BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:

AMENDMENTS TO REGULATION OF	)	R01-26
PETROLEUM LEAKING	)	(Rulemaking – Land)
UNDERGROUND STORAGE TANKS	)	
(35 ILL. ADM. CODE 732)	)	

NOTICE OF FILING

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(Original and Nine Copies)
(VIA FEDERAL EXPRESS)

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NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Pre-Filed Testimony of Stephen A. Beverly and Richard R. Butterworth, Jr., and the Appearance of Stephen A. Beverly and Richard R. Butterworth, Jr., in the above-titled matter, copies of which are hereby served upon you.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE NAVY

By: Stephen A. Beverly
One of its Attorneys

DATED: March 26, 2001

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
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AMENDMENTS TO REGULATION OF	)	R01-26
PETROLEUM LEAKING	)	(Rulemaking – Land)
UNDERGROUND STORAGE TANKS	)	
(35 ILL. ADM. CODE 732)	)	
	)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of the United States of America, Department of the Navy.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE NAVY

By: Steph A. Beverly
Stephen A. Beverly

DATED: March 26, 2001.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
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AMENDMENTS TO REGULATION OF	)	R01-26
PETROLEUM LEAKING	)	(Rulemaking – Land)
UNDERGROUND STORAGE TANKS	)	
(35 ILL. ADM. CODE 732)	)	
	)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of the United States of America, General Services Administration.

UNITED STATES OF AMERICA,
GENERAL SERVICES ADMINISTRATION

By: _____
Richard R. Butterworth, Jr.

DATED: March 26, 2001.

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BEFORE THE ILINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO REGULATION	)	R01-26
OF PETROLEUM LEAKING UNDERGROUND	)	(Rulemaking - Land)
STORAGE TANKS, 35 ILL. ADM.732	)	

PRE-FILED TESTIMONY OF STEPHEN A. BEVERLY

Good Morning, my name is Stephen Beverly. I currently serve as Senior Environmental Counsel for Southern Division, Naval Facilities Engineering Command, in Charleston, South Carolina. My primary areas of responsibility include providing legal counsel to the personnel in Southern Division's environmental department on matters involving compliance with applicable federal and state laws and regulations as well as Department of the Navy ("Navy") and Department of Defense ("DoD") policies pertaining to environmental compliance, environmental restoration and property disposal matters.

Southern Division serves as the facilities engineering and public works provider for all naval shore establishments within a 26 state Area of Responsibility (AOR) which includes the State of Illinois. My testimony here today was developed in consultation with other DoD components. On behalf of the Navy and the other military services, I want to thank you for the opportunity to provide our views on the Agency's proposed revisions to the Part 732 Petroleum Underground Storage Tank (LUST) regulations.

On February 16, 2001, the Agency filed a Motion to Amend the proposed LUST rulemaking in order to provide relief for the federal community from the specific requirement that No Further Remediation (NFR) letters be "perfected" by recording them in county land records. As will be discussed in testimony to be provided shortly by a representative of the General Services Administration, that recording requirement was

problematic for federal landholding entities as we do not generally "own" the federal lands on which we operate and therefore have no legal authority to record restrictions on their future use. My focus today is to indicate our support for the Agency's Motion to Amend with minor amendments which I have just provided as Exhibit 1. I appreciate this Board's willingness to listen to our thoughts in that regard .

I. Preference for Risk-Based Cleanups

Southern Division's experience at sites throughout our AOR is that under appropriate circumstances, risk-based site cleanups can be a protective, timely and cost-effective alternative to more extensive and potentially cost prohibitive remedial measures which may, or may not, ultimately permit unrestricted future land uses. We wish to have the flexibility afforded by this approach for LUST sites in Illinois where we and the Agency agree that use of a risk-based cleanup approach will protect human health and the environment and is practicable. Unfortunately, unless the changes proposed in the recent Motion to Amend brought forth by the Agency are adopted, our future ability to do so will be jeopardized since the existing regulations in Subpart G of Part 732 contain specific deed recordation requirements which we are legally precluded from satisfying. All that we in the federal community seek is the same ability which is being afforded those in private industry to be able to close out our LUST sites with full Agency concurrence utilizing the concept of risk-based remediation.

II. Why an exception should be made for federal facilities

Because we are asking this Board to adopt an alternative approach to the NFR recordation requirement contained in the existing LUST regulations, we understand that we

need to explain to you how we will ensure the future maintenance of whatever land use restrictions such a recorded instrument would otherwise have lawfully imposed.

In lieu of recording NFR letters containing specific land use restrictions, we have proposed to the Agency use of a tri-party Memorandum of Agreement (MOA) between the federal landholding agency, U.S. EPA Region 5 and the Agency. We have executed such agreements in other U.S. EPA Regions and more importantly, this Board recently approved of their use under the amended TACO Regulations as a form of institutional control.

