

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PIASA MOTOR FUELS, INC.,)	
)	
Petitioner,)	
)	
v.)	
)	PCB No. 14-131
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Post-Hearing Brief of Piasa Motor Fuels, Inc. Copies of these documents are hereby served upon you.

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Dated: October 6, 2014

Respectfully submitted,

PIASA MOTOR FUELS, INC.

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Its Attorney

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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ILLINOIS ENVIRONMENTAL)	PCB No. 14-
PROTECTION AGENCY,)	(UST Appeal)
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PETITIONER’S POST-HEARING BRIEF

NOW COMES Petitioner, PIASA MOTOR FUELS, INC. (“Petitioner” or “Piasa”), by and through its attorneys, BROWN HAY & STEPHENS, LLP, and pursuant to the briefing schedule in the Hearing Officer’s Hearing Report of September 10, 2014, hereby submits is Post-Hearing Brief following the hearing held by the Pollution Control Board (“Board”) on September 10, 2014. Petitioner respectfully offers it post-hearing comment and argument as follows:

I. BACKGROUND

1. This matter is an appeal of an Illinois Environmental Protection Agency (“IEPA” or “Agency”) final decision of April 8, 2014 (Administrative Record, pp. 356 – 358; hereinafter referred to as “A.R. pp. ___) that modified a Stage 2 Site Investigation Plan and Budget (A.R. pp. 232 – 352), submitted on March 13, 2014, as related to certain soil samples. Specifically, the IEPA asserted that “Illinois EPA does not approve of the soil sampling that was performed below

the water table.” And, “(i)t has not been demonstrated that such samples were warranted as part of Stage I.” A summary of Stage 1 sampling and results may be found at A.R. pp. 240 – 243. The IEPA further advised that all costs of sampling below the groundwater table should be removed from the budgets (Stage 1 and Stage 2) when submitted.

2. This appeal was then filed on May 16, 2014 challenging the modification eliminating all soil sampling below the groundwater table. Petitioner contends that the IEPA has misinterpreted the limitation on Stage 1 Site Investigation imposed by 35 Ill. Adm. Code 734.315(a)(1)(A) and (B)¹, with the same relevant language regarding Stage 1 soil investigation requirements in both:

The borings must be advanced through the entire vertical extent of contamination, based upon field observations and field screening for organic vapors, provided that borings must be drilled below the groundwater table only if site-specific conditions warrant.

3. Petitioner would like to also point out a procedural issue that may be present here. Petitioner’s Exhibits 2 and 3 were not contained in the Administrative Record filed by the IEPA. They were admitted into evidence at the hearing, so the import of this point may be minor. Exhibit 2 was a 45-day Report submitted to the IEPA on July 21, 2006; and, Exhibit 3 was the Amended 45-day Report submitted on September 22, 2006. Both of these documents should have been in the Administrative Record since they were reviewed for this matter. *See* A.R., pp 1 – 2 and 354 for references to these reports and their approval.

II. GROUNDWATER TABLE

3. The interpretation of the term “groundwater table” is significant in the evaluation of this case. It is defined rather simply in the Board’s rules in Part 742 (TACO) at Section

¹ Hereinafter, citations to Board regulations will be made by section number only.

742.200 as “the top water surface of an unconfined aquifer at atmospheric pressure.” Petitioner’s expert witness, Mr. Joseph Truesdale, provided several important points relating to groundwater table depth at the hearing:

- Groundwater table depth should be determined by having a monitoring well screened at that level (Transcript of September 10, 2014 at p. 68) (hereinafter Tr. at p. ___”);
- Groundwater table depth cannot be determined by looking at core samples from a boring (Tr. pp. 35 – 36);
- Groundwater table depth fluctuates considerably over time and an area (Tr. p. 56).

4. These conclusions seem to be consistent with other provisions relating to water table, at least as to determining the gradient of the groundwater. Monitoring wells are necessary to determine that gradient. “*Static groundwater elevations* in each well must be determined and recorded following well construction and prior to each sample collection to determine the gradient of the groundwater table.” Emphasis added. See Section 734.430(c). It seems that in this section of Part 734, it is clear that the static groundwater elevation in a well is determinative of water table, which makes the most sense since the surface of the water is open to atmospheric pressure.

5. The IEPA project manager, Mr. Karl Kaiser, did not directly contradict Mr. Truesdale’s testimony regarding water table. He did not discuss how the top surface of the water at atmospheric pressure could be determined by observation of a core soil sample. He did not provide any qualitative or quantitative measures of how the presence of moisture would be observed such as to define the level of the groundwater table. Rather, the IEPA, in the LUST Section at least, uses the “depth to groundwater” (Tr. p. 136, pp. 138 – 139), and only during drilling (Tr. p. 139 – 140). This appears to be some IEPA interpretive policy that has been

provided by LUST Section management to project managers. Tr. p. 139, lines 7 -11. Note that Mr. Kaiser insisted that the depth to groundwater during drilling is determinative even if monitoring well data is available and conflicts. Tr. pp. 138 – 140.

