

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CONGRESS DEVELOPMENT )  
COMPANY, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

12-12  
PCB 11-  
(Permit Appeal - Land)

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JUL 08 2011

STATE OF ILLINOIS  
Pollution Control Board

ORIGINAL

**NOTICE OF FILING**

John Therriault  
Assistant Clerk  
Illinois Pollution Control Board  
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Chicago, Illinois 60601-3218

Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
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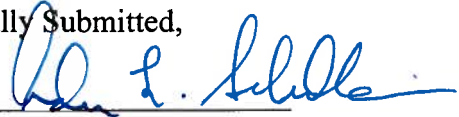
Elizabeth A. Wallace  
Gerald T. Karr  
Office of the Attorney General  
69 West Washington Street  
Suite 1800  
Chicago, Illinois 60602

PLEASE TAKE NOTICE that today I filed with the Illinois Pollution Control Board a Petition for Review of Denial of Significant Permit Modification Application, Entry of Appearance for Russell R. Eggert and Andrew L. Schulkin, and Unopposed Motion to Consolidate, copies of which are hereby served upon you.

Dated: July 8, 2011

Respectfully Submitted,

By:

  
Russell R. Eggert  
Andrew L. Schulkin  
LATHROP & GAGE LLP  
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Suite 2100  
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312.920.3300 (Telephone)  
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Attorneys for Petitioner Congress  
Development Company

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ORIGINAL

**PETITION FOR REVIEW OF DENIAL OF SIGNIFICANT PERMIT  
MODIFICATION APPLICATION**

Petitioner Congress Development Company ("Congress") hereby requests review, pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/40(a)(1) and 35 Ill. Admin. Code Part 105, Subpart B, and 35 Ill. Admin. Code 813.106, of the June 3, 2011 decision by Respondent, the Illinois Environmental Protection Agency (the "Agency" or "IEPA"), to deny Petitioner's Application for Permit to modify a solid waste management site, dated December 13, 2010. The Agency erred in denying the Permit because (1) it failed to give a sufficiently specific or detailed reason for its denial, (2) even if its reasons were sufficiently specific and detailed, the regulations upon which it relied do not provide a basis for denying the Permit application, and (3) to the extent IEPA may have based its decision on Congress's inability to obtain access to adjacent properties for groundwater sampling, IEPA misconstrued the potentially relevant statute.

In support of its Petition, Congress states as follows:

1. Congress owns a sanitary landfill in Hillside, Illinois (the "Landfill") and is a permittee under IEPA Permit No. 1995-165-LFM (the "Permit").

2. There have been detections of constituents in the perimeter groundwater wells at the Landfill above the background values listed in the permit. Although the surrounding communities obtain their water from Lake Michigan and have ordinances prohibiting the use of groundwater as drinking water, the Illinois solid waste management regulations, 35 Ill. Admin. Code Part 811, required Congress to perform additional groundwater sampling.

3. Congress submitted a groundwater assessment monitoring plan to IEPA that the Agency approved on June 5, 2008 and incorporated into Modification No. 37 to the Permit as Condition VII.25. Congress performed the assessment monitoring required by Condition VII.25.

4. On October 29, 2009, Congress submitted a permit application (Log No. 2009-522) to expand investigation activities to determine the rate and extent of potential groundwater impacts (the "Assessment Monitoring Report"). As part of the Assessment Monitoring Report, Congress proposed to install 44 new assessment monitoring wells beyond the existing groundwater monitoring network, and to retrofit well G117.

5. The proposed well locations were designated as A-31 to A-52. Proposed well locations A-33, A-39, A-40, A-41, A-42, A-43, A-44, A-45, A-46, A-47, A-48, A-49, A-50, A-51 and A-52 were outside of the Landfill property.

6. The Agency approved the Assessment Monitoring Report on June 17, 2010 and incorporated it into Modification No. 43 to the Permit as Condition VII.24. Condition VII.24 directed Congress to install and sample the 44 new wells and one retrofitted well described in the Assessment Monitoring Report.

