

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)

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STATE OF ILLINOIS
Pollution Control Board

PC#31

NOTICE OF FILING

To: see attached service list

PLEASE TAKE NOTICE that on the 18th day of April 2012, I filed with the Office of the Clerk of the Pollution Control Board the attached Post-Hearing Comments on behalf of Citizens Against Ruining the Environment.

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

Dated: April 18, 2012

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Pollution Control Board

CERTIFICATE OF SERVICE

I, KEITH HARLEY, an attorney, hereby certify that true copies of Citizens Against Ruining the Environment's Post-Hearing Comments were delivered via electronic filing on April 18, 2012 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 April 18, 2012 to the following:

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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.

CARE is very concerned that the Illinois Pollution Control Board (“Board”) concluded that groundwater monitoring should not be required at CCDD sites in its February 2, 2012 First Notice Proposed Rule. CARE asserts this decision is contrary to the legislative mandate the Board must fulfill, against the manifest weight of evidence now before the Board and contrary to the more prudent positions taken by the Illinois Environmental Protection Agency, the Illinois Attorney General and Will County. On a more basic level, CARE’s members are among the 350,000 residents of Will County who rely on groundwater as their drinking water supply. In the absence of protective groundwater monitoring, the first evidence of a release will be realized in the private or public wells on which these residents depend for their potable water. On behalf of these residents, CARE is deeply disappointed that the Illinois Pollution Control Board is unilaterally putting Will County residents in harm’s way and, in doing so, that it is acting contrary to legislative mandate and the manifest weight of evidence, and in isolation from the

Illinois Legislature, the Illinois Environmental Protection Agency, the Illinois Attorney General and Will County.

As established by the record, 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. This could occur while a facility is operating, or at any time after a facility concludes operations. These risks to groundwater resources are even greater if self-screening protocols are not perfectly implemented, a scenario that IL EPA characterizes as "inherent" in the screening process. TR 3/12/12 a.m. at 22.

I. The Illinois Pollution Control Board's First Notice Proposal Is Contrary to The Clear Mandates of Illinois Law Establishing the Paramount Importance of Protecting Groundwater Resources, and Mandating Preventive Approaches to Protect This Resource

CARE's position on the necessity of groundwater monitoring is consistent 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 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. As stated by Illinois EPA:

“We emphasize that, because really the State’s policy of preventing groundwater contamination is to prevent and protect groundwater resources from – for current and future beneficial uses. And we believe that’s potential reason enough to justify groundwater monitoring in fill operations. This policy and the importance of the groundwater resource requires the uncertainties really be resolved in favor of groundwater monitoring.” TR 3/12/12 a.m. at 23.

Importantly, the “State’s policy of preventing groundwater contamination” that Illinois EPA espouses is not merely internal Illinois EPA guidance, it is the unambiguous legislative mandate in the Illinois Groundwater Protection Act, 415 ILCS 55/2 (“...it is the policy of the State of Illinois to restore, protect, and enhance the groundwaters of the State, as a natural and public resource). Notably, consistent with the IL EPA’s position, the Illinois Groundwater Protection Act mandates a preventative approach. 415 ILCS 55/2(b).

The IPCB has its own well-established precedent underscoring the importance of groundwater monitoring in light this legislative mandate. In the Matter of: Groundwater Protection:

Regulations for Existing and New Activities within Setback Zones and Regulated Recharge Areas (35 Ill. Adm. Code 601, 615, 616 and 617) (“Technical Standards”). PCB R89-5, Final Order: Opinion and Order of the Board (December 6, 1991). In this Order, the IPCB emphasized the insufficiency of any groundwater monitoring scheme that relies on the initial detection of a release by an “off-site entity”, an approach the IPCB asserted was inconsistent with the legislative mandates of the Illinois Groundwater Protection Act. *Id.* at 29-30. In the IPCB’s view, in order to act consistently with the Illinois Groundwater Protection Act, a monitoring component is an essential element of the groundwater protection scheme, providing notice of contamination in its earliest stages and allowing for the initiation of non-degradation and preventative response measures to maintain and or restore the integrity of potable supplies. *Id.* The IPCB concludes its analysis by emphasizing that groundwater monitoring is indispensable to fulfill the mandates of the Illinois Groundwater Protection Act, and does so in a way which is consistent with the position advocated in the present matter by the IL EPA, the Illinois Attorney General, Will County officials and CARE: “This preventative aspect of the regulations would be lost should the Board only require groundwater monitoring after contamination is discovered at an off-site location.” *Id.*

I. The Illinois Pollution Control Board’s First Notice Proposal Is Contrary to The Manifest Weight of the Evidence

For purposes of creating a record, CARE points to the following evidence in this rulemaking.