6. Petitioner contends that the IEPA's use of groundwater "depth while drilling" as the definition of groundwater table constitutes an interpretation of general applicability, or in other words a rule. If the IEPA had wanted such an interpretation, it should have been made during rulemaking. Instead, the IEPA, at least in the LUST Section, has made a rule for expediency rather than scientific reality. The groundwater table is an easy to understand concept, but the IEPA wants it determined up front in the process because it relates to how much soil sampling can properly be done. Ignoring real monitoring well data in favor of drilling contact with groundwater is easy for the IEPA; it just is not accurate. If an accurate determination of groundwater table was needed in Stage 1, provisions could have made during rulemaking for investigative processes to make that possible.

7. Mr. Brandon Hargrave did not add much to the understanding of the water table as a concept. He testified that the depth at which he encountered groundwater during the drilling was the groundwater table. He then defined it as: "The depth below ground surface at which groundwater -- where you generally encounter groundwater." Tr. p. 97. He did not know the regulatory definition, but when the actual definition was read to him, he suggested that it was the same thing as what he just said. Tr. p. 98. Petitioner contends that Mr. Hargrave's understanding of the definition of groundwater table is inaccurate since it does not include the concept of a water surface at atmospheric pressure. Nonetheless, Mr. Hargrave was the on-site geologist for Petitioner when the sample drilling occurred, and it is clear that whatever he

thought was the groundwater table, he believed further sampling was needed, as will be discussed below.

8. Limiting soil sample to above the groundwater table may have sounded simple enough to the layman's ear, but when regulatory certainty is going to be required, scientific specificity is appropriate and absolutely necessary.

III. SITE-SPECIFIC CONDITIONS JUSTIFY DRILLING BELOW WATER TABLE

8. One of the primary purposes of the Stage 1 investigation is to define the entire vertical extent of contamination. However, the IEPA contends that once the groundwater is contacted, it becomes a groundwater issue (Tr. p. 139), apparently only to be evaluated and remediated in later stages in the process.

9. Mr. Truesdale testified that site-specific conditions were present at Petitioner's site that warranted drilling beyond the water table, first from the geology perspective stating:

Normal contaminant fate and transport processes for any fine grain soil would almost always necessitate drilling below the water table and evaluation of the distribution of soil phase contaminants absorbed to the solids within the water bearing unit. Tr. p. 68 – 69.

Further, relative to the physical observations by the on-scene project person:

Field screening and PID response combined with textural classification of the soils that are impacted according to ASTM classification. Tr. p. 69.

10. Responding to cross-examination, Mr. Truesdale explained how the site-specific conditions are present in "typical" LUST sites in Illinois, but not necessarily in all.

I said that in a typical LUST site. There are always site-specific conditions in a glacial depositional environment. In Illinois, there are other types of depositional environments such as alluvial, sand and gravel, valley terrains, where conditions may not dictate sampling below the water table.

If there's a large vertical separation between the source and observed groundwater and visual olfactory evidence or field screening of organic vapors, that indicates that migration ceases before groundwater is observed in a boring, those are the two principle cases where it would not apply.

But in a typical LUST site, that clause would never be applicable, but there are cases in Illinois where that would be applicable.

11. Mr. Hargrave, the geologist on site during the drilling, explained the process he followed when doing the borings at the site. Significantly, his most important observations in determining how deep to bore were the indications of contamination by visual and olfactory or instrumentation – *i.e.*, “field observations and field screening for organic vapors.” In order to fully define the vertical extent of contamination, he would advance borings until reaching clean samples. Tr. pp. 103 – 108. Mr. Hargrave may not have agreed with Petitioner’s thoughts here on “water table,” but he explained why he drilled borings to certain depths based on his site-specific observations.

12. The IEPA on the other hand has apparently not seen site-specific circumstances that would justify soil sampling below the groundwater table. Tr. p 140, 147. Mr. Kaiser testified that no site-specific conditions for this project were set forth in the report and that none were called to his attention. Tr. p. 159. He even believes that such separate statement of reasons is required by the regulations. Tr. p. 160. No legal authority for that position was provided by Mr. Kaiser, as Petitioner contends there is none to be found. If the facts supporting such a conclusion are present in the submittal before the IEPA, the regulated community should reasonably expect them to be reviewed for their significance.

13. The IEPA made its initial filing in the rulemaking for Part 734 on January 13, 2004 docketed as R04-23. An excerpt from that filing showing the title of the matter and the proposed language of Section 724.315 is attached hereto as Exhibit A (hereinafter “Exh. A”). At

that time, borings were not to be beyond the groundwater table. *See* proposed Section 734.315(a)(1) at Exh. A, p. 3. A hearing was held on March 15, 2004. During that hearing, Mr. Doug Clay testified on behalf of the IEPA. When speaking of drilling through the water table, he said there was concern by IEPA geologists about drilling through an aquatard. However, he then said, “that should be a decision made by a professional in the field, correct, not by someone who is sitting in the office.” Transcript of March 15, 2004 hearing in R04-22/23, page 126.

14. On May 25, 2004, the IEPA submitted its Second Errata Sheet, which made changes that included allowing borings below the groundwater table “if site specific conditions warrant.” This addition was made in several places. Exh. B. The IEPA’s Third Errata Sheet filed on August 2, 2004 then modified the proposal a little further such that Section 734.315(a)(1) looks as in the final rule, allowing boring below the groundwater table if site-specific conditions warrant.

