ILLINOIS POLLUTION CONTROL BOARD
July 8, 1998

IN THE MATTER OF:	)	
	)	
REVIEW OF REMEDIATION COSTS FOR	)	R98-27
ENVIRONMENTAL REMEDIATION TAX	)	(Rulemaking - Land)
CREDIT (AMENDMENTS TO 35 ILL.	)	
ADM. CODE 740)	)	

Proposed Rule. Second Notice.

OPINION AND ORDER OF THE BOARD (by K.M. Hennessey, C.A. Manning, and M. McFawn):

In 1997, the Illinois General Assembly adopted legislation creating the environmental remediation tax credit (tax credit). The tax credit allows taxpayers to credit against their Illinois income tax liability a portion of the costs that the taxpayer has spent to clean up certain contaminated properties (or "brownfields"). The tax credit is intended to give taxpayers an incentive to clean up and redevelop brownfields.

A taxpayer who wishes to claim the tax credit must first submit to the Illinois Environmental Protection Agency (Agency) an application for review of its cleanup (or "remediation") costs. The proposal that the Board adopts today for second notice establishes the procedures and standards under which the Agency will consider these applications.

PROCEDURAL MATTERS

Effective July 21, 1997, the Illinois General Assembly adopted Public Act 90-123. See Pub. Act 90-123, eff. July 21, 1997. This bill amended two statutes: the Illinois Income Tax Act (Income Tax Act), 35 ILCS 5/101 *et seq*. (1996), which the bill amended by adding Section 201(l), a provision creating the tax credit; and the Illinois Environmental Protection Act (Environmental Protection Act), 415 ILCS 5/1 *et seq*. (1996), which the bill amended by adding Section 58.14, a provision regarding the Agency's review of remediation costs eligible for the tax credit.

Section 58.14 of the Environmental Protection Act required the Agency to propose rules for its review of environmental remediation costs within six months after the effective date of Pub. Act 90-123. Section 58.14 requires the Board to adopt those rules for second notice within six months after the Board receives the Agency's proposed rules.

On January 21, 1998, the Agency filed a proposal, along with a motion for acceptance, a Statement of Reasons, and an Agency Analysis of Economic and Budgetary Effects of Proposed Rulemaking. On January 22, 1998, the Board accepted this matter for hearing.

The Board held three public hearings in this matter: the first, in Chicago, on February 24, 1998; the second, in Springfield, on February 27, 1998; and the third, also in Springfield, on March 17, 1998. At the February 24 hearing, several witnesses testified: Mr. Gary King, manager of the Division of Remediation Management in the Agency's Bureau of Land; Mr. Lawrence Eastep, manager of the Remedial Project Management Section of the Agency's Bureau of Land; Mr. Douglas Oakley, an Agency employee who manages and reviews claims for Underground Storage Tank remedial costs; and Dr. Shirley Baer, an Agency employee who works in the Agency's Voluntary Site Remediation Unit. Dr. Baer also coordinated the Agency's efforts on this proposal with the Department of Revenue (DOR) and the Department of Commerce and Community Affairs (DCCA). Tr.1 at 9-11.[1]

At the February 27, 1998, hearing, all of these Agency witnesses again testified, along with Ms. Melissa Pantier of DCCA. In addition, Ms. Kelsey Lundy, Director of Community Affairs of the St. Louis Regional Commerce and Growth Association (RCGA) testified about the proposal. The RCGA represents business and industries in the St. Louis metropolitan area, including five counties in southwestern Illinois. Tr.2 at 62. Mr. Eric Voyles, a member of the RCGA, also testified, as did Mr. Eugene Schmittgens, attorney for the RCGA.

The March 17, 1998, hearing was held to receive testimony on DCCA's decision, under Public Act 90-489, effective January 1, 1998, not to perform an economic impact study on the Agency's proposed rules. No one testified at that hearing.

