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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO REGULATION OF	)	01-26
PETROLEUM LEAKING UNDERGROUND	)	(Rulemaking – Land)
STORAGE TANKS	)	
35 ILL. ADM. CODE 732	)	

P.C. #11

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board Comments of the Illinois Department of Transportation on the proposed amendments to Regulation of Petroleum Leaking Underground Storage Tanks.

THE ILLINOIS DEPARTMENT OF TRANSPORTATION

By: Randy Schick
One of its Attorneys

Dated: December 11, 2001

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This filing submitted on recycled paper

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
	)	
	)	R 01-26
	)	(Rulemaking-land)
Amendments to 35 Ill. Adm. Code 732:	)	
Regulation of Petroleum Leaking Underground	)	
Storage Tanks.	)	

COMMENTS OF THE ILLINOIS DEPARTMENT OF TRANSPORTATION

The Illinois Department of Transportation ("IDOT") appreciates this opportunity to comment on the proposed amendments to the Petroleum Leaking Underground Storage Tanks Regulations, 35 Ill. Admin. Code 732. IDOT generally supports the proposed amendments. However, IDOT is concerned that amendatory language allowing costs incurred for MTBE remediation after receipt of a No Further Remediation Letter ("NFR Letter") in subsection 732.606(kk) might be construed to preclude indemnification costs pursuant to a court order or settlement agreement after receipt of an NFR Letter. Specifically, IDOT is concerned that costs it requests an owner or operator to reimburse, after an NFR Letter has been issued, in dealing with contaminated soil and groundwater that it has allowed to remain under the highway right-of-way pursuant to a highway authority agreement with that owner or operator under 35 Ill. Admin. Code 742.1020 will not be indemnified by the leaking underground storage fund ("LUST Fund") because of subsection 732.606(kk). IDOT believes that that result would not be in keeping with the indemnification provisions of the Illinois Environmental Protection Act or in the spirit of the risk-based approach to corrective action found in the Act.

IDOT proposes the following amendatory language for Section 732.606(kk):

kk) Costs incurred for additional remediation after receipt of a No Further Remediation Letter for the occurrence for which the No Further Remediation Letter was received,

except costs incurred for MTBE remediation pursuant to subsection 732.310(l)(2) of this Part or indemnification costs incurred pursuant to a court order or settlement agreement (including a highway authority agreement under 35. Ill. Admin. Code 742.1020), between the owner or operator and a third-party meeting the requirements of 415 ILCS 5/57.8(c). [The double underlined language is proposed by IDOT.]

IDOT has some experience related to this issue. When IDOT first entered into highway authority agreements in 1997, it attempted to include the following language in the agreement:

> If the release of contaminants in the right-of-way is from a leaking underground storage tank of petroleum and the conditions and requirements of the Illinois Environmental Protection Act and regulations promulgated by authority of that Act have been met, reimbursement payments to the Department pursuant to this Agreement may be indemnified by the Leaking Underground Storage Tank Fund, as the Illinois Attorney General has reviewed and approved this Settlement Agreement under Section 57.8(c)of the Act. The Department shall provide sufficient documentation to Owner/Operator for a request for indemnification to IEPA. Owner/Operator shall reimburse the Department as required by this Agreement for costs indemnified by the Leaking Underground Storage Tank Fund within 30 days of receipt of those funds. This provision shall survive a "No Further Remediation" determination for the Site and last for the duration of this Agreement.

The Illinois EPA objected to this language and would not approve agreements with this language in them. It considered these costs to be remediation costs after the NFR Letter, and, therefore, ineligible under subsection 732.606(kk). It continues to take that position. The Department has entered into nearly five hundred highway authority agreements without this language.

However, IDOT respectfully disagrees and believes that this subsection does not govern indemnification costs under subsection 5/57.8(c) of the Illinois Environmental Protection Act. There are two types of costs for which Section 5/57.8 contemplates reimbursement from the LUST Fund:

1) corrective action costs, under subsection 5/57.8(a), and
2) indemnification costs under subsection 5/57.8(c).

Corrective action costs may well be ineligible after an NFR Letter if subsection 732.606(kk) says they are. Indemnification costs, however, are different than corrective action costs, as Section 5/57.8 recognizes in many subsections by referring to "costs of corrective action or indemnification." They relate to costs arising from a "legally enforceable judgment entered against the owner or operator" or a "settlement with a third-party due to a release of petroleum from an underground storage tank." 415 ILCS 5/57.8(c)

Indemnification costs arise from claims by third-parties which result in a judgment or settlement agreement that may arise before, during or after an NFR Letter. As the Board noted on page 9 to the preamble to this proposed rule, "The Agency also stated that the NFR Letter does not necessarily relieve the owner or operator for off-site contamination." The proposed rule recognizes that in Section 732.411(f), where it states, "The owner or operator is not relieved of responsibility to clean up a release that has migrated beyond the property boundary even where off-site access is denied." It is this off-site contamination and costs associated with it with which IDOT is concerned, and which are dealt with by highway authority agreements and the indemnification provision in the Act.