I. “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. This is uncontroverted evidence.

2. As to Will County, the Illinois EPA presented uncontroverted evidence that there are 398 potential private wells, 31 public non-community wells and 12 community water supply wells within 2,500 feet of the existing CCDD and USFO sites. TR 3/12/12 a.m. at 20; see also Exhibit 27 “CCDD and USFO Sites In Relation to the Potential For Aquifer Recharge Within Will County”.

3. There are 350,000 people served by groundwater supplies in Will County. TR 3/12/12 a.m. at 20. This is uncontroverted evidence.

4. As Rick Cobb testified on March 12th:

“Basically the existing and potential locations of fill operations covered under the proposed Part 1100 are in some of the most geologically susceptible areas of the State of Illinois. And moreover, the importance of groundwater as a fresh water source within the Chicago metropolitan area really can hardly be overstated...Therefore, really, the sand and –shallow sand and gravel and the Siurian Dolomite aqifer systems will be the primary source of drinking water in northeastern Illinois.” TR 3/12/12 a.m. at 15, 16.

This is uncontroverted evidence.

5. 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.” IL EPA Statement of Reasons, p. 6. As Rick Cobb stated in his March 12th testimony:

“Again, the Agency’s larger point is because of imperfect certification and screening procedures that are just inherent in screening procedures of any type and the strong likelihood of maybe an imperfect performance of certification in the screening

procedures...[t]here is no certification process that's absolutely perfect." TR 3/12/12 a.m. at 22.

This evidence is based on IL EPA's decades-long history of enforcing regulations, including many cases that are adjudicated by the IPCB.

6. 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. As Rick Cobb stated in his March 12th testimony:

"And with the acceptance of large quantities of soil over time, and nearly the complete absence of any technical control such as liners to prevent any contamination, and the location of such facilities in these extremely highly sensitive geological areas with heavy reliance on groundwater as not only a current and future source of fresh water, we really think that for the CCDD and uncontaminated soil fill operations, that we must –that the Board should consider the potential to cause groundwater contamination, and not just be thinking about contamination that's been caused and allowed." Id. at 22.

It is uncontroverted that CCDD and USFO facilities will be consolidating a large volume of offsite materials into unlined areas, often directly into the groundwater flow in extremely highly sensitive geological areas with heavy reliance on groundwater as a source of fresh water.

7. The demands on groundwater resources in northeastern Illinois including Will County will increase. As stated by Rick Cobb in his testimony:

Northeastern Illinois could be facing a future shortage of supplies, and really the biggest driver of the water use is population. In the year 2000, there were about 8.6 million

people in Illinois' northeastern region, and that number could grow to 12 million by the year 2050. And based on growth trends, the metropolitan area may need as much as 50% more water within the next 50 years. TR 3/12/12 a.m. at 22.

This increased demand for water cannot be satisfied by Lake Michigan Water because of Supreme Court-imposed allocation limits. Id. at 16. It also cannot be satisfied by deeper bedrock aquifers because they are contaminated with radionuclides and are not being replenished. Id. Instead, the shallow sand and gravel and the Silurian Dolomite aquifer systems will be the primary drinking water in northeastern Illinois. Id. The future availability of clean and adequate supplies from this source "will be vital to the Illinois population and economy." Id. Yet, it is precisely this groundwater source that is at risk of contamination by virtue of undetected releases from CCDD sites. IL EPA Statement of Reasons, p. 6. This evidence is uncontroverted.

8. A key factual basis for the IPCB's conclusion that groundwater monitoring should be not required is groundwater monitoring at a single CCDD site in Kane County. This site ceased operations more than twenty years ago. IPCB Proposed Rule First Notice, Opinion and Order, at 23, 53-54. Groundwater monitoring data was assembled only after the site was purchased by Kane County, many years after closure. There is nothing in the record about groundwater conditions during the active operations of this facility, nor for long periods after it closed. This is not an adequate factual basis to support the IPCB's conclusion.