7. Congress was unable to obtain access to neighboring properties to install the remaining groundwater monitoring wells referenced in Condition VII.24, even though it sent letters to each of the neighboring property owners requesting access to their properties and

subsequently made dozens of follow-up phone calls to discuss the access issues. Only two the adjoining property owners, Public Storage and the Illinois Department of Transportation, expressed a willingness to allow groundwater monitoring wells to be installed on their properties, and neither responded in time for access arrangements and well installations to be completed before the end of 2010.

8. Condition VII.27, which was later renumbered as Condition VII.26 and is referred to as such herein, was also added to the Permit in Modification No. 43.

9. Pursuant to Condition VII.26 and 35 Ill. Admin. Code 811.324, Congress was required to complete a Corrective Action Measures Assessment for groundwater impacts at the Congress Landfill. Condition VII.26 directed Congress to submit the Corrective Action Measures Assessment report required under 35 Ill. Admin. Code 811.324(e) by September 15, 2010 and to submit a Significant Permit Modification Application with the selected corrective action remedy by December 14, 2010.

10. Congress submitted a Corrective Action Measures Assessment Report (the "CAMA Report") to IEPA on September 14, 2010. Congress submitted a Significant Permit Modification Application (Log No. 2010-578) in the form of a Corrective Action Remedy Selection Report (the "Remedy Selection Report") on December 13, 2010.

11. In the CAMA Report, Congress identified four potential corrective action measures that could be used to address the groundwater impacts at the Congress Landfill: source control, in-situ treatment, ex-situ treatment, and containment. The CAMA Report evaluated these alternatives based on the criteria in 35 Ill. Admin. Code 811.324 and 811.325.

12. In the Remedy Selection Report, Congress identified source control as the selected corrective action remedy and explained why that remedy satisfies the criteria of 35 Ill.

Admin. Code Section 811.325. The source controls that Congress proposed using to address groundwater impacts were (a) a final cover system, (b) a landfill gas collection and control system, (c) a leachate management system and (d) a bifurcation system for leachate withdrawal.

13. The Remedy Selection Report explained that Congress still intended to conduct groundwater monitoring on neighboring properties "should it be possible to obtain access agreements with those adjacent property owners." Congress also performed a well water survey that was summarized in the Remedy Selection Report. Congress identified 26 potential wells within one mile of the Landfill and found evidence that eight of those wells still existed, though none was being used as source of municipal drinking water.

14. On June 3, 2011, IEPA sent a letter to Congress stating that it was denying the December 13, 2010 Significant Permit Modification Application (the "Denial Letter") for the following reasons:

(a) Pursuant to 35 Ill. Adm. Code 811.324(c), the rate and extent of groundwater impacts shall be defined. The application does not meet this requirement as the nature (gas or leachate) has not been determined and the extent of groundwater contaminants has not been defined.

(b) Pursuant to 35 Ill. Adm. Code 811.325(b)(1), the selected remedy must be protective of the human health and environment. The application does not meet this requirement as the extent of impacts, in relation to human receptors, has not been defined. Further, the concentration of contaminants, with respect to human receptors, has not been addressed.

(c) Pursuant to 35 Ill. Adm. Code 811.326(a)(1)(A), the operator must establish and implement a corrective action groundwater monitoring program based on the defined nature and extent of groundwater contaminants. The application does not meet this requirement as no groundwater corrective action is proposed.

(d) Pursuant to 35 Ill. Adm. Code 811.326(a)(1)(A), the operator must establish and implement a corrective action groundwater monitoring program based upon the defined nature and extent of groundwater contaminants. The application does not meet this requirement as the impacts to groundwater have not been defined and delineated.

15. Section 39(a) of the Environmental Protection Act, 415 ILCS 5/39(a), requires the Agency to provide a permit applicant with "specific, detailed statements as to the reasons the permit application was denied."

