSE TO COMMENTS FROM OFFICE OF THE ATTORNEY GENERAL**, a copy of which is herewith served upon you.



John Henriksen, Executive Director
Illinois Association of Aggregate Producers

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ILLINOIS ASSOCIATION OF AGGREGATE PRODUCERS
RESPONSE TO COMMENTS FROM OFFICE OF THE ATTORNEY GENERAL

NOW COMES the Illinois Association of Aggregate Producers (IAAP) and submits the following response to the Office of the Attorney General (OAG) comments filed June 8, 2006, pursuant to Hearing Officer Antonioli's June 13, 2006 Order.

Historical / Legislative Background

The IAAP represents companies that produce crushed stone, sand, gravel, silica sand and agricultural lime: "aggregates." Aggregates are used for building and maintaining roads, bridges, homes, hospitals, schools and commercial buildings, as well as a wide variety of other uses such as for manufacturing glass and as soil additives. In addition to producing aggregates, a number of IAAP member companies accept clean construction or demolition debris ("clean fill") generated by road and building contractors. These new business operations were triggered by State legislation recognizing that clean fill is not a "waste" that should be intensively regulated by the Illinois Environmental Protection Agency ("IEPA").

Aggregate producers use clean fill in order to accelerate the reclamation of excavations generated by mining. Land disturbed by mining operations is thereby made ready for a variety of post-mining uses: commercial, industrial, recreational or residential. Aggregate mines have historically charged only nominal fees for clean fill disposal in comparison to the high tipping fees paid to ship these materials to solid waste landfills.

Clean fill operations currently accept millions of tons of materials each year generated by construction and demolition activities, thereby providing an economical way to handle materials that cannot be incorporated into building sites. It is critical to bear in mind that costs would increase for all sectors of our State's construction industry in the absence of these clean fill sites. Every ton of material not accepted at a clean fill site will either be taken to a solid waste landfill (thereby reducing the useful life of these facilities and increasing costs for the generator) or dumped at a non-regulated site.

Concerned that clean fill operations might become subject to burdensome regulatory oversight, the IAAP began discussions with the IEPA in 1999 regarding **voluntary** best management practices for aggregate mines that accept these materials. This effort resulted in the development of IAAP Best Management Practices for clean fill that were endorsed by the IEPA, Bureau of Land, prior to the enactment of P.A. 94-272. **These voluntary industry guidelines helped ensure proper disposal of clean fill prior to P.A. 94-272.**

On July 19, 2005, Governor Blagojevich signed legislation (P.A. 94-272) that creates a comprehensive regulatory scheme for the disposal of clean fill: uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed asphalt pavement, or soil generated from construction or demolition activities. Please note: the clean fill regulatory scheme outlined in P.A. 94-272 was not enacted in response to actual environmental concerns. This legislation was not an IEPA initiative given the lack of any significant agency enforcement activity to date linked to the disposal of clean fill deposited at aggregate mines or other excavations. **In essence, IEPA enforcement activity has not focused on clean fill operations because these sites have historically posed no significant threat to the environment or to public health.**

Clean fill operations currently operate in accordance with interim authorizations issued by IEPA, in accordance with the provisions of P.A. 94-272. Clean fill sites currently operating under an IEPA interim authorization are required to perform the following activities:

- Assure that only clean fill is being accepted by screening each truckload of material received using a device approved by the IEPA that detects volatile organic compounds. Such devices may include, but are not limited to, photo ionization detectors. Unacceptable fill material shall be rejected from the site.
- Retain for a minimum of 3 years the following information:
 - The name of the hauler, the name of the generator, and place of origin of the debris or soil;
 - The approximate weight or volume of the debris or soil; and
 - The date the debris or soil was received.

Although the annual volume of clean fill is quite large, the types of materials that may be accepted at clean fill sites are limited. Specifically, the only materials that may be accepted by a clean fill operation are defined in Section 3.160(b) of the Illinois Environmental Protection Act ("Act") as follows: "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. 415 ILCS 5/3.160(b).

General construction or demolition debris materials ("C&D waste") routinely generated by construction and demolition activities cannot be accepted at clean fill operations and are defined by Section 3.160(a) of the Act as follows:

- a) "General construction or demolition debris" means non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; *wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals incidental to any*

of those materials. 415 5/3.160(a) (emphasis added).

After extracting any materials that may be recycled and returned to the economic mainstream, or taken to a clean fill operation, all remaining C&D waste must be deposited at a solid waste landfill permitted by the IEPA.

With the enactment of P.A. 94-272, the IAAP Clean Fill Work Group actively negotiated with the IEPA to develop a workable regulatory system. These negotiations resulted in the IEPA proposal adopted for first notice and published in the Illinois Register on April 21, 2006. [See Illinois Register, Vol. 30, Issue 16, 7711-740 (Apr. 21, 2006).] Although these rules did not address all IAAP concerns regarding the scope of this regulatory scheme, these rules represent a reasonable compromise and are supported by our industry.