A highway authority agreement is both an institutional control under Section 35 Ill. Admin. Code 742.1020 and a settlement agreement under Section 5/57.8(c) of the Act. As an institutional control, it invariably is used by the owner or operator to obtain an NFR Letter. When that is obtained, under the Agency's policy, that is when it ceases to be effective as a settlement agreement to the owner or operator. As a result of that policy, the owner or operator has to

make a Hobson's choice to: 1) either avoid entering the agreement and expend vast sums of money remediating the highway right-of-way and restoring pavement so that it can possibly obtain reimbursement of those costs from the LUST Fund, or 2) enter into the agreement and obtain the NFR Letter and risk that IDOT will some day excavate through the contaminated area and request reimbursement for those costs for which the owner will, according to the Agency, no longer be eligible for reimbursement.

IDOT has had several "mom and pop" owners refuse to enter the agreement for that reason, and their sites, IDOT believes, are still unresolved. Many mom and pops have reluctantly entered an agreement despite this issue, and IDOT may soon be pursuing reimbursement from some of them. They will not be reimbursed from the LUST Fund, and will face severe financial hardship from our claim. IDOT does not believe the law requires that result.

IDOT believes that its settlement agreement/highway authority agreement and the circumstances surrounding it comply with the requirements for indemnification found in subsection 5/57.8(c). In accordance with that subsection, it is a settlement with a third party due to a release of petroleum from an underground storage tank, and the Attorney General has reviewed and approved its reasonableness. This subsection also requires that "the owner or operator has satisfied the requirements of subsection (a) of this Section." These requirements are not obvious, nor do they all seem to fit indemnification circumstances very well. The Board has not adopted any rules that would clarify what those requirements are. Perhaps now it would wish to do so.

Apparently, the requirements that are referred to are found in subsection 5/57.8(a)(6). That subsection provides:

> (6) For purposes of this Section, a complete application ["for payment . . . after completion of any other required activities at the underground storage tank site"] shall consist of:

(A) A certification from a Licensed Professional Engineer as required under this Title and acknowledged by the owner or operator.

(B) A statement of the amount approved in the plan and the amount actually sought for payment along with a certified statement that the amount so sought shall be expended in conformance with the approved budget.

(C) A copy of the Office of the State Fire Marshal's eligibility and deductibility determination.

(D) Proof that approval of the payment requested will not result in the limitations set forth in subsection (g) of this Section being exceeded.

(E) A federal taxpayer identification number and legal status disclosure certification on a form prescribed and provided by the Agency.

Presumably any owner or operator that obtained LUST Fund reimbursement for its corrective action and obtained an NFR Letter has complied with these requirements. The Agency nevertheless would no doubt review compliance with these requirements at the time the owner or operator submits an application for reimbursement for costs of indemnification, before, during or after receipt of an NFR Letter. Compliance with requirements A, C, D and E should be relatively straightforward. How to achieve compliance with requirement B, however, in any indemnification scenario is not apparent to this petitioner. How is the amount of a third party settlement for costs or a court order for costs incurred due to a release of petroleum onto off-site property supposed to fall within an owner's approved plan and an approved budget?

In IDOT's context, how does an owner or operator presented with our claim for reimbursement under a settlement agreement obtain plan and budget approval? IDOT's experience has been that the amount of contaminated soil that needs to be removed from an excavation and deposited in a landfill can only be determined at the time of the highway project is being performed. For instance, our construction activities can vary from our design plans. There is really no opportunity to obtain plan and budget approval in advance of the project that

would be meaningful, unless it were simply a review of our contract specifications for dealing with the contaminated soil and our bid items, such as, "$55 per cubic yard for disposal of contaminated soil," for reasonableness. A review by the Agency after the project, however, would make more sense. A rule would help clarify whether requirement B makes sense in the indemnification context, and specify a more meaningful Agency review for reasonableness of the settlement activities and cost amounts. IDOT would be happy to work with the Agency, Board and others to develop such a rule.

To further support its argument, IDOT has attached a copy of pages 81 and 82 from an August 6, 1999 draft of a proposed rule change to Section 732.606(kk) from the Agency to the Illinois Environmental Regulatory Group, as Exhibit A. The Agency proposal would have included indemnification as an ineligible cost after receipt of an NFR Letter. That proposal would indicate that the Agency thought that reimbursement for indemnification had not yet, but needed to be, ruled out after an NFR Letter. IDOT does not know why this amendatory proposal was removed from subsequent drafts. The inference is that indemnification is not prohibited by this subsection, even though the Agency, to the petitioner's knowledge, still takes the position that it is not willing to open up LUST Fund reimbursement after an NFR Letter. That it is now willing to do so for MTBE cleanup shows that its post NFR Letter policy is not really written in stone and does not have to be.