15. The IEPA now seems to be: 1) insisting on a separately set out statement of the site-specific justification for boring below the water table (Tr. p. 160); and, 2) not able to identify any criteria that would justify it (never having seen any) (Tr. p. 140). The first is definitely not a regulatory requirement. The second seems to be a means to implement the rule as proposed rather than the way it was actually promulgated. Mr. Truesdale described the site-specific conditions that would apply both in geologic terms and the types of observations the on-site professional might see to justify the additional borings. Mr. Hargrave provided similar testimony only not so much as expert opinion, but in a description of how he proceeded with the boring, and his observations that led him to either drill further or stop.\

16. Mr. Hargrave's testimony meshes well with Mr. Clay's regulatory testimony mentioned above. The guy in the field is making judgment calls within the best of his professional ability in the field, not someone sitting in the office.

17. As Petitioner contended in its Petition, the only required component of a Stage 1 Plan and Budget is a certification that was provided by Petitioner and approved by the IEPA. *See* Section 734.315(b), A.R., p. 1.

The Stage 1 site investigation plan must consist of a certification signed by the owner or operator, and by a Licensed Professional Engineer or Licensed Professional Geologist, that the Stage 1 site investigation will be conducted in accordance with this Section.

18. The honest professional judgment of Mr. Hargrave, as overseen by Mr. Truesdale, P.E., P.G. and with the required certifications may be reviewed before actual reimbursement is made, but it should not be "second-guessed" by "someone sitting in the office" at IEPA.

IV. SOIL SAMPLING RESTRICTION NOT PRESENT FOR MONITORING WELLS

19. It should be noted that the limitation on soil sampling below the groundwater table DOES NOT appear in the groundwater investigation part of Stage 1. *See* Section 734.315(a)(2)(C). Petitioner contends that even if one accepted the IEPA's rationale about sampling below the groundwater table, such would not even apply to the soil samples taken in the five monitoring well borings done in Stage 1. Specifically, those were B-4, B-5, B-10, B-12 and B-14. *See* Table 1.0, A.R. pp. 240 – 241. *See* Tr. pp. 65 – 67. Petitioner believes the IEPA's Stage 1 modification clearly should be reversed to the extent it affects the soil samples taken in monitoring well borings, no matter what the Board's ultimate analysis on the other issues discussed above.

V. CONCLUSION

20. Petitioner believes that the IEPA's decision should be reversed, but that it would likely need a remand for a proper review. It would be expected that it would be necessary for the IEPA to separate the Stage 1 sampling costs from the others, or separating the monitoring well soil samples from the others in the event Petitioner fails on the Stage 1 sampling issue.

WHEREFORE, for the above reasons, Petitioner respectfully requests that the Pollution Control Board reverse the IEPA's April 8, 2014 final decision as to Stage 1 soil sampling activities and the budget rejection that flowed from that flawed logic; and, further award Petitioner reasonable attorney's fees and expenses related to bringing this action;

Respectfully submitted,

PIASA MOTOR FUELS, INC.

By: /s/William D. Ingersoll
Its Attorney

Dated: October 6, 2014

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
REGULATION OF PETROLEUM)
LEAKING UNDERGROUND STORAGE)
TANKS (PROPOSED NEW 35 ILL.)
ADM. CODE 734))

R 04-23
(Rulemaking - Land)

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STATE OF ILLINOIS
Pollution Control Board

**STATEMENT OF REASONS, SYNOPSIS OF TESTIMONY, AND STATEMENT
REGARDING MATERIAL INCORPORATED BY REFERENCE**

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA") and, pursuant to 35 Ill. Adm. Code 102.202, submits its Statement of Reasons, Synopsis of Testimony, and Statement Regarding Material Incorporated by Reference for the above referenced proceeding.

I. STATEMENT OF REASONS

A. Facts in Support, Purpose and Effect

1. Background

In this proposal the Illinois EPA submits a proposed new 35 Ill. Adm. Code 734 ("Part 734") as an addition to the Illinois Pollution Control Board ("Board") rules governing the Leaking Underground Storage Tank ("LUST") Program. The proposed Part 734 is applicable to petroleum underground storage tank ("UST") releases reported on or after June 24, 2002, the effective date of Public Act 92-0554, and is identical in substance to 35 Ill. Adm. Code 732 ("Part 732"), as amended in the concurrent Part 732 proposal, except for changes enacted in Public Act 92-0554. Those changes are different corrective action requirements and increased caps on the total amount owners and operators can be paid from the Underground Storage Tank

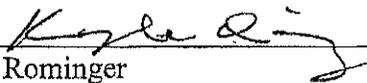
panel format should streamline the hearing process, and has proved beneficial in past rulemakings.

III. STATEMENT REGARDING MATERIAL INCORPORATED BY REFERENCE

The material incorporated by reference in Section 734.120 is the same material already incorporated by reference in Section 732.104, or new material proposed to be incorporated by reference in the concurrent Part 732 rulemaking and, according to the Board's technical staff, is already in the Board's possession. Therefore, the Illinois EPA respectfully requests that the Board waive the submission of copies of the material incorporated by reference as required under 35 Ill. Adm. Code 102.202(d).