16. In the Denial Letter, the Agency did not identify specific shortcomings in the Significant Permit Modification Application, but instead referred to three regulations and concluded, with little or no explanation, that the Significant Permit Modification Application did not comply with them. The Denial Letter is attached hereto as Exhibit 1.

17. In the alternative, even if the reasons provided were sufficient, the regulations referenced in the Denial Letter—35 Ill. Admin. Code 811.324(c), 811.325(b)(1) and 811.326(a)(1)(A)—either are inapplicable or do not provide a basis for denying the Permit application.

18. The provisions of 35 Ill. Admin. Code 811.324 apply to a corrective measures assessment and do not provide criteria for selecting a corrective action remedy. Under 35 Ill. Admin. Code 811.324(c), a landfill owner must "continue to monitor in accordance with the assessment monitoring program, as specified in Section 811.319(b)."

19. Contrary to what is alleged in the Denial Letter, 35 Ill. Admin. Code 811.324(c) does not require a landfill owner or operator to assess the cause or "nature" of groundwater impacts as part of a Significant Permit Modification Application outlining its selection of a corrective action remedy.

20. The criteria for selecting a corrective action remedy for groundwater impacts are outlined in 35 Ill. Admin. Code 811.325. Pursuant to 35 Ill. Admin. Code 811.325(b)(1), a landfill owner must select a corrective action remedy that is "protective of human health and the environment."

21. Contrary to what is alleged in the Denial Letter, Congress did select a corrective action remedy that is protective of human health and the environment. Congress conducted a water well survey and found that there was no evidence of any groundwater wells within a one mile radius of the Landfill being used for drinking water. It also outlined a series of source control measures that are intended to eliminate any groundwater impacts from the Landfill.

22. The requirements for implementing the selected corrective action remedy are set forth in 35 Ill. Admin. Code 811.326. Pursuant to 35 Ill. Admin. Code 811.326(a)(1)(A), a landfill owner who implements a corrective action remedy must establish and implement a corrective action groundwater monitoring program.

23. Contrary to what is alleged in the Denial Letter, Congress is not obligated to comply with 35 Ill. Admin. Code 811.326(a)(1)(A) because the Agency has not approved and directed Congress to implement a corrective action remedy. Even if this regulation were applicable, Congress stated in its Significant Permit Modification Application that it intended to install groundwater monitoring wells on neighboring properties and is now in the process of doing so.

24. In the alternative, although it is not stated in the Denial Letter, IEPA may have intended to deny the Significant Permit Modification Application because Congress was unable to obtain access to neighboring properties for groundwater monitoring prior to the Permit application deadline.

25. The Agency informed Congress that if it was unable to reach an agreement with adjoining landowners for access, it should have brought an action pursuant to Section 22.2c of the Act, 415 ILCS 5/22.2c, to compel its neighbors to permit Congress to install groundwater monitoring wells on their properties.



26. Section 22.2c is entitled "Adjacent site remediation; injunction" and provides,

If *remediation* of real property contaminated by hazardous substances or petroleum products cannot be reasonably accomplished without entering onto land adjoining the site from which those substances were released, and if the owner of the adjoining land refuses to permit entry onto the adjoining land *for the purpose of effecting remediation*, then the owner or operator of the site may bring an action to compel the owners of the adjoining land to permit immediate entry *for purposes relating to the remediation of the site*, the adjoining land, and any other real property that may be contaminated with hazardous substances or petroleum products. The court shall prescribe the conditions of the entry and shall determine the amount of damages, if any, to be paid to the owner of the adjoining land as compensation for the entry. The court may require the owner or operator who is seeking entry to give bond to the owner of the adjoining land to secure performance and payment.

415 ILCS 5/22.2c (emphasis added).

27. Congress has been seeking access to neighboring properties to conduct a groundwater investigation, not to perform a remediation. Section 22.2c of the Act provides no authority for a court to grant an injunction compelling an adjoining landowner to allow entry on to its land for an environmental investigation, and Congress is aware of no other authority that can be used to compel an adjoining landowner to provide access to its property to a private party.