IDOT does not only believe that the Agency's position on indemnification is not in accord with the Illinois Environmental Protection Act, but also not with the spirit of Brownfield and risk-based cleanup initiatives. The Agency's position drives the owner or operator toward the cleanup of the right-of-way now so that LUST Fund reimbursement can be an obtained option. That cleanup is totally unnecessary to protect human health and environment because the owner or operator could instead enter into a highway authority agreement to do so. The Agency, however, cannot force the owner or operator to choose the latter risk-based option, but its policy is driving it to the former.

That cleanup is not in the interest of the Agency, as it forces the Agency to expend large sums of LUST Fund dollars on an avoidable and expensive cleanup of the right-of-way. That cleanup is not in the interest of the owner or operator who needs LUST Fund reimbursement, your mom and pops, who will have to take the risk of spending large sums of money to cleanup the right-of-way for which at best it will have to wait for reimbursement and at worst will be denied part of the reimbursement.

That cleanup is also not in the interest of the Illinois Department of Transportation. IDOT has no desire to shut down its roads and have concrete torn up for a corrective action that could be avoided by a highway authority agreement. The right-of-way in these urban areas, where many gas stations are found, is also complicated, full of utilities and storm sewers, so that work in these areas is difficult. For all of these reasons, it makes good policy sense to encourage highway authority agreements, especially for small scale gas station owners, by allowing claims after an NFR Letter to be indemnified by the LUST Fund.

Respectfully submitted,
ILLINOIS DEPARTMENT OF TRANSPORTATION

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Dated: December 11, 2001

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minimum requirements of the Act and regulations:

z) Costs incurred after completion of early action activities in accordance with Subpart B by owners or operators choosing, pursuant to Section 732.300(b) of this Part, to conduct remediation sufficient to satisfy the remediation objectives;

aa) Costs incurred after completion of site classification activities in accordance with Subpart C by owners or operators choosing, pursuant to Section 732.400(b) or (c) of this Part, to conduct remediation sufficient to satisfy the remediation objectives;

bb) Costs of alternative technology that exceed the costs of conventional technology;

cc) Costs for investigative activities and related services or materials for developing a High Priority corrective action plan that are unnecessary or inconsistent with generally accepted engineering practices or unreasonable costs for justifiable activities, materials or services;

dd) Costs to prepare site classification plans and associated budget plans under Section 732.305, to perform site classification under Section 732.307, or to prepare site classification completion reports under Section 732.309, for sites where owners or operators have elected to classify under Section 732.312;

ee) Costs to prepare site classification plans and associated budget plans under Section 732.312, to perform site classification under Section 732.312, or to prepare site classification completion reports under Section 732.312, for sites where owners or operators have performed classification activities under Sections 732.305, 732.307, or 732.309;

ff) Costs requested that are based on mathematical errors;

gg) Costs that lack supporting documentation;

hh) Costs proposed as part of a budget plan that are unreasonable;

ii) Costs incurred during early action that are unreasonable;

jj) Costs incurred at a site that has entered the Site Remediation Program under Title XVII and 35 Ill. Adm. Code 740; ~~and~~

kk) Costs incurred for additional remediation, including indemnification, after receipt of a

EXHIBIT A

No Further Remediation Letter for the occurrence for which the No Further Remediation Letter was received, except costs incurred for MTBE remediation pursuant to Section 732.310(i)(2);

ll) Handling charges for subcontractor's costs that have been billed directly to the owner or operator; and

mm) Handling charges for subcontractor's costs when the contractor has not paid the subcontractor.

(Source: Amended at 21 Ill. Reg. 3617, effective July 1, 1997)

Section 732.607 Payment for Handling Charges

Handling charges are eligible for payment only if they are equal to or less than the amount determined by the following table:

SUBCONTRACT OR FIELD PURCHASE COST:	*ELIGIBLE HANDLING CHARGES AS A PERCENTAGE OF COST:*
$0 - $5,000	*12%*
$5,001 - $15,000	*$600 PLUS 10% OF AMOUNT OVER $5,000*
$15,001 - $50,000	*$1,600 PLUS 8% OF AMOUNT OVER $15,000*
$50,001 - $100,000	*$4,400 PLUS 5% OF AMOUNTOVER $50,000*
$100,000 - $1,000,000	*$6,900 PLUS 2% OF AMOUNT OVER $100,000* (Section 57.8(gf) of the Act):

Section 732.608 Apportionment of Costs

a) The Agency may apportion payment of costs if:

1) *The owner or operator was deemed eligible to access the fund for payment of corrective action costs for some, but not all, of the underground storage tanks at the site; and*

2) *The owner or operator failed to justify all costs attributable to each underground storage tank at the site.* (Derived from Section 57.8(m) of the Act)

b) The Agency will determine, based on volume or number of tanks, which method of

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