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY



Kyle Rominger
Assistant Counsel

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this Part prior to receiving payment for any related costs or the issuance of a No Further Remediation Letter.

BOARD NOTE: Owners or operators proceeding under subsection (d) of this Section are advised that they may not be entitled to full payment. Furthermore, applications for payment must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter. See Subpart F of this Part.

Section 734.315 Stage 1 Site Investigation

The Stage 1 site investigation shall be designed to gather initial information regarding the extent of on-site soil and groundwater contamination that, as a result of the release, exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants.

- a) The Stage 1 site investigation shall consist of the following:
 - 1) Soil investigation.
 - A) One boring shall be drilled 15 feet out from the location of each soil sample collected pursuant to Section 734.210(h)(1)(A) of this Part that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. If a boring cannot be drilled at a distance of 15 feet, it shall be drilled at a lesser distance that is as close as practicable to the 15-foot distance. Each boring shall be drilled to a depth of 30 feet, or until groundwater or bedrock is encountered, whichever is less.
 - B) One boring shall be drilled as close as practicable to the location of each soil sample collected pursuant to Section 734.210(h)(1)(B) of this Part that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. Each boring shall be drilled to a depth of 15 feet below the UST excavation floor, or until groundwater or bedrock is encountered, whichever is less.
 - C) Three borings shall be drilled for each soil sample collected pursuant to Section 734.210(h)(1)(C) of this Part that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants; one boring shall be drilled as close as practicable to the location of the sample and two borings

shall be drilled 15 feet out from the location of the sample (perpendicular to the piping run), in opposite directions from each other. If a boring cannot be drilled at a distance of 15 feet, it shall be drilled at a lesser distance that is as close as practicable to the 15-foot distance. All three borings shall be drilled to a depth of 15 feet below the piping run excavation floor, or until groundwater or bedrock is encountered, whichever is less.

- D) One boring shall drilled 15 feet out from the location of each boring drilled pursuant to Section 734.210(h)(2)(A) of this Part that produced one or more samples exceeding the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. If a boring cannot be drilled at a distance of 15 feet, it shall be drilled at a lesser distance that is as close as practicable to the 15-foot distance. Each boring shall be drilled to a depth of 30 feet, or until groundwater or bedrock is encountered, whichever is less.
- E) One boring shall drilled 15 feet out from the location of each boring drilled pursuant to Section 734.210(h)(2)(B) of this Part that produced one or more samples exceeding the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. If a boring cannot be drilled at a distance of 15 feet, it shall be drilled at a lesser distance that is as close as practicable to the 15-foot distance. Each boring shall be drilled to a depth of 15 feet, or until groundwater or bedrock is encountered, whichever is less.
- F) If auger refusal occurs during the drilling of a boring required under subsection (a)(1) of this Section, the boring shall be drilled in an alternate location that will allow the boring to be drilled to the required depth. The alternate location shall not be more than ten feet from the boring's original location. If auger refusal occurs during drilling of the boring in the alternate location, drilling of the boring shall cease and the soil samples collected from the location in which the boring was drilled to the greatest depth shall be analyzed for the applicable indicator contaminants.
- G) One soil sample shall be collected from each five-foot interval of each boring required under subsection (a)(1) of this Section. Each sample shall be collected from the location within the five-foot interval that is the most

contaminated as a result of the release. If an area of contamination cannot be identified within a five-foot interval, the sample shall be collected from the center of the five-foot interval. For borings required under subsection (a)(1)(B) of this Section, soil samples shall be collected only from soil located at or below the elevation of the UST excavation floor, provided, however, that soil samples shall not be collected from soil below the groundwater table. All samples shall be analyzed for the applicable indicator contaminants.

- 2) Groundwater investigation.
 - A) A groundwater investigation is required under the following circumstances:
 - i) There is evidence that groundwater wells have been impacted by the release above the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants;
 - ii) Free product that may impact groundwater is found to need recovery in compliance with Section 734.215 of this Part; or
 - iii) There is evidence that contaminated soils may be or may have been in contact with groundwater, except that, if the owner or operator pumps the excavation or tank cavity dry, properly disposes of all contaminated water, and demonstrates to the Agency that no recharge is evident during the 24 hours following pumping, the owner or operator does not have to complete a groundwater investigation, unless the Agency's review reveals that further groundwater investigation is necessary.
 - B) If a groundwater investigation is required, the owner or operator shall install five groundwater monitoring wells. One monitoring well shall be installed in the location where groundwater contamination is most likely to be present. The four remaining wells shall be installed at the property boundary line or 200 feet from the UST system, whichever is less, in opposite directions from each other. The wells shall be installed in locations where they are most likely to detect groundwater contamination resulting

from the release and provide information regarding the groundwater gradient and direction of flow.

