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MAY 14 2004

**STATE OF ILLINOIS
Pollution Control Board**

PC#2

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|--------------------------------------|---|-------------------------|
| IN THE MATTER OF: |) | |
| |) | R04-5 |
| RCRA SUBTITLE D UPDATE, USEPA |) | (Identical-in-Substance |
| REGULATIONS (January 1, 2003 through |) | Rulemaking – Land) |
| June 30, 2003) |) | |
| <hr/> | | |
| IN THE MATTER OF: |) | R04-15 |
| |) | (Identical-in-Substance |
| RCRA SUBTITLE D UPDATE, USEPA |) | Rulemaking – Land) |
| REGULATIONS (July 1, 2003, through |) | |
| December 31, 2003) |) | |

NOTICE OF FILING

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[No Service List for These Dockets]

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Illinois Environmental Protection Agency's Comments for the above-titled proceeding, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Mark Wight
Mark Wight
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DATE: May 13, 2004

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

ILLINOIS POLLUTION CONTROL BOARD

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AGENCY'S COMMENTS

The Illinois Environmental Protection Agency ("Agency") respectfully submits its comments in the above-titled matter to the Illinois Pollution Control Board ("Board") pursuant to 35 Ill. Adm. Code 102.108 and 102.610 and the Board's Proposed Opinion and Order of March 18, 2004.

I. Disposal of Lead-Based Paint Waste in Construction and Demolition Landfills – Section 810.103

In response to the Board's request for comments on the incorporation into the Illinois landfill regulations of the June 18, 2003, federal amendments relating to landfill disposal of residential lead-based paint waste, the Agency comments as follows:

Although the goal of the lead-based paint ("LBP") waste amendments is laudable, the Agency strongly opposes the adoption in Illinois of the federal amendments. The federal amendments are designed for a regulatory structure for landfills that does not exist in Illinois. As a result, the amendments will, at best, create legal conflicts with existing landfill provisions and unnecessary confusion. At worst, the amendments may create legal inferences disruptive to the Agency's administration of the non-hazardous landfill rules.

The United States Environmental Protection Agency ("USEPA") has adopted amendments to 40 C.F.R. 257 and 258 to allow the disposal of LBP waste in construction and demolition ("C & D") landfills meeting the requirements in Subparts A or B of 40 C.F.R. 257. Subparts A and B of Part 257 establish minimum criteria and performance standards for non-municipal, non-hazardous waste disposal units. The federal amendments to both subparts include revising the definition of "municipal solid waste landfill" and adding definitions of "construction and demolition landfill" and "residential lead-based paint waste." The stated purpose of the amendments is to

expressly allow residential lead-based paint waste that is exempted from the hazardous waste management requirements as household waste to be disposed of in construction and demolition landfills by stating that a construction and demolition landfill accepting residential lead-based paint waste, and no other household waste, is not a municipal solid waste landfill unit.

68 Fed. Reg. 36487 (June 18, 2003).

Without the federal amendments, LBP waste, even though considered a "household waste" and therefore exempt from hazardous waste disposal requirements, still would require disposal in municipal solid waste landfill ("MSWLF") units. With the federal amendments, all regulatory impediments are removed from the federal structure so that LBP waste may be disposed of in any non-hazardous, non-MSWLF landfill unit under the federal structure. This approach may work well for states without delegated programs for non-hazardous wastes that are regulated pursuant to Parts 257 and 258 and for states that have adopted structures similar to Parts 257 and 258. It will not work well for Illinois because the Illinois regulatory structure for non-hazardous landfills is substantially different than the federal structure. The Illinois regulatory structure contains additional legal and economic impediments to the disposal of C & D debris and LBP waste that cannot be resolved by the federal amendments alone.

The federal structure for regulating non-hazardous landfills divides them into MSWLF units accepting household wastes and regulated pursuant to Part 258 and non-MSWLF units not accepting household wastes and regulated pursuant to Part 257. The latter are further divided into non-MSWLF units accepting conditionally exempt small quantity generator (“CESQG”) waste and regulated under Subpart B of Part 257 and all other non-MSWLF units regulated under Subpart A of Part 257. Under the federal amendments, both classifications of non-MSWLF units under Part 257 may include “construction and demolition landfills” if those landfills do not also receive hazardous waste or industrial solid waste.