Under such facility specific MOAs, DoD facilities within the State would commit to, among other things, certain periodic site inspection and reporting requirements so as to ensure that our facility personnel adequately maintain those site remedy-based LUCs necessary for long term protection of human health and the environment. I have provided as Exhibit 2, a model MOA for your consideration. The provisions contained within this model were negotiated between DoD, U.S. EPA Region 5 and Agency representatives and are consistent with DoD policy promulgated in January 2001 on the establishment of land use controls in consultation with appropriate environmental regulatory agencies. I have also brought with me today and have marked as Exhibit 3, several copies of that policy should the Board desire to review the same.

We believe the MOA concept provides a sound alternative approach to requiring NFR recordation. Moreover, the MOA makes clear that compliance with its provisions is a prerequisite for continued validity of those NFR letters which would be issued by the Agency for the sites which would be encompassed under such an agreement.

III. Conclusion

In conclusion, we are proposing with full Agency concurrence, that the Part 732 LUST regulations be revised to exempt federal facilities from the aforementioned NFR recordation requirement subject to a given facility's execution of, and subsequent compliance with, a tri-party LUC MOA with the Agency and U.S.EPA.

Respectfully submitted,

UNITED STATES OF AMERICA,
DEPARTMENT OF THE NAVY,

By: _____
One of its Attorneys

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STATE OF ILLINOIS
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
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AMENDMENTS TO REGULATION OF PETROLEUM LEAKING UNDERGROUND STORAGE TANKS; 35 ILL. ADM. CODE 732	)	**R01-26 (Rulemaking - Land)**

PRE-FILED TESTIMONY OF RICHARD R. BUTTERWORTH, JR.,

Good morning, my name is Richard R. Butterworth, Jr. I am a Senior Assistant General Counsel in the Office of General Counsel, General Services Administration ("GSA"). My testimony is provided on behalf of the GSA.

I have been an employee of the GSA for 13 years, and have been in my current role for the past five years. In addition to other duties, I serve as chief counsel for the Office of Property Disposal within the Public Buildings Service, GSA. In that capacity, I am responsible for policy development, legislative initiatives, regulatory interpretation and adoption, overall program legal review, and for individual real property disposal actions.

I. Background

To give some background to my testimony here today, on February 16, 2001, the IEPA ("Agency"), filed a Motion to Amend its proposed rulemaking filed with the Board back on December 6, 2000, wherein certain amendments to the Part 732 LUST regulations were proposed for Board adoption. That Motion seeks to amend Subpart G, Sections 732.702 through 732.704 to adopt language similar in many respects to that adopted by the Board in its Rulemaking R00-

19(A) which made certain amendments to the TACO rules set forth in Part 742. More specifically, the Agency's Motion would provide an exemption for federal landholding agencies from the requirement to "perfect" all No-Further-Remediation ("NFR") letters issued by the Agency by recording the same in the cognizant County Recorders Office. For any federal installation in the State to be entitled to this exemption, it must enter into a Memorandum of Agreement ("MOA") with the Agency which would contain certain periodic site inspection and reporting requirements. I am here today to testify in support of that Motion to Amend and to explain why such relief is necessary.

II. Why Federal Installations Need a Recording Exemption

Federal Installations in Illinois need the proposed recording exemption because unlike privately-owned facilities, certain legal limitations exist on the ability of federal agencies to deed record land use restrictions on federal properties to be retained in federal hands. To understand the scope of federal agency real property management authority, it must first be recognized that those real properties which the various federal agencies occupy or otherwise control are not "owned" as such by them, but rather by the United States as sovereign. This is simply because the ultimate authority to manage all federally-owned land rests with Congress pursuant to the Property Clause of the U.S. Constitution (Article IV, Section 3) and Congress has not chosen to assign ownership over federal lands to any particular agency or agencies.

GSA derives its particular authorities to manage and dispose of federal lands from the Federal Property and Administrative Services Act of 1949, as amended, the same statute under which GSA was established. See 40 U.S.C. §§ 471 et. seq. (hereafter "Property Act"). One of

the principle purposes of the Property Act was to provide economies of scale and consolidation of resources and authorities within the Federal Government. One of those key areas of consolidation was the authority to manage and dispose of real property. Specifically, GSA was authorized to ensure the effective utilization of "excess" real property (property which a landholding agency has determined is no longer needed to accomplish its particular mission) and the efficient disposal of "surplus" real property (excess property for which there is no other federal agency need). See 40 U.S.C. §§ 483, 484. GSA is authorized to provide these functions for all federal executive agencies. Therefore, unless an agency has specific authority to dispose of real property, once a landholding agency has determined that the property is excess to its needs, it must turn the property over to GSA for disposition.