- C) If a soil sample collected pursuant to Section 734.210(h) of this Part, other than a soil sample collected pursuant to Section 734.210(h)(1)(B), exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants, soil samples shall be collected from the monitoring well installation boring drilled pursuant to subsection (a)(2)(B) of this Section that is located beyond the soil sample collected pursuant to Section 734.210(h) of this Part that exceeds objectives. The soil samples shall be collected from the five-foot intervals identified in subsections (i), (ii), and (iii) of this subsection (a)(2)(C). Each sample shall be collected from the location within a five-foot interval that is the most contaminated as a result of the release. If an area of contamination cannot be identified within a five-foot interval, the sample shall be collected from the center of the five-foot interval, provided, however, that soil samples shall not be collected from soil below the groundwater table. All samples shall be analyzed for the applicable indicator contaminants.
- i) One sample shall be collected from the five-foot interval intersecting the elevation of the soil sample collected pursuant to Section 734.210(h) of this Part that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants.
 - ii) One sample shall be collected from the five-foot interval immediately above the five-foot interval identified in subsection (a)(2)(C)(i) of this Section; and
 - iii) One sample shall be collected from the five-foot interval immediately below the five-foot interval identified in subsection (a)(2)(C)(i) of this Section.
- D) Following the installation of the groundwater monitoring wells, groundwater samples shall be collected from each well and analyzed for the applicable indicator contaminants.

- 3) An initial water supply well survey in accordance with Section 734.445(a) of this Part.
- b) The Stage 1 site investigation plan shall consist of a certification signed by the owner or operator, and by a Licensed Professional Engineer or Licensed Professional Geologist, that the Stage 1 site investigation will be conducted in accordance with this Section.
- c) If none of the samples collected as part of the Stage 1 site investigation exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants, the owner or operator shall cease site investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part. If one or more of the samples collected as part of the Stage 1 site investigation exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants, within 30 days after completing the Stage 1 site investigation the owner or operator shall submit to the Agency for review a Stage 2 site investigation plan in accordance with Section 734.320 of this Part.

Section 734.320 Stage 2 Site Investigation

The Stage 2 site investigation shall be designed to complete the identification of the extent of soil and groundwater contamination at the site that, as a result of the release, exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. The investigation of any off-site contamination shall be conducted as part of the Stage 3 site investigation.

- a) The Stage 2 site investigation shall consist of the following:
 - 1) The additional drilling of soil borings and collection of soil samples necessary to identify the extent of soil contamination at the site that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. Soil samples shall be collected in appropriate locations and at appropriate depths, based upon the results of the soil sampling and other investigation activities conducted to date, provided, however, that soil samples shall not be collected below the groundwater table. All samples shall be analyzed for the applicable indicator contaminants; and
 - 2) The additional installation of groundwater monitoring wells and collection of groundwater samples necessary to identify the extent of groundwater contamination at the site that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. If soil samples are

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO:) R04-22
REGULATION OF PETROLEUM) (Rulemaking – Land)
LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE 732))

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO:) R04-23
REGULATION OF PETROLEUM) (Rulemaking – Land)
LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE 734))

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
SECOND ERRATA SHEET

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through its attorney Kyle Rominger, and submits this Second Errata Sheet to its proposal for the amendment of 35 Ill. Adm. Code 732 and the adoption of 35 Ill. Adm. Code 734. The Illinois EPA proposes the following amendments to the text of the rules submitted in its proposal to the Board dated January 1, 2004:

1. In response to questions raised at the first hearing, the Illinois EPA proposes to amend the proposed definition of "financial interest" in Sections 732.103 and 734.115 to the following by deleting the word "advisor."

"Financial interest" means any ownership interest, legal or beneficial, or being in the relationship of director, officer, employee, or other active participant in the affairs of a party. Financial interest does not include ownership of publicly traded stock.

2. The Illinois EPA proposes to amend proposed Section 734.100(a) to the following by changing "June 24, 2002" to the date the regulations are adopted. This change is proposed to avoid problems that could arise from a retroactive application of the rules. For example, an owner or operator that reported a release after June 24, 2002, and that defines the extent of on-site contamination prior to the adoption of rules should not be required to perform additional on-site investigation solely to meet the specific sampling requirements of Sections 734.210(h) and 734.315. The owner or operator should be able to utilize the site investigation data collected to date if that data adequately characterizes the extent of on-site contamination. Altered wording is highlighted in bold lettering.

- a) This Part applies to owners or operators of any underground storage tank system used to contain petroleum and for which a release is reported to IEMA on or after **[effective date of rules]** in accordance with OSFM regulations. It does not apply to owners or operators of sites for which the OSFM does not require a report to IEMA or for which the OSFM has issued or intends to issue a certificate of removal or abandonment pursuant to Section 57.5 of the Act.

3. For reasons noted in paragraph 2 above, the Illinois EPA proposes to amend proposed Section 734.105(c) as follows to clarify owners and operators electing to proceed under 734.105 may be deemed to have satisfied certain requirements of Part 734, depending upon work conducted prior to the election.

- c) Owners and operators electing pursuant to this Section to proceed in accordance with this Part shall submit with their election a summary of the activities conducted to date ~~that satisfy requirements of this Part, a statement of the requirements of this Part that have yet to be satisfied,~~ and a proposed starting point for compliance with this Part. The Agency shall review and approve, reject, or modify the submission in accordance with the procedures contained in Subpart E of this Part. The Agency may deem a requirement of this Part to have been met, based upon activities

conducted prior to an owner's or operator's election, even though the activities were not conducted in strict accordance with the requirement. For example, an owner or operator that adequately defined the extent of on-site contamination prior to the election may be deemed to have satisfied Sections 734.210(h) and 734.315 even though sampling was not conducted in strict accordance with those Sections.