In Illinois, landfills are classified and regulated based on the potential of the waste they receive for causing environmental harm, so there is no Part or Subpart closely corresponding to the more general Part 257 of the federal rules.¹ At 35 Ill. Adm. Code 811, non-hazardous waste landfills are classified as inert waste landfills, chemical waste landfills, or putrescible waste landfills. Putrescible waste landfills may or may not receive household wastes. Those receiving household wastes must comply with additional state requirements for MSWLF units that are consistent with 40 C.F.R. 258. There is not one classification of landfill known as the “construction and demolition landfill,” and there are no standards specific to such landfills. Further complicating matters, C & D debris is not handled as a discrete type of waste. The Environmental Protection Act (“Act”) distinguishes between “general construction and demolition debris” and “clean construction and demolition debris.” 415 ILCS 5/3.160 (2002). Because of the varying definitions for inert, chemical and putrescible wastes, C & D debris, depending on its content, may be disposed at any of the several non-hazardous landfill classifications in Illinois, but only MSWLF-equivalent, putrescible waste landfills may receive

¹ Illinois has declined to seek approval to administer 40 C.F.R. 257 because the state’s existing regulatory structure is more stringent than the Part 257 requirements.

all types of non-hazardous C&D debris. A brief summary of the Illinois rules illustrates some of the problems that would be created by adoption of the federal amendments.

An inert waste landfill could be a "construction and demolition landfill" for some clean C & D debris. Inert waste landfills accept only non-biodegradable, non-putrescible wastes that do not decompose biologically, burn, serve as food for vectors, form a gas, cause an odor, or form a contaminated leachate. 35 Ill. Adm. Code 810.103 (defining "inert waste"); 811.201. Generally, clean C & D wastes such as brick, masonry and cured concrete are among those wastes that may be disposed of in inert waste landfills.² However, because of the contaminated leachate it would produce, LBP waste could not be disposed of at inert waste landfills without amending the definition of inert waste.

Some clean C & D debris as well as LBP waste could be disposed of in a chemical waste landfill. Chemical waste landfills may receive non-putrescible solids producing no gas and producing contaminated leachates only through non-biological, chemical or physical processes. 35 Ill. Adm. Code 810.103 (defining "chemical waste"); 811.301. For economic reasons, it is unlikely a chemical waste construction and demolition landfill would be created. General C & D could not be disposed at such a facility unless the definition of "chemical waste" was amended thereby removing the reason for the classification. The clean C & D debris disposable at a chemical waste landfill would be disposable in an inert waste facility, so the only advantage of a chemical waste construction and demolition landfill would be the acceptability of the LBP waste. The chemical waste landfill requirements are not substantially different from putrescible waste landfill requirements except for gas monitoring, so it probably is not cost-effective to create a chemical waste construction and demolition landfill for the purpose of avoiding MSWLF

² As a practical matter, most clean C & D debris in Illinois is not disposed of in landfills because of the "waste exclusion" for such materials when certain management practices are followed. 415 ILCS 5/3.160(b) (2002). There are currently no Agency-permitted inert waste landfills in Illinois.

requirements for LBP waste.³

Clean and general C & D wastes as well as LBP waste could be disposed of at a non-MSWLF putrescible landfill unit. These wastes generally would be consistent with the definition for “putrescible waste” so there are no legal impediments to such disposal. *Id.* § 810.103 (defining “putrescible waste”). However, the requirements for non-MSWLF putrescible units are so similar to those for MSWLF putrescible units that, again, the economics of creating such a construction and demolition landfill for the purpose of avoiding MSWLF requirements for LBP waste simply do not add up.⁴

Having ruled out, based on legal and economic factors, inert, chemical, and non-MSWLF putrescible waste landfills as disposal alternatives for LBP waste, only MSWLF units are left. Not only would the federal amendments be insufficient to accomplish the federal goal of increasing disposal alternatives for LBP waste, but also their adoption is likely to create confusion where none now exists. Placing a definition of “construction and demolition landfill” into a regulatory structure where no such classification, standards or entities exist or are likely to exist can only raise questions that will be the Agency’s burden to explain. At worst, the definition might create an inference that could become the basis for landfills that do not meet the requirements for hazardous waste disposal but that would accept waste that in many, if not most, cases will have the toxicity characteristic for lead as defined at 35 Ill. Adm. Code 721.124. Moreover, the definition itself implies that CESQG waste may be disposed in certain non-hazardous landfills. CESQG waste is by definition hazardous waste and cannot be disposed in non-hazardous waste landfills in Illinois. 415 ILCS 5/21(f) (2002); 35 Ill. Adm. Code 721.105(f)(3)(E) (Board Note), 721.105(g)(3)(E) (Board Note); 810.103 (defining wastes subject

³ There are currently fewer than a dozen Agency-permitted chemical waste “monofills” in Illinois.

