

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO CLEAN) R-12-009
CONSTRUCTION OR DEMOLITION) (Rulemaking – Land)
DEBRIS (CCDD) FILL OPERATIONS:)
PROPOSED AMENDMENTS TO 35 ILL.)
Adm. Code 1100)

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed electronically with the Illinois Pollution Control Board, the Pre-Filed Questions of the Illinois Environmental Protection Agency.

Dated: October 17, 2011

Respectfully submitted,

**PUBLIC BUILDING COMMISSION
OF CHICAGO**

By: c/manning
 Claire A. Manning

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**PRE-FILED QUESTIONS OF THE ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY FROM THE PUBLIC BUILDING COMMISSION OF CHICAGO**

The Public Building Commission of the City of Chicago (PBC), by and through its counsel, Claire A. Manning, Brown Hay & Stephens, LLP, asks the following questions of the Illinois Environmental Protection Agency (IEPA) witnesses in the above referenced matter.

Other Excavation Definition.

As the IEPA stated at the September 26 hearing the terminology “~~o~~ other excavation” has long been a source of confusion in the application of the Clean Construction and Demolition Debris (CCDD) law and regulations. In the original 2006 rulemaking, the Board established the following definition:

“~~C~~CCDD fill operation” means the use of CCDD as fill material in a current or former quarry, mine, or other excavation. *For purposes of this Part, the term “other excavation” does not include holes, trenches, or similar earth removal created as part of normal construction, removal, or maintenance of a structure, utility, or transportation infrastructure.* Emphasis added. 35 Ill. Adm. Code 1100.103 (current).

The proposed rules create a new and separate definition for “~~o~~ other excavation” which reads somewhat differently than the current definition:

“~~O~~ther excavation” means a pit created primarily for the purpose of extracting resources (e.g., soil, sand, gravel, clay) and does not include holes, trenches, or similar earth removal created as part of normal construction, removal, or maintenance of a structure, utility, or transportation infrastructure. 35 Ill. Adm. Code 1100.103 (proposed)

It appears from IEPA testimony that the proposed definition would exclude from the realm of CCDD regulation (as was intended by the original regulatory definition) soil that is placed in sites that have been excavated (cleared of existing buildings, structures, earth, etc.) as part of a construction project (for a home, a new building, a bridge construction, a highway or street reconstruction, a sewer reconstruction, etc.).

- Does the IEPA agree that neither the CCDD law nor these proposed regulations are intended to apply to soil or fill that is utilized as explained above, including the soil standards the IEPA proposes at Section 1100.605(a)(1)? If not, please explain.
- Does the IEPA agree that a project engineer or consultant at one of these construction sites not subject to these rules can nonetheless reasonably rely upon the full panoply of the Board's TACO rules to determine whether any incoming soil or other fill material are adequately protective of human health and safety? If not, please explain.
- Does the IEPA agree that the Board's TACO rules, although initially intended as a site remediation tool for onsite soils, nonetheless have become somewhat of an ~~industry~~ "standard" in terms of addressing what soils are appropriately and safely moved from one location to another? If not, please explain.

Uncontaminated Soil.

P.A. 96-1416 defined ~~un~~"uncontaminated soil" for purposes of the CCDD amendments as ~~soil that does not contain contaminants in concentrations that pose a threat to human health and safety and the environment.~~ Further, P.A. 96-1416 precludes CCDD facilities or Soil Only facilities from accepting soil that was removed as a result of (i) activities under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA); (ii) closure under the Resource Conservation and Recovery Act (RCRA); (iii) remediation pursuant to the state's underground storage tank program or site remediation program (except for those required by Section 58.9 of the Act). See 415 ILCS 5/22.51 (f)(2)(C) and 415 ILCS 5/22.51a (d)(2)(C)

In P.A. 96-1416, as amended by P.A. 97-0137, the legislature charged the Board with adopting ~~rules~~ specifying the maximum concentrations of contaminants (MC) that may be present in "uncontaminated soil" for purposes of implementation of the CCDD law. The legislation provides the Board with discretion to determine the appropriate MCs and allows for the use of background concentrations relevant to the deposition site (CCDD facility or Soil Only facility). The IEPA's rule proposal would allow the use of some, but not all, of the Board's TACO rules. For example, the IEPA's rule specifically precludes the use of site-specific evaluations, local area background calculations, exposure route values, etc. See 35 Ill. Adm. Code 1100.605(d) (proposed). The proposed rule also appears to mandate compliance with such conservative TACO parameters as ingestion and inhalation factors, Groundwater I standards, uniform pH assumptions, etc.

- Did the IEPA rely on any relevant scientific studies or information to support the use of the most conservative of the TACO parameters, regardless of fill placement or deposition site – as being necessary for the protection of human health and safety?