4. In the first errata sheet for Parts 732 and 734 the Illinois EPA proposed to amend proposed Sections 732.202(h)(1)(B) and 734.210(h)(1)(B) by adding a sentence at the end of each Section that would allow the Illinois EPA to require more than two excavation floor samples for underground storage tanks ("USTs") with a volume of 15,000 gallons or more. In response to questions at the first hearing, the Illinois EPA proposes to strike the additional sentence so that Sections 732.202(h)(1)(B) and 734.210(h)(1)(B) remain as originally proposed, which is as follows:

B) Two samples shall be collected from the excavation floor below each UST with a volume of 1,000 gallons or more. One sample shall be collected from the excavation floor below each UST with a volume of less than 1,000 gallons. The samples shall be collected from locations representative of soil that is the most contaminated as a result of the release. If areas of contamination cannot be identified, the samples shall be collected from below each end of the UST if its volume is 1,000 gallons or more, and from below the center of the UST if its volume is less than 1,000 gallons.

5. In the first errata sheet for Parts 732 and 734 the Illinois EPA proposed to amend proposed Sections 732.202(h)(1)(D) and 734.210(h)(1)(D) to allow the Illinois EPA to require more than two backfill samples for larger underground storage tanks. In response to questions at the first hearing, the Illinois EPA proposes to instead amend proposed Sections 732.202(h)(1)(D) and 734.210(h)(1)(D) to the following to provide greater specificity in the sampling requirements. Altered wording from the original proposed wording is highlighted in bold lettering.

D) If backfill is returned to the excavation, one representative sample of the backfill shall be collected for each 100 cubic yards of backfill returned to the excavation.

6. In response to questions at the first hearing about soil sampling below the groundwater table, the Illinois EPA proposes to amend proposed Sections 732.202(h)(2)(A) and (B) and 734.210(h)(2)(A) and (B) to the following to allow soil sampling below the groundwater table if site specific conditions warrant. Added wording is highlighted in bold lettering.

2) At a minimum, for each UST that remains in place, the owner or operator shall collect and analyze soil samples as follows:

A) One boring shall be drilled at the center point along each side of each UST, or along each side of each cluster of multiple USTs, remaining in place. If a side exceeds 20 feet in length, one boring shall be drilled for each 20 feet of side length, or fraction thereof, and the borings shall be evenly spaced along the side. The borings shall be drilled in the native soil surrounding the UST(s) and as close practicable to, but not more than five feet from, the backfill material surrounding the UST(s). Each boring shall be drilled to a depth of 30 feet below grade, or until groundwater or bedrock is encountered, whichever is less. Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 30 feet below grade.

B) Two borings, one on each side of the piping, shall be drilled for every 20 feet of UST piping, or fraction thereof, that remains in place. The borings shall be drilled as close practicable to, but not more than five feet from, the locations of suspected piping releases. If no release is suspected within a length of UST piping being sampled, the borings shall be drilled in the center of the length being sampled. Each boring shall be drilled to a depth of 15 feet below grade, or until groundwater or bedrock is encountered, whichever is less. Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 15 feet below grade. For UST piping that is removed, samples shall be collected

from the floor of the piping run in accordance with subsection (h)(1)(C) of this Section.

7. In response to questions at the first hearing regarding the measurement of one-eighth of an inch of free product, the Illinois EPA proposes to amend Sections 732.203(a) and 734.215(a) to the following to specify the location of the measurement. Added wording is highlighted in bold lettering. (Please note that the amendment shown here is to the existing language of Section 732.203(a). New Section 734.215(a) should be identical to Section 734.203(a), as amended).

- a) Under any circumstance in which conditions at a site indicate the presence of free product, owners or operators shall remove free product exceeding one-eighth of an inch in depth as measured in a groundwater monitoring well, or present as a sheen on groundwater in the tank removal excavation or on surface water, to the maximum extent practicable while initiating or continuing any actions required pursuant to this Part or other applicable laws or regulations. In meeting the requirements of this Section, owners or operators shall:

8. For the reasons noted in paragraph 7 above, the Illinois EPA proposes to amend proposed Sections 732.203(a)(4)(I) and 734.215(a)(4)(I) to the following. Added wording is highlighted in bold lettering.

- I) A schedule of future activities necessary to complete the recovery of free product still exceeding one-eighth of an inch in depth as measured in a groundwater monitoring well, or still present as a sheen on groundwater in the tank removal excavation or on surface water. The schedule shall include, but not be limited to, the submission of plans and budgets required pursuant to subsections (c) and (d) of this Section; and

9. In response to a suggestion from the Board's technical staff, the Illinois EPA proposes to amend Sections 732.300(b)(3)(A), 732.307(f), and 734.445(a) to the following by replacing the words "or within" with "and within." Altered wording is highlighted in bold lettering.

a. 732.300(b)(3)(A):