With that background in mind, the IAAP offers the following response to the OAG's June 8, 2006 General Comments as well as to Specific Comment #1, #2 and #7.

Response to General Comments

As a threshold matter, the OAG's general comments do not focus on the operations that are the subject of this rulemaking: **clean fill operations**.

Clean fill and C&D waste are two distinct classes of material. The distinction between the two is evident in Illinois statutes, Illinois regulations, IEPA guidance documents, and in the regulatory programs in other states. These two distinct classes of materials carry markedly different levels of risk, and should be regulated accordingly. C&D waste is already subject to regulation in Illinois as a waste material. The IPCB should not regulate clean fill in the same manner as C&D waste and should instead follow the Illinois legislature's directive and develop regulations designed specifically for clean fill.¹

The Illinois Environmental Protection Act contains very different definitions for clean fill and C&D waste. *Compare* 415 ILCS 5/3.160(a) (C&D waste) *with* 415 ILCS 5/3.160(b) (clean fill).² These statutory definitions are mutually exclusive. C&D waste material is "waste"³ and includes items such as electrical wiring, piping, and plumbing fixtures. These materials would not fit within the statutory definition of clean fill, which by definition is not "waste."⁴ Similar definitions are contained in the Proposed Rule⁵ and IEPA guidance documents.⁶ Accordingly, under the proposed clean fill regulations, C&D waste cannot be placed in a clean fill facility.

¹ In general landfills can be classified in three categories: (1) Hazardous Waste Landfills (Subtitle C RCRA landfills), where EPA regulations set minimum standards, *see* 40 C.F.R. Parts 260-279; (2) Municipal Solid Waste Landfills (Subtitle D RCRA landfills), where EPA regulations set minimum standards, *see* 40 C.F.R. Parts 239-259; and (3) General Construction & Demolition Debris Landfills, where EPA has not created minimum standards and where state regulations vary. Clean fill operations are not "landfills" and are exempt from regulation in most states.

² These statutory definitions are reproduced on page 2 of this Response.

³ 415 ILCS 5/3.290

⁴ 415 ILCS 5/22.51(d).

⁵ Proposed Rule §1100.103.

⁶ <http://www.epa.state.il.us/small-business/construction-debris>.

The IPCB should not use a study of C&D waste to guide development of regulations for clean fill. Attached to the Comment of OAG is the article, Clark, et al., "A Review of Construction and Demolition Debris Regulations in the United States" (published in Critical Reviews in Environmental Science in Technology, 2006). As the article's title suggests, it is an analysis of C&D waste regulations in other states, not clean fill regulations.

Specifically, the article's definition of construction debris includes roofing material, gypsum wallboard, lead, cadmium, arsenic, and even hazardous wastes such as PCBs and asbestos.⁷ As noted above, these materials by definition cannot be present in clean fill. Further, a review of the article's reference to regulations from the "border states" of Indiana, Kentucky, Michigan, Missouri, and Wisconsin,⁸ shows that the cited regulations do not govern clean fill operators or facilities. Instead, the cited regulations apply to solid waste operators and solid waste management facilities. By contrast, Missouri has a separate policy governing clean fill.⁹ We are aware of no clean fill regulations in Indiana, Kentucky, Michigan, and Wisconsin. However, Wisconsin DNR has promulgated a guidance document specifically stating that Wisconsin's solid waste regulations do not apply to clean fill.¹⁰ Presumably the Missouri and Wisconsin guidance documents were not cited in the article because the focus of the article was C&D waste. Because the article ignored clean fill regulations and policy, the IPCB should not be guided by the article.

Through the Illinois legislature's mandate that clean fill operations be regulated, Illinois and the IEPA will be leaders in regulating a material that in most states is exempt from regulation. The IPCB would be in error if it ignored the legislature's directive to create appropriate regulations for clean fill, and instead treated clean fill like C&D waste, which is already regulated in Illinois.

Response to Specific Comments

Comment 1 - Scope of Load Checking Program (Proposed Section 1100.205)

Proposed Rules: All loads need to be checked using PID/FID Meters

OAG Comment: Facilities should screen for the presence of asbestos-containing materials and metals (i.e. lead, chromium and cadmium) by utilizing an X-ray fluorescence analyzer of "XRF." The OAG anticipates the cost of a XRF analyzer to be \$35,000 and suggests that all labor and maintenance costs are "clearly outweighed by the benefits to the environment."

IAAP Response: Clean fill can contain a variety of naturally occurring metals and other chemical compounds. It appears that the OAG is using the definition of C&D waste (i.e.

⁷ "Review of Construction and Demolition Debris Regulations" at 143.