At the first and second hearings, the hearing officer accepted into the record the following exhibits:

Exhibit 1: Prefiled Testimony of Gary King of the Agency (Exh. 1);

Exhibit 2: Illinois Environmental Protection Agency Draft of Revisions to Proposed Amendments to Part 740 in Response to Questions from Pollution Control Board Hearing of 2/24/98 (Exh. 2);

Exhibit 3: Draft of DCCA's Proposed Amendments to 14 Ill. Adm. Code 520 (Enterprise Zone Program) (Exh. 3);

Exhibit 4: Agency's Bureau of Land Inventory Data Input Form for Generator Identification Number (Exh. 4); and

Exhibit 5: Testimony of Kelsey Lundy on behalf of the RCGA.

Following the hearings, the hearing officer established a deadline for interested persons to file public comments. The Board received the following public comments:

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[1] The transcript of the February 24, 1998 hearing is cited as "Tr.1 at __;" the transcript of the February 27, 1998 hearing is cited as "Tr.2 at __."

Public Comment #1 (PC 1): Public Comment of Kelsey Lundy on behalf of the RCGA;

Public Comment #2 (PC 2): Agency's Pre-First Notice Comments; and

Public Comment #3 (PC 3): Public Comment of Kelsey Lundy on behalf of the RCGA.

The Board proposed the rules for first notice on April 16, 1998, and it was published in the *Illinois Register* on May 1, 1998. Upon that publication, a 45-day comment period began. During the public comment period, the Board received two additional public comments:

Public Comment #4 (PC 4): Agency's First Notice Comments; and

Public Comment #5 (PC 5): Public Comment of Kelsey Lundy on behalf of the RCGA.

In addition, after the public comment period had closed, the RCGA filed a motion for leave to file the public comment of Senator Frank Watson instanter. Senator Watson was a sponsor of the legislation that created the tax credit. The Board grants the motion and accepts the public comment of Senator Watson as Public Comment #6 (PC 6).

In order to meet the statutory deadline imposed by Section 58.14 of the Environmental Protection Act, the Board must proceed to second notice on or before July 21, 1998. With this opinion and order, the Board meets that requirement. The Board now sends the proposal to the Joint Committee on Administrative Rules (JCAR). Following JCAR's review, the Board will consider the rules for final adoption.

BACKGROUND AND OVERVIEW OF PROPOSAL

Pub. Act 90-123 established two programs to provide financial incentives for brownfields remediation. The first program, directed at the public sector, is the Brownfields Redevelopment Program. Under that program, the Agency will issue grants to municipalities to investigate and assess brownfields sites. The Agency's proposed rules for that program appeared in the *Illinois Register* on June 19, 1998.

The second program, directed at the private sector, is the tax credit that is the subject of this rulemaking. Generally, that program provides taxpayers who remediate brownfields a tax credit that is equal to 25% of the taxpayer's remediation costs over $100,000 per site. Tr.1 at 13-14. The $100,000 limit is waived in certain areas that meet certain criteria, including that the site is entirely within an enterprise zone. See Pub. Act 90-123, eff. July 21, 1997 (added 35 ILCS 5/201(l)). The total credit allowed will not exceed $40,000 per year, with a maximum total of $150,000 per site. *Id*. Unused credits may be carried forward for five taxable years. *Id*.

The tax credit is not available "if the taxpayer or any related party caused or contributed to, in any material respect, a release of regulated substances on, in, or under" the site. Pub. Act 90-123, eff. July 21, 1997 (added 35 ILCS 5/201(l)). Furthermore, the tax credit is available only to taxpayers who remediate sites under the Site Remediation Program (SRP). The SRP is a voluntary program under which participants may clean up sites where contaminants are present. It allows participants to use risk-based cleanup objectives that take into account current and anticipated uses of sites. The SRP also establishes procedures for the Agency's review and approval of site cleanup activities. Readers interested in a more thorough discussion of the SRP should consult the Board's opinion in Site Remediation Program and Groundwater Quality (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620) (June 5, 1997), R97-11.

Three agencies have roles to play regarding the tax credit. First, DCCA identifies those areas that are not subject to the $100,000 remediation cost threshold. See Pub. Act 90-123, eff. July 21, 1997 (added 35 ILCS 5/201(l)); see also Tr.1 at 13-14. Second, the Agency must determine what costs are considered "remediation costs" and therefore eligible to be applied to the tax credit. See Pub. Act 90-123, eff. July 21, 1997 (added 415 ILCS 5/58.14). Finally, DOR will take the information that it receives from DCCA and the Agency and implement the tax credit. Tr.1 at 14-15; see also Pub. Act 90-123, eff. July 21, 1997 (added 35 ILCS 5/201(l)).