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that the Board reverse the IEPA's June 3, 2011 denial of Petitioner's Significant Permit Modification Application and/or enter an order directing IEPA to use its authority to compel adjoining landowners to allow Congress to install groundwater monitoring wells on their properties.

Dated: July 8, 2011

Respectfully Submitted,

By: 

Russell R. Eggert  
Andrew L. Schulkin  
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Suite 2100  
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Attorneys for Petitioner Congress  
Development Company

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Pollution Control Board

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on July 8, 2011, the foregoing Petition for Review of Denial of Significant Permit Modification Application was served upon the following

*by hand delivery:*

John Therriault  
Assistant Clerk  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

*by U.S. first class mail:*

Elizabeth A. Wallace  
Gerald T. Karr  
Office of the Attorney General  
69 West Washington Street  
Suite 1800  
Chicago, Illinois 60602

*by U.S. first class mail:*

Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P. O. Box 19276  
Springfield, Illinois 62794-9276

By:



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Attorneys for Petitioner Congress  
Development Company



# ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829  
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR

217/524-3300

June 3, 2011

Certified Mail  
7009 3410 0002 3808 2049

Congress Development Company  
Attn: Josh McGarry  
4100 W. Frontage Road  
Hillside, Illinois 60162

Re: 0318170002 -- Cook County  
Congress Development Co  
Log No. 2010-578  
Permit Landfill 811-817 File  
Permit Denial



Dear Mr. McGarry:

This will acknowledge receipt of your Application for Permit to modify a solid waste management site, dated December 13, 2010, and received by the Illinois EPA on December 14, 2010.

Your permit application to propose a corrective action measures assessment is denied.

You have failed to provide proof that granting this permit would not result in violations of the Illinois Environmental Protection Act (Act). Section 39(a) of the Act [415 ILCS 5/39(a)] requires the Illinois EPA to provide the applicant with specific reasons for the denial of permit. The following reason(s) are given:

1. Pursuant to 35 Ill. Adm. Code 811.324(c), the rate and extent of groundwater impacts shall be defined. The application does not meet this requirement as the nature (gas or leachate) has not been determined and the extent of groundwater contaminants has not been defined.
2. Pursuant to 35 Ill. Adm. Code 811.325(b)(1), the selected remedy must be protective of the human health and environment. The application does not meet this requirement as the extent of impacts, in relation to human receptors, has not been defined. Further, the concentration of contaminants, with respect to human receptors, has not been addressed.
3. Pursuant to 35 Ill. Adm. Code 811.326 (a)(1)(A), the operator must establish and implement a corrective action groundwater monitoring program based upon the defined nature and extent of groundwater contaminants. The application does not meet this requirement as no groundwater corrective action is proposed.

Rockford • 4302 N. Main St., Rockford, IL 61103 • (815) 987-7760

Elgin • 595 S. State, Elgin, IL 60123 • (847) 608-3131

Bureau of Land – Peoria • 7620 N. University St., Peoria, IL 61614 • (309) 693-5462

Collinsville • 2009 Mall Street, Collinsville, IL 62234 • (618) 346-5120

Des Plaines • 9511 W. Harrison St., Des Plaines, IL 60016 • (847) 294-4000

Peoria • 5415 N. University St., Peoria, IL 61614 • (309) 693-5463

Champaign • 2125 S. First St., Champaign, IL 61820 • (217) 278-5800

Marion • 2309 W. Main St., Suite 116, Marion, IL 62959 • (618) 993-7200

4. Pursuant to 35 Ill. Adm. Code 811.326 (a)(1)(A), the operator must establish and implement a corrective action groundwater monitoring program based upon the defined nature and extent of groundwater contaminants. The application does not meet this requirement as the impacts to groundwater have not been defined and delineated.

Within 35 days after the date of mailing of the Illinois EPA's final decision, the applicant may petition for a hearing before the Illinois Pollution Control Board to contest the decision of the Illinois EPA, however, the 35-day period for petitioning for a hearing may be extended for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Illinois EPA within the 35-day initial appeal period.