⁸ OAG Comment at 6. See 401 Ky. Admin. Regs. 48 ("Standards for Solid Waste Facilities"); Mich. Admin. Code R. 299.4101 et seq. ("Solid Waste Management"); 10 Mo. C.S.R. Div. 80 ("Solid Waste Regulations"); Wis. Admin. Code ch. NR 500 et seq. ("General Solid Waste Management Requirements").

⁹ See <http://www.dnr.mo.gov/env/swmp/pubs-reports/cleanfill%20policy.pdf>.

¹⁰ See <http://dnr.wi.gov/org/aw/wm/faq/solidwaste/swfaq11.htm> ("Wisconsin's solid waste codes and statutes do not use the term 'clean fill' . . . facilities accepting only clean soil, brick, building stone, concrete, reinforced concrete, broken pavement, and unpainted or untreated wood are exempt from licensing and the requirements of chs. NR 500 to 538, Wis. Adm. Code.").

drywall, roofing materials, wood...) and applying the risk of those materials to standards for clean fill operations (which primarily accept soil, aggregate and broken concrete). The clean fill industry has a concern that the use of a XRF would result in many instances where naturally occurring metals, including the metals outlined by the OAG, are positively identified in incoming loads. This positive reading of naturally occurring metals would result in rejection(s) for irrelevant and irrational reasons. We also believe that it would be difficult to determine a justifiable and defensible "action" level for metals identified by a field XRF during the time line upon the Board.

The cost of new XRF equipment is stated correctly; however, competent persons and training costs may increase the OAG's estimate significantly. In addition, if the requirement is made that all loads be inspected by an XRF, more than one XRF will need to be employed by each CCDD acceptance location in the event that one is rendered inoperable.

With regards to screening for asbestos and other unacceptable materials, the IAAP and IEPA are currently developing a training program for clean fill sites.

Proposed Rules: All PID/FID Meters must be calibrated utilizing established background levels and interpreted based on the manufacturer's margin of error.

OAG Comment: Using background levels would essentially "undercount" the amount of organic contaminants contained in a load.

IAAP Response: Background readings in existence at many sites may cause the devices being used to screen loads to register above zero at all times. This language ensures that the decision to reject a load of fill material properly accounts for existing environmental conditions. The decision to allow instrument calibration for background levels was specifically negotiated in the early discussions between IEPA and stakeholders during this rulemaking.

Using ambient air when calibrating equipment would insure that background conditions are considered, and therefore not undercount CCDD conditions, when screening incoming CCDD loads. It should be noted that in the majority of areas in the City of Chicago, an instrument measuring ambient air would have a reading above zero. In addition, it is important to note that each PID and FID manufacturer has an estimated margin of error stated in the equipment manual. For example, the manufacturer's margin of error for one brand of PID is +/-0.1 ppm for all readings less than 10,000 ppm. This stated error should also be considered when screening clean fill loads.

Comment 2 -- Leachate / Contingent Groundwater Sampling Requirements

Proposed Rules: The IAAP and the IEPA have discussed such sampling and agreed that such testing is not necessary and should not be included in the proposed regulations.

OAG Comment: The OAG suggests including groundwater monitoring or leachate sampling and analysis to the Rules since the OAG feels it is likely that inappropriate materials will be sent to clean fill facilities and may not be detected until a public water supply or private well is

contaminated. The OAG states that other state programs include some form of ground water monitoring, however, as discussed in more detail in our “Response to General Comments” above, OAG’s comments regarding other state programs reference C&D waste regulations.

IAAP Response: Leachate sampling is historically only required of licensed landfills. The OAG states that other state programs include some form of ground water monitoring; however, their comments regarding other state programs reference C&D waste regulations, not clean fill sites.¹¹ Thus, many of their statements are irrelevant to the proposed clean fill regulation. For instance, Wisconsin does NOT require ground water monitoring for clean fill landfills and the state merely recognizes and does not regulate “non-waste” materials that Illinois defines and regulates as clean fill.

To reiterate, clean fill operations are not “landfills” and are exempt from regulation in most states.

Leachate sampling is the process of testing the water or groundwater that comes into contact with the foreign material. The results of this sampling indicate whether the potential for groundwater contamination exists. It is important to note that background levels of contaminants in the Chicagoland area are naturally elevated, making it virtually impossible for any soil sample in the area to pass a leachate test for comparison to the potable water standards.

The liability leachate testing places on the clean fill acceptance site operator is overwhelming and unnecessary. If these rules are passed in their current form, it will likely force most of the aggregate producers to discontinue this acceptance practice. Every ton of material not accepted at a clean fill site will either be taken to a solid waste landfill (thereby reducing the useful life of these facilities and increasing costs for the generator) or dumped at a non-regulated site. The public eventually bears the enhanced costs associated with either of these options.

