

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF 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

PCH10

To: see attached service list

PLEASE TAKE NOTICE that on the 2nd day of December 2011, I filed with the Office of the Clerk of the Pollution Control Board the attached Appearance and Post-Hearing Comments on behalf of Citizens Against Ruining the Environment.

By: Keith Harley
Keith Harley, Attorney for Citizens Against Ruining the Environment

ORIGINAL

Dated: December 2, 2011

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Pollution Control Board

CERTIFICATE OF SERVICE

I, KEITH HARLEY, an attorney, hereby certify that true copies of my Appearance on behalf of Citizens Against Ruining the Environment and Citizens Against Ruining the Environment's Post-Hearing Comments were delivered via electronic filing on December 2, 2011 to the following:

Mr. John T. Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, IL 60601

and that true copies of these documents were mailed by First Class Mail, by depositing the same in the U.S. Mail depository located at 211 West Wacker, Chicago, Illinois in an envelope with sufficient postage prepaid, on December 2, 2011 to the following:

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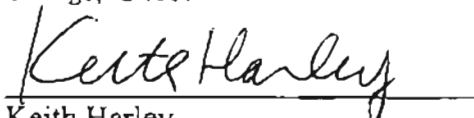
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Keith Harley

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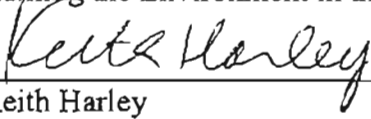
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APPEARANCE

I, Keith Harley, an attorney, hereby enter my Appearance on behalf of Citizens Against Ruining the Environment in the above matter.



Keith Harley

Date: December 2, 2011

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POST-HEARING COMMENTS

OF CITIZENS AGAINST RUINING THE ENVIRONMENT

Now comes Keith Harley of the Chicago Legal Clinic, Inc., on behalf of his client, Citizens Against Ruining the Environment, and respectfully submits the following comments. Citizens Against Ruining the Environment (“CARE”) is a Will County-based environmental organization comprised of members who live, work and recreate in Will County.

There are eleven (nine active) CCDD and/or uncontaminated Soil Fill Operations in Will County, the most in the State of Illinois. PC 6 at 1. At the same time, many communities in Will County - including the Lockport and Joliet areas where CARE is most active - use groundwater as the source of their private well and public water supplies. Id. Consequently, CARE’s primary concern is the cumulative impact of aggregated contaminated material in a CCDD or Soil Fill Operation on groundwater, over time. That is, even if no individual load of CCDD or soil exceeds contaminant thresholds, thousands of loads directed to a single location could cumulatively cause endangering conditions. This is particularly true for contaminants that are persistent and toxic. For example, even if no individual load of lead-containing CCDD or soil poses a threat to groundwater or exceeds a regulatory threshold, the additive total of thousands of lead-containing loads could accumulate lead levels in a CCDD or Soil Fill Operation that

threaten groundwater resources. This could occur while a facility is operating, or at any time after a facility concludes operations.

In stating this concern, CARE is acting consistently with the legislative mandate which must be met in this rulemaking. Section 22.51(f)(1) of the Act, as amended by Public Act 096-1416, unconditionally mandates that “The rules must include standards and procedures necessary to protect groundwater...”. In order to protect groundwater resources, the Board may include requirements regarding: 1. Testing, 2. Certification, 3. Surface water runoff, 4. Liners, 5. Other protective barriers, 6. Monitoring, 7. Groundwater monitoring, 8. Corrective action, 9. Recordkeeping, 10. Reporting, 11. Closure, 12. Post-closure care, 13. Financial assurance, 14. Post-closure land use controls, 15. Location standards, 16. Modification of existing permits, and 17. Other standards and procedures necessary to protect groundwater. Id.

As an initial matter, CARE points out that the Legislature clearly intended for the IL EPA and the Board to use the full arsenal of regulatory requirements as necessary to protect groundwater. The protection of groundwater is the unmistakable, unconditional and paramount legislative priority, without reference to the costs to regulated entities or the additional administrative requirements for Illinois EPA. The protection of groundwater is not constrained by a time horizon; any regulatory regime must protect groundwater now and in the future.

When measured against this standard, CARE asserts the IL EPA regulatory proposal is deficient. CARE asserts the IL EPA regulatory proposal fails to establish appropriately protective contaminant screening requirements. The groundwater monitoring requirements imposed on CCDD and soil fill operators are dangerously lax. Many critical regulatory requirements are unenforceable in practice, either because the requirements are “self-implementing” or because a permit or meaningful facility registration process is not required at

all. Notably, CARE is not alone in questioning these aspects of the IL EPA regulatory proposal. These are among the concerns also being raised by Will County government officials (see PC 6), by the Illinois Attorney General (see the October 17, 2011 Pre-Filed Questions submitted by the Office of the Attorney General) and, in some instances, by Waste Management of Illinois, Inc. (see the September 15, 2011 Pre-Filed Questions submitted by Waste Management of Illinois, Inc.).