Should you wish to reapply or have any questions regarding this application, please contact Tom Hubbard at 217/524-3286.

Sincerely,



Stephen F. Nightingale, P.E.  
Manager, Permit Section  
Bureau of Land

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ENTRY OF APPEARANCE

COMES NOW Russell R. Eggert and Andrew L. Schulkin of the law firm Lathrop & Gage LLP, and hereby enter their appearance in the above-styled matter on behalf of Petitioner Congress Development Company.

Respectfully Submitted,

By:   
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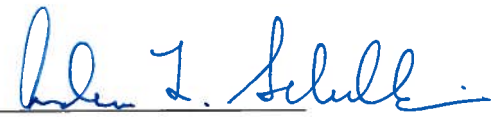
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PCB 11-90  
(Permit Appeal – Land)  
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(Permit Appeal - Land)

**PETITIONER CONGRESS DEVELOPMENT COMPANY'S  
UNOPPOSED MOTION TO CONSOLIDATE**

Petitioner Congress Development Company ("Congress") moves, pursuant to 35 Ill. Admin. Code 101.406, to consolidate *Congress Development Company v. Illinois Environmental Protection Agency*, No. PCB 11-90 (Permit Appeal – Land) with the permit appeal that Congress is filing simultaneously with this Motion on July 8, 2011. In support of its Motion, Congress states as follows:

1. Congress owns a sanitary landfill in Hillside, Illinois (the "Landfill") and is a permittee under Illinois Environmental Protection Agency ("IEPA" or "Agency") Permit No. 1995-165-LFM (the "Permit").

2. On June 3, 2011, Congress filed its Petition for Review in *Congress Development Company v. Illinois Environmental Protection Agency*, No. PCB 11-90, seeking review of IEPA's April 29, 2011 decision to deny Congress's January 27, 2011 Application for Permit to modify a solid waste management site.

3. On July 8, 2011, Congress filed a second Petition for Review seeking review of IEPA's June 3, 2011 decision to deny Congress's December 13, 2010 Application for Permit to modify a solid waste management site (the "July 8 Permit Appeal").



4. Both permit appeals involve the same parties and concern groundwater monitoring and assessment at the Landfill.

5. The administrative record for the two appeals will include many of the same documents. The two appeals also may involve overlapping factual and legal issues, such as whether the well water survey performed by Congress was sufficient and whether Congress can compel neighboring property owners to provide access to their properties for groundwater investigation.

6. Because of the overlap between the two proceedings, it will be more convenient, efficient and expeditious for Congress, IEPA and the Board to have the permit appeals heard and decided together. Consolidation of the two proceedings will not cause material prejudice to any party.

7. Counsel for IEPA in *Congress Development Company v. Illinois Environmental Protection Agency*, No. PCB 11-90, has indicated that the Agency is not opposed to the relief sought in this Motion.

8. If the cases are consolidated, Congress agrees to waive the 120 day decision deadline in Section 40(a)(2) of the Illinois Environmental Protection Act, 415 ILCS 5/40(a)(2), for *Congress Development Company v. Illinois Environmental Protection Agency*, No. PCB 11-90, and to extend that deadline by up to 35 days so that the two permit appeals may be heard and decided together. Congress also agrees to extend the deadline for filing the administrative record in PCB 11-90 so that IEPA may file a single administrative record for both appeals 30 days from the date of filing of the July 8 Permit Appeal.

WHEREFORE, for the foregoing reasons, Congress respectfully requests that the Board consolidate the July 8 Permit Appeal with *Congress Development Company v. Illinois*

*Environmental Protection Agency*, No. PCB 11-90, and extend the decision deadline and administrative record filing deadline for PCB 11-90.

Dated: July 8, 2011

Respectfully Submitted,

By: 

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I, the undersigned, hereby certify that on July 8, 2011, Petitioner Congress Development Company's Unopposed Motion to Consolidate was served upon the following

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