

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO CLEAN)
CONSTRUCTION OR DEMOLITION) R 2012-009
DEBRIS (CCDD) FILL OPERATIONS:) (Rulemaking - Land)
PROPOSED AMENDMENTS TO 35 Ill.)
Adm. Code 1100)

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST


PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board the Illinois Attorney General's Office's Pre-Filed Questions Directed To The Illinois Environmental Protection Agency, a copy of which is hereby served upon you.

Dated: October 17, 2011

Respectfully submitted,

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DEBRIS (CCDD) FILL OPERATIONS:) (Rulemaking - Land)
PROPOSED AMENDMENTS TO 35 Ill.)
Adm. Code 1100)

**PRE-FILED QUESTIONS DIRECTED TO THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
SUBMITTED BY THE ILLINOIS ATTORNEY GENERAL'S OFFICE**

The Illinois Attorney General's Office hereby files its questions directed to the Illinois Environmental Protection Agency ("Illinois EPA") in this matter, as provided by the Hearing Officer Order issued on August 15, 2011.

I. STATUTORY AND REGULATORY FRAMEWORK

The Attorney General is the chief legal officer of the State of Illinois and the Attorney General has an obligation to represent the interests of the People so as to ensure a healthful environment for all the citizens of the State. Ill. Const. 1970, art. V, § 15; *People v. NL Industries*, 152 Ill.2d 82, 103 (1992). In addition, the purpose of the Illinois Environmental Protection Act is "to establish a unified, statewide program" which, along with other remedies, is "to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (2010); *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill.2d 103, 107 (2007). The Illinois EPA was created by the Act and charged with carrying out its purposes. 415 ILCS 5/4 (2010).

In 1993, the State of Illinois petitioned the United States Environmental Protection Agency ("U.S. EPA") to obtain an adequacy determination for the State's solid waste management program. Subsequently, on January 3, 1994, the U.S. EPA issued its Illinois: Final Determination of Adequacy of State Municipal Solid Waste Permit Program. 59 *Federal Register* 86, January 3, 1994.¹

¹ In its decision on adequacy of the State of Illinois' solid waste management program, the United States Environmental Protection Agency specifically found that:

The combination of the State's existing permit program, the incorporation of certain portions of the revised Federal Criteria, and the interim period of IEPA enforcement created by Public Law 88-496, will ensure full compliance with all of the revised Federal Criteria. In its application, Illinois demonstrated that the State's permit program adequately meets the *location restrictions, operating criteria, design criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, and financial assurance criteria* in the revised Federal Criteria.

Among the regulations adopted by the Board and impliedly determined to be adequate by the U.S. EPA were provisions governing the regulation of inert waste. *See* 35 Ill. Adm. Code Part 811, Subpart B & Subpart B of Part 812. Inert wastes include “only non-biodegradable and non-putrescible solid wastes; including, but not limited to, bricks, masonry, and concrete.” 35 Ill. Adm. Code 810.103. Similarly, the definition for clean construction or demolition debris (“CCDD”) means *to the extent allowed by federal law, clean construction or demolition debris shall not be considered “waste” if uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities.* 415 ILCS 5/3.160 (2010). There are two differences in the definitions: 1) CCDD is not considered waste when used as fill, unlike inert waste; and 2) CCDD includes asphalt, which is a source of polynuclear aromatic hydrocarbons (“PNAs”), which by operation of the Board Waste Disposal Regulations would classify CCDD as a “chemical waste.” *See* 35 Ill. Adm. Code 810.103.

In addition, inert waste landfills are required to collect and analyze leachate samples at least every 6 months and notification shall be provided to the Illinois EPA within 1 business day after the discovery of any leachate contamination. *See* 35 Ill. Adm. Code 811.206. Moreover, Section 811.206(d) of the inert waste landfill regulations provides, among other things, that a landfill that accepts only inert wastes becomes subject to regulation as a chemical or putrescible waste landfill (Subparts C of Parts 811 & 812) if the leachate becomes contaminated at any time. In accordance with §§811.206(d), 810.103, & 811.202(a), leachate is contaminated if it contains concentrations of constituents greater than the water supplies standards set forth at 35 Ill. Adm. Code 302.301, -.304, & -.305

Section 22.51 of the Act, was amended by Public Act 096-1416, which became effective on July 30, 2010. Section 22.51(f)(1), contains the General Assembly’s position on the Part 1100 Rulemaking:

(f)(1) ... The rules must include standards and procedures necessary to protect groundwater, which may include, but shall not be limited to, the following: *requirements regarding testing and certification of soil used as fill material, surface water runoff, liners or other protective barriers, monitoring (including, but not limited to, groundwater monitoring), corrective action, recordkeeping, reporting, closure and post-closure care, financial assurance, post-closure land use controls, location standards, and the modification of existing permits to conform to the requirements of this Act and Board rules. . . .*

415 ILCS 5/22.51(f)(1) (2010) (*Emphasis added*).

In addition, Illinois demonstrated that the State’s MSWLF permit program has the authority to issue permits incorporating the requirements of the revised Federal Criteria for all MSWLFs in the State. The USPEA determined that Illinois’ permit program contains provisions for public participation, compliance monitoring, and enforcement. (*Emphasis added*.)

at 59 *Fed.Reg.* 86 (1/3/94).

II. SPECIFIC QUESTION DIRECTED TO THE ILLINOIS EPA

In light of the foregoing information regarding the Board's approach to inert waste, a potentially more benign material than CCDD, the Attorney General puts requests that the Illinois EPA respond in detail to the following questions:

1. Section 1100.205(b) Certifications and Load Checking – This subsection requires an inspection of incoming loads with a photo ionization detector (“PID”). However the operator's use of a PID will not reveal the presence of elevated levels of metals in a particular load.

Q: Why do the proposed Part 1100 regulations not require operators to inspect incoming loads via x-ray fluoroscopy to detect the presence of heavy metals?

2. Sections 100.404, 405, and 409 Standards for Issuance of a Permit, for Denial of a Permit, and Transfer of a Permit – Section 1100.104 states that the Agency *must issue a permit* upon proof that the facility will not cause a violation of the Act or Board regulations. (*Emphasis added.*) However, there is nothing in either of these two Sections that allows the Agency to consider the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management and CCDD operation when considering issuance of the permit. *See* Section 39.2(a) (the local siting requirements for pollution control facilities). Under the Regulations as written, the Illinois EPA would be required to issue a permit to an owner/operator who has willfully violated the Act and Board Regulations previously.

Q: Why do the proposed Part 1100 regulations not address this potential problem and what steps will the Illinois EPA take to ensure that historically bad owner/operators are closely scrutinized in the CCDD permitting process, including the transfer of permits?

3. Section 1100.411(a) Procedures for the Renewal of Permits – This Section requires a permittee to file a renewal application within 90 days prior to the expiration date of the existing permit, but does not indicate what such failure to comply would entail i.e. is it just a violation of the regulations or would the permit terminate.

Q: Why do the proposed Part 1100 regulations not include bright line language to address the consequences of the late filing of a permit renewal application and provide guidance to the regulated community?

4. Section 1100.412(c)(1)(D) Procedures for Closure and Postclosure Maintenance – This subsection allows for termination of the permit if there have been no exceedances of the Class I groundwater quality standards during the preceding three years. In addition, Section 1100.755 also requires a demonstration that there are no class I groundwater exceedances for a period of 3 years. Section 22.17 of the Act requires a minimum of 15 for sanitary landfills.

Q: Why do the proposed Part 1100 regulations limit to three years, the acceptable time frame for an owner/operator to be without an exceedance of the Class I groundwater quality standards and what if any protections are there for citizens using groundwater as a resource that becomes contaminated beyond the three year period?

5. Section 1100.740 Sampling Frequency – This Section provides for only annual groundwater testing at a minimum. However, the Board Inert Waste Regulations require semi-annual testing. As mentioned above, inert waste is potentially more benign because it does not contain asphalt, yet the regulations require that inert waste be tested at least twice a year.

Q: Why do the proposed Part 1100 regulations limit the frequency of groundwater monitoring at CCDD facilities to once a year, when inert waste landfills require bi-annual testing for contaminants?

6. Section 1100.745 Non-Compliance Response Program –

I) This Section provides for dates by which the owner or operator must do the following: (a) report groundwater exceedances to the Agency (within 60 days after sample was collected), retest the groundwater (within 60 days after date sample was collected) and submit a report with the sample results to the Agency (60 days after receiving the resampling data), submit a corrective action program (within 120 days after date the resampling results were sent to the Agency), and implement the corrective action program (within 120 days after date the resampling results were sent to the Agency). Under the Board Inert Waste Regulations, an owner or operator must report any exceedance within 1 business day (*See* 35 Ill. Adm. Code 811.206(d)).

Q: Why do the proposed Part 1100 regulations allow a CCDD owner/operator 60 days to report an exceedance when an inert waste landfill operator must report it within 1 business day?

Q: Why do the proposed Part 1100 regulations allow a CCDD owner/operator 60 days to report an exceedance, when each additional day additional fill material is being placed upon the contaminated soil or other waste?