A) At a minimum, the owner or operator shall identify all potable water supply wells located at the site and within 200 feet of the site, all community water supply wells located at the site and within 2,500 feet of the site, and all regulated recharge areas and wellhead protection areas in which the site is located. Actions taken to identify the wells shall include, but not be limited to, the following:

b. 732.307(f):

f) Survey of Water Supply Wells. At a minimum, the owner or operator shall conduct a water supply well survey to identify all potable water supply wells located at the site and within 200 feet of the site, all community water supply wells located at the site and within 2,500 feet of the site, and all regulated recharge areas and wellhead protection areas in which the site is located. Actions taken to identify the wells shall include, but not be limited to, the following.

c. 734.445(a):

a) At a minimum, the owner or operator shall conduct a water supply well survey to identify all potable water supply wells located at the site and within 200 feet of the site, all community water supply wells located at the site and within 2,500 feet of the site, and all regulated recharge areas and wellhead protection areas in which the site is located. Actions taken to identify the wells shall include, but not be limited to, the following:

10. For the reasons noted in paragraph 6 above, the Illinois EPA proposes to amend proposed Sections 734.315(a)(1)(A) through (E) to the following to allow soil sampling below the groundwater table if site specific conditions warrant. Added wording is highlighted in bold lettering.

1) Soil investigation.

A) One boring shall be drilled 15 feet out from the location of each soil sample collected pursuant to Section 734.210(h)(1)(A) of this Part that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm.

Code 742 for the applicable indicator contaminants. If a boring cannot be drilled at a distance of 15 feet, it shall be drilled at a lesser distance that is as close as practicable to the 15-foot distance. Each boring shall be drilled to a depth of 30 feet **below grade**, or until groundwater or bedrock is encountered, whichever is less. **Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 30 feet below grade.**

- B) One boring shall be drilled as close as practicable to the location of each soil sample collected pursuant to Section 734.210(h)(1)(B) of this Part that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. Each boring shall be drilled to a depth of 15 feet below the UST excavation floor, or until groundwater or bedrock is encountered, whichever is less. **Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 15 feet below the UST excavation floor.**
- C) Three borings shall be drilled for each soil sample collected pursuant to Section 734.210(h)(1)(C) of this Part that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants; one boring shall be drilled as close as practicable to the location of the sample and two borings shall be drilled 15 feet out from the location of the sample (perpendicular to the piping run), in opposite directions from each other. If a boring cannot be drilled at a distance of 15 feet, it shall be drilled at a lesser distance that is as close as practicable to the 15-foot distance. All three borings shall be drilled to a depth of 15 feet below the piping run excavation floor, or until groundwater or bedrock is encountered, whichever is less. **Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 15 feet below the piping run excavation floor.**
- D) One boring shall drilled 15 feet out from the location of each boring drilled pursuant to Section 734.210(h)(2)(A) of this Part that produced one or more samples exceeding the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. If a boring cannot be drilled at a distance of 15 feet, it shall be drilled at a lesser distance that is as close as practicable to

the 15-foot distance. Each boring shall be drilled to a depth of 30 feet **below grade**, or until groundwater or bedrock is encountered, whichever is less. **Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 30 feet below grade.**

- E) One boring shall drilled 15 feet out from the location of each boring drilled pursuant to Section 734.210(h)(2)(B) of this Part that produced one or more samples exceeding the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. If a boring cannot be drilled at a distance of 15 feet, it shall be drilled at a lesser distance that is as close as practicable to the 15-foot distance. Each boring shall be drilled to a depth of 15 feet **below grade**, or until groundwater or bedrock is encountered, whichever is less. **Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 15 feet below grade.**

11. For the reasons noted in paragraph 7 above, the Illinois EPA proposes to amend Sections 732.605(a)(12) (renumbered to 732.605(a)(11)) and 734.625(a)(11) as follows. Added wording is highlighted in bold lettering. (Please note that the amendment shown here is to the existing language of Section 732.605(a)(12). New Section 734.625(a)(11) should be identical to Section 734.605(a)(12), as amended and renumbered to 732.605(a)(11)).

11)12) Recovery of free **product exceeding one-eighth of an inch in depth as measured in a groundwater monitoring well, or present as a sheen on groundwater in the tank removal excavation or on surface water-phase petroleum from groundwater;**

12. In response to a concern about paying for concrete replacement only after a No Further Remediation Letter is issued, the Illinois EPA proposes to amend Section 732.605(a)(17) (renumbered to 732.605(a)(16)) and 734.625(a)(16) to the following by replacing the second sentence with the sentences highlighted in bold lettering. The intent is to prevent the UST Fund from paying for the destruction and replacement of concrete,

asphalt, or paving in the same location multiple times. Altered wording is highlighted in bold lettering. (Please note that the amendment shown here is to the existing language of Section 732.605(a)(17). New Section 734.625(a)(16) should be identical to Section 734.605(a)(17), as amended and renumbered to 732.605(a)(16)).

~~16)17)~~ Costs for destruction and replacement of concrete, asphalt, or and paving to the extent necessary to conduct corrective action and if the concrete, asphalt, or paving was installed prior to the initiation of corrective action activities, the destruction and replacement has been certified as necessary to the performance of corrective action by a Licensed Professional Engineer, and the destruction and replacement and its costs are approved by the Agency in writing prior to the destruction and replacement. **The destruction and replacement of concrete, asphalt, and paving shall not be paid more than once.** Costs associated with the replacement of concrete, asphalt, or paving shall not be paid in excess of the cost to install, in the same area and to the same depth, the same material that was destroyed (e.g., replacing four inches of concrete with four inches of concrete);

13. The Agency proposes to amend proposed Sections 732.840 and 734.840 to the following to increase the maximum amounts allowed for concrete, asphalt, and paving. The proposed increases are to allow for associated sales tax and mobilization costs.