The Department of Defense ("DOD") is in a unique situation in the Federal Government in that it has a specific delegation of the same property and management functions as GSA but only with regard to closing or realigning base properties identified under one of the various Base Closure and Realignment ("BRAC") statutes passed by Congress in recent years. Therefore, in those limited circumstances, DOD can act as both the landholding and disposal agency - in effect, stepping into the shoes of GSA.

While it is true that Congress has chosen on other occasions to grant certain specific property management authorities to other federal agencies, including the DOD, the scope of those authorizations has been very limited. For example, federal agencies have the general authority to grant utility easements or right-of-ways on retained lands to third parties. However, the Department of Justice has previously determined that the authority Congress provided to

agencies to execute these types of instruments does not extend to other broader disposals of property interests. Consistent with the provisions of the Property Act, GSA views the deed recording of specific land use restrictions (e.g., future industrial use only limitations or well installation prohibitions) as constituting a "disposal" of a federal property interest. Thus, only GSA and not individual landholding Agencies can impose such restrictions on active installation properties.

GSA has chosen not to delegate the authority to landholding agencies to record land use restrictions that would run with the land in perpetuity for three principal reasons. First, we believe it would be contrary to Congressional desires as to who should hold property disposal authority. In the case of DOD, the fact that Congress has only chosen to expressly grant that agency full property disposal authority in the context of BRAC real estate actions clearly indicates that it was not their intent for DOD to have those same authorities in the context of managing active base properties. Secondly, GSA believes that recorded land usage restrictions should only be agreed to in the context of an actual property disposal, so that such restrictions can truly reflect the risks associated with known site conditions in the context of a particular contemplated reuse of the property rather than some hypothetical use in the future. At the time of property disposal, GSA or any landholding agency with disposal authority could review the institutional controls previously set in place during the landholding agency's use of the property and determine, with appropriate regulatory agency input, whether those controls should remain and become permanent use restrictions or be modified in order to be truly protective in the

context of the pending reuse. And finally, GSA strongly believes there are other effective means to impose use restrictions on federal property without requiring that those restrictions be recorded. An example would be the MOA concept developed by DOD and proposed to the Agency and which has now been incorporated into the new TACO rules.

We believe it important to point out that in addition to those specific site inspection and reporting requirements which the aforementioned agreements might encompass, two federal laws, namely CERCLA and NEPA, independently impose certain pre-property disposal related notice obligations on federal landholding agencies not similarly imposed on private entities. For example, CERCLA Section 120(h)(3) requires federal agencies disposing of surplus properties to specifically state in the form of a deed covenant that all remedial action necessary to protect human health and the environment with regard to identified hazardous substance activity has been taken prior to conveyance. The United States also commits to return to the property to correct any other hazardous substance condition from prior federal activity that was not previously identified.

Secondly, federal landholding agencies must comply with the National Environmental Policy Act ("NEPA") in the context of making closure and "excessing" decisions. Under NEPA, federal agencies are required to assess potential impacts to the "quality of the human environment" from the proposed federal closure and disposal actions. Thus, if any institutional controls would be affected by an agency's decision to close a particular facility or to declare property excess, the landholding agency must evaluate those impacts and allow public comment on that evaluation. GSA must also comply with NEPA for our disposal actions and, if there is

contamination in place on property GSA is disposing, we routinely notify the appropriate State regulatory agency to obtain their input on the need for land use restrictions on the property.

In light of the foregoing, GSA urges the Board to adopt the amendments reflected in the Agency's February 16, 2001 Motion to Amend. GSA believes that these amendments will adequately address the federal community's concerns regarding limitations on our ability to perfect NFR letters through deed recordation while establishing a process for ensuring federal agency maintenance with IEPA oversight of all LUST site related land use controls. Under this amendment, an NFR letter would be deed recorded if and when any site to which they pertained was transferred by deed from the federal government to any non-federal entity.

In conclusion, we at GSA support the Agency's proposal to modify the proposed LUST rules to take into account the unique authorities -provided to, and responsibilities imposed upon, federal agencies' management of federal real property. I appreciate the opportunity the Federal Government has had to work with the Board and the Agency to resolve these issues and I thank you for the opportunity to present this testimony to you today.

RICHARD R. BUTTERWORTH, JR.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the Pre-Filed Testimony of Stephen A. Beverly and Richard R. Butterworth, Jr., and Appearance of Stephen A. Beverly and Richard R. Butterworth, Jr., copies of which are attached hereto, upon the attached Service List via First Class U.S. Mail, postage prepaid, at North Charleston, South Carolina, this 26th day of March 2001.

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R01-26 SERVICE LIST
In the Matter of: Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732
Revised March 19, 2001

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