OAG Cost Estimate: The OAG estimates that costs could be \$2,000 to 3,000 per well for installation with the number of wells wholly dependent on the size of the operation. Additional costs (geotechnical/hydrogeological studies and Phase I environmental site assessments) cannot be estimated. The OAG estimates that sampling costs would be approximately \$1200-1500 and would depend on the number of wells.

IAAP Response: Well construction costs are in excess of the OAG’s estimate and barely account for the additional costs associated with contracting professional geological, hydrogeological, and engineering consultants.

Comment 7 - Lack of Financial Assurance

Current Language: The current draft does not address this issue.

¹¹ See, e.g., 401 Ky. Admin. Regs. 48:090(12) (groundwater monitoring for contained landfills); Mich. Admin. Code R. 299.4906 (“Landfill Groundwater Monitoring; Systems”); 10 Mo. C.S.R. 80-3.010(11) (groundwater monitoring at sanitary landfills), 10 Mo. C.S.R. 80-4.010(11) (groundwater monitoring at demolition landfills); Wis. Admin Code Ch. NR 507 (“Environmental Monitoring for Landfills”).

OAG Comment: The OAG suggests that some sort of financial assurance requirement be included such as letter of credit, performance or surety bond.

IAAP Response: Most clean fill operations are sited at aggregate mining operations with reclamation bonds enforced by IDNR's Office of Mines and Minerals, an ongoing financial assurance that negates the need for duplicate coverage. As for the rest of these sites, it is plain that no financial assurance is required given that excavations accepting clean fill in accordance with the IEPA's pending rules do not pose a threat to the environment and therefore will not require environmental remediation. More significantly, the Board may not lawfully impose a financial assurance requirement for clean fill sites regulated pursuant to P.A. 94-272.

The IEPA and Board's power to require any form of financial assurance from the regulated community must be grounded in a specific grant of statutory authority conferred by the Illinois General Assembly. For example, waste disposal operations regulated by the IEPA, pursuant to Section 21(d) of the Act, cannot accept waste unless the operator ". . . has posted with the Agency a performance bond or other security for the purpose of insuring closure of the site and post-closure and post-closure care in accordance with this Act and regulations adopted thereunder." 415 ILCS 5/21.1.

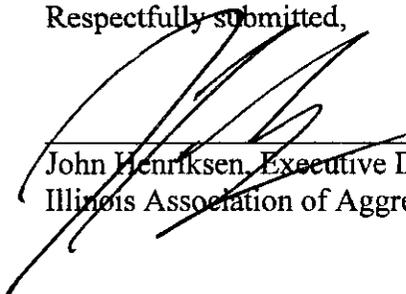
In contrast, the clean construction or demolition debris fill program established by P.A. 94-272 does not authorize the IEPA to require any form of financial assurance from clean fill site operators. 415 ILCS 5/22.51. The Board may not lawfully impose a financial assurance requirement for clean fill sites by rule in the absence of specific statutory authority for such requirement conferred by Section 22.51 of the Act.

Conclusion

Aggregate mines that accept clean fill are willing to be regulated by the IEPA. The clean fill requirements set forth in the April 21, 2006 rulemaking proposal are reasonable and reflect IAAP discussions about this program with the IEPA during the last 6 years. The additional load checking, sampling and financial assurance requirements proposed in the OAG's June 8, 2006 comments are not reasonable and were therefore eliminated during the IAAP's rulemaking negotiations with the IEPA. **Adopting unreasonable clean fill regulations will force aggregate mines out of the clean fill acceptance business, thereby increasing the costs of building and maintaining airports, schools and other public works as well as the commercial and residential construction driving our State's economic recovery.**

The IAAP requests that the Board reject the suggested changes set forth in the OAG's June 8, 2006 Public Comment for the reasons set forth above. The IAAP supports the IEPA's April 21, 2006 proposal and requests that the Board's July 6, 2006 second notice order adopt the language of this agreed-upon rulemaking.

Respectfully submitted,



John Henriksen, Executive Director
Illinois Association of Aggregate Producers

CERTIFICATE OF SERVICE

The undersigned states that a true and correct copy of the foregoing **NOTICE OF FILING and ILLINOIS ASSOCIATION OF AGGREGATE PRODUCERS RESPONSE TO COMMENTS FROM OFFICE OF THE ATTORNEY GENERAL** was served on the following by mailing the same via the United States postal service, Springfield, Illinois, on June 26, 2006:

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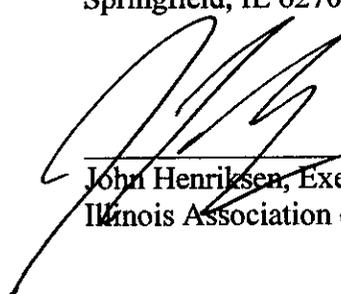
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