Section 732.840/734.840 Concrete, Asphalt, and Paving: Destruction or Dismantling and Reassembly of Above Grade Structures

a) Payment for costs associated with concrete, asphalt, and paving installed as an engineered barrier, other than replacement concrete, asphalt, and paving, shall not exceed the following amounts. Costs associated with the replacement of concrete, asphalt, and paving used as an engineered barrier are subject to the maximum amounts set forth in subsection (b) of this Section instead of this subsection (a).

<u>Depth of Material</u>	<u>Maximum Total Amount per Square Foot</u>
Asphalt and paving – 2 inches	\$1.65
3 inches	\$1.86
4 inches	\$2.38
Concrete – any depth	\$2.38

b) Payment for costs associated with the replacement of concrete, asphalt, and paving shall not exceed the following amounts:

<u>Depth of Material</u>	<u>Maximum Total Amount per Square Foot</u>
Asphalt and paving – 2 inches	\$1.65
3 inches	\$1.86
4 inches	\$2.38
6 inches	\$3.08
Concrete – 2 inches	\$2.45
3 inches	\$2.93
4 inches	\$3.41
5 inches	\$3.89
6 inches	\$4.36
8 inches	\$5.31

For depths other than those listed above, the Agency shall determine reasonable maximum payment amounts on a site-specific basis.

c) Payment for costs associated with the destruction or the dismantling and reassembly of above grade structures shall not exceed the time and material amounts set forth in Section 734.850 of this Part. The total cost for the destruction or the dismantling and reassembly of above grade structures shall not exceed \$10,000.00 per site.

14. The Agency proposes to amend Sections 732.614 and 734.665 as follows to clarify that applications for payment are included in the information subject to those Sections. Altered wording is highlighted in bold lettering.

Section 732.614/734.665 Audits and Access to Records: Records Retention

The Agency has the authority to audit all data, reports, plans, documents and budgets submitted pursuant to Title XVI of the Act and this Part. If the data, report, plan, document or budget audited by the Agency pursuant to this Section fails to conform to all applicable requirements of Title XVI of the Act and this Part, the Agency may take appropriate actions. [415 ILCS 5/57.15]

- a) Owners or operators that submit a report, plan, budget, application for payment, or any other data or document under this Part, and Licensed Professional Engineers and Licensed Professional Geologists that certify such report, plan, budget, application for payment, data, or document, shall maintain all books, records, documents, and other evidence directly pertinent to the report, plan, budget, application for payment, data, or document, including but not limited to all financial information and data used in the preparation or support of applications for payment. All books, records, documents, and other evidence shall be maintained in accordance with accepted business practices and appropriate accounting procedures and practices.
- b) The Agency or any of its duly authorized representatives shall have access to the books, records, documents, and other evidence set forth in subsection (a) of this Section during normal business hours for the purpose of inspection, audit, and copying. Owners, operators, Licensed Professional Engineers, and Licensed Professional Geologists shall provide proper facilities for such access and inspection.
- c) Owners, operators, Licensed Professional Engineers, and Licensed Professional Geologists shall maintain the books, records, documents, and other evidence set forth in subsection (a) of this Section and make them available to the Agency or its authorized representative until the latest of the following:
 - 1) The expiration of 4 years after the date the Agency issues a No Further Remediation Letter issued pursuant to Subpart G of this Part;
 - 2) For books, records, documents, or other evidence relating to an appeal, litigation, or other dispute or claim, the expiration of 3 years after the date of the final disposition of the appeal, litigation, or other dispute or claim; or

3) The expiration of any other applicable record retention period.

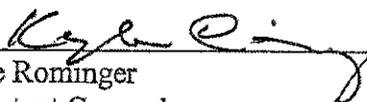
15. Included as Attachment A to this errata sheet is a corrected version of Attachment 9 to Harry Chappel's testimony. Corrections were made to the standard deviations in the last line of the chart and to the final figure below the chart.

16. Included as Attachment B to this errata sheet is a corrected version of Attachment 12 to Harry Chappel's testimony. Sites 1 and 12 were removed from the chart because they were missing the number of personnel hours, and the totals and averages were recalculated.

17. Included as Attachments C and D to this errata sheet is information to support testimony on the proposed conversion factor of 1.5 tons per cubic yard of soil. Attachment C contains soil conversion factors from Foundation Engineering, Peck, Hanson, and Thornburn (1953). Attachment D contains soil conversion factors from Handbook for Civil Engineers, Frederick S. Merritt, ed. (2nd Edition, 1976).

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY



Kyle Rominger
Assistant Counsel

DATED: May 25, 2004
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CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Notice to Appear, by means described below, upon the following persons:

To: Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
(Via electronic filing)

Scott B. Sievers
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
(Via hand delivery and email)

Carol Webb
Hearing Officer
Illinois Pollution Control Board
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P.O. Box 19274
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Dated: October 6, 2014

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By: /s/ William D. Ingersoll
William D. Ingersoll