⁴ There are currently no commercial, Agency-permitted, non-MSWLF putrescible units in Illinois.

to Part 811), 811.101, 811.201, 811.301, 811.323. This brief summary of the federal and state regulatory structures for non-hazardous landfills demonstrates that the federal amendments alone cannot accomplish the federal purpose in Illinois. Instead they will have the effect of creating legal contradictions and general confusion complicating the administration of the State's existing rules. States are not required to adopt the federal amendments for LBP waste because they are less stringent than existing federal criteria. 68 Fed. Reg. 36492 (June 18, 2003). The Illinois EPA strongly recommends against adopting the federal amendments for the reasons set forth above. Disposal of LBP waste in non-hazardous, non-MSWLF units may or may not be a wise policy, but the additional amendments to Illinois rules that would be necessary to accomplish this change imply broader policy changes to the existing structure that should be determined in a context other than an identical-in-substance rulemaking.

If the Board does not agree with the Agency's recommendation, the Agency requests that, at a minimum, the Board include a Board Note following the definition of "construction and demolition landfill." The Board Note would be for the purpose of clarifying CESQG waste disposal requirements and would be similar to the Board Notes at 35 Ill. Adm. Code 721.105(f)(3)(E) and 721.105(g)(3)(E). The Agency suggests the following:

BOARD NOTE: The Illinois non-hazardous waste landfill regulations, 35 Ill. Adm. Code 810 through 814, do not allow the disposal of hazardous waste in a landfill regulated under those rules. The Board specifically does not intend that this definition authorize any disposal of conditionally exempt small quantity generator waste in a landfill not specifically permitted to accept the particular hazardous waste.

II. Restrictions on the Location of a New MSWLF Unit in the Vicinity of a Public Airport – Section 811.302

In response to the Board's request for comments on the incorporation into the Illinois landfill regulations of the October 15, 2003, federal revision relating to locating MSWLF units near certain public airports, the Agency comments as follows:

The Agency supports the Board's addition of the Board Note at 35 Ill. Adm. Code 811.302(f).

III. Miscellaneous Housekeeping Amendments

The Agency supports the Board's miscellaneous housekeeping amendments and respectfully requests that the Board add the following housekeeping amendments to its list:

| Illinois Section | 40 C.F.R. Section | Revision |
|-----------------------|--|---|
| 811.710(g)(2) | [No equivalent provision at 258.74(a)] | Revise the Illinois Section by adding "to release" following "trustee," so that it reads: Within 60 days after receiving a request from the owner or operator for a release of funds, the Agency shall instruct the trustee <u>to release</u> to the owner or operator such funds as the Agency specifies in writing to be in excess of the current cost estimate. |
| 811.716(c)(1)(A)(iii) | 258.74(f)(3)(A)(3) | Revise the reference in the Illinois Section from (f)(4) to (d) so that it reads: iii) Certifies that the unit of local government meets the conditions of subsections (b) and <u>(d)</u> (f)(4) . |

The Agency's financial assurance reviewers have noted two provisions in 35 Ill. Adm. Code 811. Subpart G that need correction. Section 811.710(g)(2) contains an omission of two words that if inserted will make the provision clear without substantively changing its meaning.

In addition, the current Section 811.716(c)(1)(A)(iii) references subsection (f)(4) of the section, but Section 811.716 does not contain a subsection (f)(4). Section 811.716 is derived from 40 C.F.R. 258.74(f). The federal subsection corresponding with Section

811.716(c)(1)(A)(iii) is Subsection 258.74(f)(3)(A)(3), which references subsections 258.74(f)(2) and (f)(4). Thus, it appears that the reference to subsection (f)(4) in the Part 811 rules is a remnant from the federal rules that was inadvertently left unchanged. Subsection 811.716(d) is the subsection of the Part 811 rules that corresponds with subsection 40 C.F.R. 258.74(f)(4). The Agency requests that subsection 811.716(c)(1)(A)(iii) be revised accordingly as a part of this docket.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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