Comment One: The Illinois EPA Regulatory Proposal Fails To Establish Appropriately Protective Contaminant Screening Requirements

Other participants in this rulemaking have actively questioned the adequacy of the IL EPA proposal to prevent contaminated materials from being placed in CCDD and Soil Fill Operations. The Illinois Attorney General questions why the load checking provisions of Section 1100.205(b) did not require the use of an x-ray fluoroscopy (“XRF”) to detect the presence of heavy metals. October 17, 2011 Pre-Filed Questions submitted by the Office of the Attorney General at 3. CARE shares this concern, especially because the mandated inspection with a photo ionization detector (“PID”) will not detect some persistent and toxic metals that could accumulate over time and pose a threat to groundwater resources. It is irrational for the IL EPA to require load checking with PID for organics, but not to require the use of XRF for inorganics, especially because inorganics also potentially threaten groundwater.

Comment Two: The Illinois EPA Regulatory Proposal Fails To Establish An Adequate System to Determine if Groundwater Resources Are Being Negatively Affected by CCDD/Soil Fill Operations and to Remediate Affected Groundwater

Groundwater protection is an unconditional legislative mandate for this rulemaking. Groundwater protection is required without reference to cost, ease to regulators and regulated

entities or the duration of the requirements necessary to achieve this objective. In turn, groundwater monitoring is the means by which to detect negative impacts.

The groundwater monitoring requirements imposed on CCDD and Soil Fill operators are dangerously lax and inconsistent with the legislative mandate for groundwater protection.

As IL EPA honestly acknowledges, “A map of the current permitted CCDD fill operations shows that both public and private wells are found in close proximity to CCDD fill operations due to the fact that the same geologic material that is good to be quarried is also appropriate material in which to sink a groundwater well.” IL EPA Statement of Reasons, p. 6. Moreover, “...since the Illinois EPA cannot be sure that the front-end screening process will keep 100% of contamination out of the fill operations, the groundwater monitoring requirement is necessary to detect any contamination of groundwater and provide timely corrective action and remediation.” Id. This is especially important because, as IL EPA states, “...a groundwater monitoring program is important at fill operations because the facilities are not required to have a protective liner to control contaminant migration and because they are consolidating a large volume of offsite materials into one area with that material often placed directly into the groundwater flow.” Id. at 32.

A. Annual Sampling Is Inadequate to Protect Groundwater and Its Users

Despite the inevitable proximity of wells and the critical importance of monitoring, IL EPA proposes requiring only annual sampling. IL EPA explicitly justifies this choice as a cost accommodation to operators. Id. at 6 – 7 (“Illinois EPA has tried to mitigate costs to the regulated community by requiring only annual sampling of the groundwater...”). CARE strongly objects to IL EPA’s proposal and its underlying justification. Viewed from the perspective of protecting the users of groundwater and the quality of this resource, more frequent

testing is essential. CARE concurs with the Illinois Attorney General that quarterly sampling is more likely to detect releases before they become endangering and in time for corrective action to be employed. This may ultimately prove to be cost efficient for operators, who will identify releases more quickly, before a contaminant plume becomes extensive and more expensive to remediate. This will also enable the operators of facilities to address the concerns of communities and local units of government by offering more frequent and contemporary data.

B. Non-Compliance Response and Corrective Action Must Be Undertaken More Quickly

IL EPA proposes an inexplicably lax timeline for releases to be reported to the Agency – 60 days – and allows for 240 days to pass before corrective action is required (60 days to retest + 60 days to submit report with retest results to the Agency + 120 additional days to submit/implement a corrective action program). Section 1100.745. There are no deadlines for IL EPA to identify deficiencies in the corrective action proposal, meaning potentially indefinite delay in the Agency review process. Section 1100.745(c). Viewed from the perspective of protecting groundwater and its users from an emergent release (the statutory priority), this timeframe is not appropriate, and should be significantly shortened. For example, as pointed out by the Illinois Attorney General, an inert waste landfill operator is required to report a release within one business day. 35 Ill. Adm. Code 811.206(d); October 17, 2011 Pre-Filed Questions submitted by the Office of the Attorney General at 4. It is reasonable to expect a professional operator to proactively design basic elements of a corrective action plan which can be rapidly adapted to an emergent release. It is also reasonable to expect Illinois EPA to place the highest priority on reviewing a corrective action plan in light of evidence of a release that threatens groundwater and its users. For these reasons, CARE recommends that Section 1100.745 be

changed to require sampling exceedances to be reported to IL EPA within one business day, that a resample be taken within 30 days, that the results of the resampling should be submitted to the Agency within 1 day, that a report and corrective action plan be submitted within 30 days, reviewed by IL EPA within 30 days and implemented immediately thereafter. Coupled with quarterly sampling, the likelihood of a prolonged period between which a release occurs and is subject to corrective action is significantly reduced, consistent with the mandate to protect groundwater.