9. The costs of sampling groundwater monitoring wells, even for all parameters set forth in the Class I groundwater regulations, is estimated to be \$3,000.00. Ex. 12 at 6; see also PC7 at 1. The Illinois EPA is proposing annual sampling. This cost on an annual basis is not an adequate factual basis to support the IPCB's broad conclusion that this cost will have a detrimental fiscal

impact on site owners and operators. IPCB Proposed Rule First Notice, Opinion and Order at 55-56.

10. Other provisions of the proposed regulations do not substitute for groundwater monitoring. For example, financial assurance and post-closure land use controls are not alternatives to groundwater monitoring, but rather something that is used after groundwater has been contaminated. TR 3/12/12 a.m. at 31.

Coupled with its clear legislative mandate, the evidence now before the IPCB unmistakably establishes the need for groundwater monitoring at CCDD sites. The Board's failure to include groundwater monitoring in light of this evidence would be contrary to the manifest weight of the evidence.

III. On the Issue of Groundwater Monitoring, The Illinois Pollution Control Board's First Notice Proposal Is Contrary to Prudent Positions Taken By the Illinois Environmental Protection Agency, the Illinois Attorney General, and Will County.

In its decision to excise groundwater monitoring requirements, the IPCB is acting in isolation from other units of government in Illinois which are invested with statutory authority to protect public health, safety and welfare. The IPCB is rejecting the rulemaking proposal put forward by the IL EPA and acting in a manner which is contrary to the positions of the Illinois Attorney General. Just as importantly, the IPCB is rejecting the recommendations of local government officials in Will County, which hosts the most regulated facilities, many of which are in immediate proximity to residents who rely on groundwater for their drinking water. TR 3/12/12 a.m. at 20; see also Exhibit 27 "CCDD and USFO Sites In Relation to the Potential For Aquifer Recharge Within Will County". As noted, the IPCB has a clear legislative mandate and responsibility to ensure the protection of groundwater resources, and previously concluded that

precautionary groundwater monitoring is essential to fulfilling this purpose. In the Matter of: Groundwater Protection: Regulations for Existing and New Activities within Setback Zones and Regulated Recharge Areas (35 Ill. Adm. Code 601, 615, 616 and 617) (“Technical Standards”). PCB R89-5, Final Order: Opinion and Order of the Board (December 6, 1991).

The Board’s isolated and unilateral decision to excise groundwater monitoring requirements appears to be based on the following conclusion in the First Notice Proposed Rule: “The Board will not propose groundwater monitoring to protect groundwater from the potential of a violation of the regulations.” The problem with this reasoning is that if a violation occurs, in the absence of on-site groundwater monitoring, it will be detected off-site. For the members of CARE and the millions of Illinois residents who like them rely on groundwater, this would be too late. Ironically, it will also be too late for regulated entities to detect and address releases while they are still on-site, and to limit the potentially catastrophic enforcement and tort liability they will face if they contaminate private or public water supplies. Plainly stated, contrary to other agencies and units of government, the IPCB appears willing to take the risk that regulated facilities will never experience a release, and that residents living in proximity to these sites will never detect contaminants from that release in their wells. Why is the IPCB willing to take this risk based on groundwater data from a Kane County site that closed more than 20 years ago, a \$3,000.00 sampling cost and the (frankly) naïve assumptions that the screening system is foolproof and that compliance will be perfect? The IL EPA, the Illinois Attorney General, Will County officials and members of the public like CARE are clearly not willing to take this risk, based on a well-grounded understanding of Illinois legal mandates and the evidence in the record of this proceeding. They are uniformly urging the IPCB to reconsider its decision. If the IPCB

persists, because it is so isolated in its decision, the IPCB must also weigh the potentially devastating effect on its institutional credibility if it is wrong.

Respectfully Submitted,

A handwritten signature in black ink that reads "Keith Harley". The signature is written in a cursive style and is positioned above a solid horizontal line.

Keith Harley, Attorney for Citizens Against Ruining the Environment

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