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- Does the IEPA agree that some permitted CCDD facilities (quarries) are located in areas (or have geological attributes) that pose much less risk to human health and safety than others?
- Does the IEPA agree that the legislation allows latitude for a more site specific approach to receipt and placement of soils (via specific permit conditions, etc), that will nonetheless ensure protection of the environment, but at a more sensible cost to taxpayers and the construction and building industries?
- Does the IEPA believe Section 1100.605, as drafted, requires a generator who conducts soil testing to analyze soils for *all chemical constituents listed in 35 Ill. Adm. Code 742*, not just “target compounds” in order for soils to be considered uncontaminated? Or instead, does Section 1100.610(a) allow an excavation contractor or site owner to rely on the professional judgment of its engineer or geologist as to what chemical constituents need to be evaluated—on the basis of historic use, Phase I, Phase II, etc.? Please explain.
- Under what circumstances, if any, will the State initiate an enforcement action against an owner or operator of an excavation site from which soil was taken to a permitted CCDD facility (quarry) where the excavation site owner or operator relied upon the judgment of a licensed professional engineer or geologist that the soil was uncontaminated? What differences, if any, would it make if the soil was tested (as opposed to not tested)?
- Would IEPA support the development of a specific list of contaminants routinely present in certain soils and require testing only for those compounds, unless there is a reason to indicate other testing should be done, on the basis of historic use?
- Would the IEPA support an approach where each permitted CCDD fill site operator (quarry) can designate, via authorized permit condition, what soil parameters define uncontaminated for purposes of use as fill at its site, on the basis of background conditions at that particularly permitted facility? If not, why not? If not, how does the IEPA envision background factors at the destination fill site to be considered?
- Would the IEPA support an approach where each permitted CCDD fill site operator can designate, also via authorized permit condition, certain site specific soil acceptance criteria, such as limitations on amount to be accepted, placement parameters, etc. , in order to protect the environmental but nonetheless allow excavated soil to be wisely and safely used as fill?
- Does the IEPA agree that some constituents routinely present in soil, especially urban soils, such as lead and other metals, are not readily soluble and thus pose a lesser risk to human health and safety by being buried deep in the earth, as opposed to being present in topsoil where human contact is inevitable? If not, please explain. If so, please explain

how such considerations are or might be safely factored into considerations regarding acceptance and placement of uncontaminated soil at permitted CCDD facilities.

Certification; Load Checking; Acceptance and Rejection of Loads.

- If an excavation site owner or contractor demonstrates that the material brought to the permitted CCDD facility is uncontaminated in accordance with these rules, through analytical testing or other appropriate means (e.g., Phase I demonstrates no recognized environmental condition and/or site never developed as industrial or commercial), would the IEPA agree that the excavation owner or contractor is not responsible for any contamination that is later discovered at the permitted fill site? If not, why not?
- Likewise, if the *material is accepted by the CCDD facility*, presumably through the use of protocols established in these rules (PID meter, pre-screening, etc.), would the IEPA agree that the excavation site owner or contractor is not responsible any contamination that is later discovered at a permitted fill site? If not, why not?
- What is the IEPA's position with regard to an excavation site owner or contractor's liability or responsibility for a load which is rejected by the fill site?
- Does the IEPA agree that PID testing has a propensity to yield false positives? If so, has the IEPA considered the economic and environmental costs of transporting and relocating rejected loads? Does a PID test at the CCDD facility trump analytical soil testing conducted by the excavation site owner or contractor?
- According to the September 26th testimony of Mr. Purseglove, ~~if~~ a facility has been found to have accepted waste, they will be required to remove the offending material and properly transport it to a facility which is properly permitted to accept it." Does the IEPA envision that the responsibility for such removal, and liability for its acceptance, is on the permitted CCDD facility? Under what conditions, if any, would the IEPA hold the excavation site owner or contractor responsible for such?

Potential Groundwater Impact.

- How does the IEPA intend to determine that groundwater near a permitted CCDD facility has been adversely impacted as a result of the facility's acceptance of CCDD or uncontaminated soil, as opposed to more likely sources that might neighbor such facilities, such as leaking underground storage tank sites, industrial releases, air contaminants, etc.?
- Can the IEPA provide information related to where the existing permitted CCDD facilities are located and whether the respective locations are located in Class I or Class II groundwater areas and whether the respective locations are in jurisdictions which have an established groundwater restriction, authorized as an institutional control by Board rules?

- Would the IEPA agree that the Board established residential ingestion or inhalation levels in TACO for the protection of human health and welfare as it relates to surface soils, not as it relates to potential groundwater impact?
- Does the IEPA have any evidence that facilities which are subject to regulation such that they can only accept Clean Construction and Demolition Debris and Uncontaminated soils pose a groundwater risk sufficient to justify the extra costs associated with groundwater monitoring?

Dated: October 17, 2011

Respectfully submitted,

**PUBLIC BUILDING COMMISSION
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PROOF OF SERVICE

I, Claire A. Manning, certify that I the following persons will be served the attached **Pre-Filed Questions of the Public Building Commission of Chicago**, by U.S. Mail, first class postage prepaid, on October 18, 2011:

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