C. All Groundwater Activities Including Sampling Results Should Be Reported To IL EPA To Enable Proactive Agency Oversight and To Enable Public Access To These Records

Illinois EPA does not recommend that a CCDD or Soil Fill operator provide any documentation to the Agency relating to groundwater “unless groundwater contamination is detected.” *Id.* at 32. In the view of IL EPA, it is appropriate for groundwater requirements to be “self-implementing.” On its face, IL EPA’s “(Agency) don’t ask, (operator) don’t tell” approach is inconsistent with a legislative mandate which unambiguously prioritizes groundwater protection above all other considerations, and which requires IL EPA to undertake all actions to achieve this result. CARE contends IL EPA’s “trust but don’t verify” approach to how facilities are achieving groundwater protection is contrary to the fundamental mandate of the legislation. CARE asserts copies of records compiled under Sections 1100.720, 1100.725, 1100.730, 1100.740, 1100.745, 1100.750, 1100.755, 1100.760 should be provided to and maintained by the IL EPA. Since regulated facilities must develop these records, submitting copies to IL EPA will involve minimal expense, and will enhance IL EPA’s proactive oversight capacity especially in the case of a facility which is operating in significant non-compliance. That is, IL EPA should

have the capability to identify and proactively respond to a substandard operator before groundwater contamination is detected.

In addition to enhancing the capacity of the Agency to exercise appropriate oversight, there is another important reason for CARE's proposal. It makes it possible for members of the public to obtain records related to groundwater activities at a fill operation. The Illinois Freedom of Information Act allows access to records in the Agency's possession; if records are not submitted to IL EPA, there is no public access. Public access to information enables public confidence in the effectiveness of regulatory programs and the activities of regulated entities. In the absence of this information, adjacent property owners, users of groundwater, and other stakeholders will not have access to information that may be directly relevant to their health, safety and well-being. This is contrary to the well-established public policy of Illinois, the stated purposes of the legislation mandating this regulatory process and the interests of every participant in this process that there is public confidence in fill operations and the agency that regulates them.

Comment Three: Section 1100.515(b) Registration Requirements Should Explicitly Include The Submission of Information to Enable IL EPA to Ensure Basic Compliance With Statutory and Regulatory Mandates

One unassailable goal of this rulemaking activity is to prevent substandard fill facilities from operating. For CCDD facilities, this will be accomplished by a traditional permitting process. For soil fill operations, which like CCDDs are subject to clear regulatory standards, IL EPA is instead proposing the continuation of a registration system. Pursuant to Section 1100.515(b), IL EPA is proposing that the registration requirements will be in a form "to be determined" by the Agency.

Mindful of the paramount importance of the protection of groundwater resources, CARE believes soil fill operations should be subject to permitting, even if the permitting is in the form of general permitting akin to that used for regulated activities like municipal separate sanitary storm sewers. PC 6 at 2. However, if the Board concludes that registration alone is adequate to ensure compliance and the practical enforceability of the regulatory requirements for soil fill operations, CARE contends there must be clear registration requirements. Clear, comprehensive registration requirements will enable the IL EPA, the Illinois Attorney General, units of local government including County State's Attorneys, and members of the public to identify and act against substandard operators quickly, before irreparable damage is done.

CARE urges the Board to significantly elaborate on the Registration requirements in Section 1100.515(b). CARE is not recommending that soil fill operators bear any additional expense beyond the costs of copying documents they are already required to develop pursuant to the regulations. Documents that should be included in Registration include:

1. written procedures for load checking, load rejection notifications, and training required under Section 1100.205;
2. a site location map required under Section 1100.304;
3. a facility plan map as required under section 1100.305;
4. a narrative description of the facility as required under Section 1100.306;
5. proof of property ownership;
6. a surface water control plan as described under Section 1100.308;
7. a closure plan and post-closure maintenance plan as described under Sections 1100.309 and 1100.310;

8. documents demonstrating procedures and practices necessary to ensure compliance with 1100.500, 1100.605, 1100.610, and 1100.615.

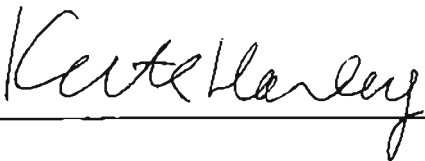
9. documents demonstrating compliance with the groundwater monitoring and protection provisions of 1100.720, 1100.725, 1100.730, 1100.740, 1100.745, 1100.750, 1100.755, 1100.760.

Compliant soil fill operators will only bear a small, one-time additional expense for copying documents that demonstrate compliance. By contrast, non-compliant and substandard operators will be easily identified, and their operations will be more efficiently terminated before threatening public health, welfare and safety.

Comment Four – CARE Concurrs With The Will County Land Use Department’s Public Comments

CARE fully agrees with the comments submitted by the Will County Land Use Department in PC 6. These include the importance of proof of local zoning/siting approval, and, the need for financial assurance to ensure corrective action, closure and post-closure requirements are met in the event a facility operator is not financially capable of meeting its obligations.

Respectfully Submitted,



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