II) In addition, in Section 1100.745(c) there are no procedures or timeframes regarding any deficiencies that the Illinois EPA might identify in an owner/operator's corrective action program i.e. it assumes that the plan will be acceptable to the Agency.

Q: How will the proposed Part 1100 regulations insure that these plans are subject to review and approval by the Illinois EPA and that the approval process does not continue

for an overly extended period of time, where groundwater contamination has been identified?

7. Section 1100.750 Alternate Non-Compliance Response Program – Subsection (a) requires the owner or operator to notify the Agency of its intention to avail itself of this Section (within 60 days after date the Agency was notified in writing of an exceedance – 120 days after date sample was collected). Subsection (b) requires the owner/operator to submit a report to the Agency that demonstrates that a source other than the owner/operator's fill operation was the source of the contamination within 180 days of the date on which the Agency was notified in writing (300 days after date sample was collected).

Q: Why do the proposed Part 1100 regulations allow a CCDD owner/operator 60 days to report an exceedance when an inert waste landfill operator must report it within 1 business day?

Q: Why do the proposed Part 1100 regulations allow a CCDD owner/operator 300 days to provide an alternate non-compliance plan, when the plan and the support for it may be deficient and then the owner/operator would be required to sample the groundwater again as required in Section 1100.745(b), thereby providing an additional 120 days to provide the Illinois EPA with the sampling results?

Q: Why would any owner/operator ever initiate the Section 1100.745(b) sampling without first attempting to provide the Illinois EPA with a Section 1100.750 alternate non-compliance program?

8. Section 1100.760 Dewatering Fill Operations – This Section contemplates certain facilities dewatering their fill areas.

Q: Are there any CCDD fill operations or registered uncontaminated soil operations that are dewatering their facilities without an NPDES Permit, and if so how many?

Q: How many current permitted CCDD fill operations or registered clean soil operations currently have a NPDES permit allowing them to discharge from the fill area at the site?

Q: Why do the proposed Part 1100 regulations not require the CCDD fill operations or registered uncontaminated soil operations currently discharging from their facilities pursuant to an NPDES permit to modify those permits to sample the discharge for the all of the constituents identified in Subpart F?

9. Section 22.51(f)(1) of the Act contemplates the inclusion of regulatory requirements for liners or other protective barriers.

Q: Why do the proposed Part 1100 regulations not include any such requirements for liners or other protective barriers to be used in all new CCDD or clean soil fill operations?

10. Section 22.51(f)(1) of the Act contemplates the inclusion of regulatory requirements for financial assurance. Given that an owner/operator may accept contaminated soils and/or other wastes that escape identification or detection during the load checking procedures identified in Section 1100.205 and based on the timeframes provided in Sections 1100.740, 745, and 750, the contaminated soils or other wastes may be buried under literally two plus years worth of CCDD or soil fill. In addition, Section 1100.205(b)(6) requires an owner/operator to “remove and properly dispose of” material other than CCDD or uncontaminated soil deposited at the facility. The experience of the State, both the Illinois EPA and the Illinois Attorney General’s Office, is that once a significant problem occurs at a facility, and it nears full capacity, the owner/operator’s financial incentive and ability to correct any non-compliance is lost. The failure to require appropriate financial assurances will undoubtedly leave orphan sites around the State, with the State becoming responsible for any corrective action.

Q: Why do the proposed Part 1100 regulations not include any such requirements for financial assurance at all permitted CCDD operations and clean soil fill operations?

11. Section 3.160(b) of the Act provides, in part as follows:

To the extent allowed by federal law, clean construction or demolition debris shall not be considered “waste” if it is (i) used as fill material outside of a setback zone if the fill is placed no higher than the highest point of elevation existing prior to the filling immediately adjacent to the fill area, and if covered by sufficient uncontaminated soil to support vegetation within 30 days of the completion of filling or if covered by a road or structure, and, if used as fill material in a current or former quarry, mine, or other excavation, is used in accordance with the requirements of Section 22.51 of this Act and the rules adopted thereunder . . . 415 ILCS 5/3.160 (2010) (Emphasis added).

Q: Do the proposed Part 1100 regulations and Sections 3.160(b), 22.51 of the Act comport with federal law, when CCDD is not being recycled but rather is being disposed of in various unlined quarries, mines or other excavations?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an Assistant Attorney General in this case, do certify that I caused to be served this 17th day of October, 2011, the foregoing Pre-Filed Questions Directed To The Illinois Environmental Protection Agency and Notice of Filing upon the persons listed on the Service List by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.


STEPHEN J. SYLVESTER