To implement its role regarding the tax credit, the Agency proposes that the Board add to Part 740 a new Subpart G entitled "Review of Remediation Costs for Environmental Remediation Tax Credit." The proposed Subpart G contains seven sections. Section 740.700 (General) generally describes the contents of Subpart G. Section 740.705 (Preliminary Review of Estimated Remediation Costs) establishes an optional procedure for obtaining a preliminary review of estimated remediation costs set forth in a budget plan. If actual remediation costs are less than those the Agency approved under the preliminary review procedure, the Agency is not required to further review those costs and may approve the costs as submitted.

To be eligible for the tax credit, a Remediation Applicant must submit an application for final review of remediation costs to the Agency and have the Agency approve the application. Section 740.710 (Application for Final Review of Remediation Costs) sets forth the information required in the application. Section 740.715 (Agency Review of Application for Final Review of Remediation Costs) establishes standards and procedures for the Agency's review of the application. Section 740.720 (Fees and Manner of Payment) addresses the fees that a Remediation Applicant must submit with its budget plan and application for final review.

Section 740.725 (Remediation Costs) provides a non-exhaustive list of examples of costs that the Agency may approve as remediation costs. It also provides that additional costs not listed may be considered remediation costs in certain circumstances. Section 740.730 (Ineligible Costs) provides a non-exhaustive list of examples of costs that are not considered remediation costs.

In addition to the new Subpart G, the Agency proposes minor changes to several existing sections of Part 740: Section 740.100 (Purpose), Section 740.120 (Definitions), and

Section 740.505 (Reviews of Plans and Reports). These changes are necessary to accommodate Subpart G.

At first notice, the Board outlined the proposed rules and discussed various issues, including (1) timeframes for review of certain plans, (2) the effect of budget plan determinations, (3) the meaning of "unreimbursed eligible remediation costs," (4) whether the costs of obtaining a special waste generator identification number should be eligible for the tax credit, and (5) the eligibility of attorney fees. The Board will not repeat that discussion here, and below addresses those issues raised after publication of the first notice.

DISCUSSION

After the first notice publication, participants in the rulemaking addressed the following issues: (1) timeframes for review of certain plans; (2) the meaning of "unreimbursed eligible remediation costs;" (3) whether developers of brownfields need greater certainty, before undertaking clean ups, that their remediation costs will be eligible for the tax credit; (4) whether Senate Bill (SB) 1705 necessitates a change to the rules; (5) whether remediation costs eligible for the tax credit should be more broadly defined; and (6) whether the costs of obtaining a special waste generator identification number should be eligible for the tax credit. The Board also considered whether SB 1291 necessitates any change to the rules. Below, the Board will discuss each of these issues and any corresponding changes to the rules for second notice.

In addition, the Board has made some minor changes to the rules for clarity and consistency, and to comply with changes that JCAR has requested. Certain of those changes will be discussed below, but most do not merit discussion. However, all changes from the proposed rules at first notice are double-underlined in the order that follows this opinion.

Section 740.705: Preliminary Review of Estimated Remediation Costs

This section establishes a procedure by which a Remediation Applicant may obtain the Agency's preliminary review of estimated remediation costs. It implements Section 58.14(d) of the Environmental Protection Act, which provides in part: "A Remediation Applicant may obtain a preliminary review of estimated remediation costs for the development and implementation of the Remedial Action Plan by submitting a budget plan along with the Remedial Action Plan." Pub. Act 90-123, eff. July 21, 1997 (added 415 ILCS 5/58.14). If actual remediation costs are less than those the Agency has approved in a preliminary review, the Agency is not required to further review those costs and may approve the costs as submitted. See Pub. Act 90-123, eff. July 21, 1997 (added 415 ICLS 5/58.14).

A Remediation Applicant obtains a preliminary review by submitting a budget plan for remediation costs to the Agency. At first notice, the Agency proposed language to clarify the timeframes under which it would review budget plans and related Remedial Action Plans. The Board generally accepted those changes, making other minor modifications for clarity. In PC 4, the Agency confirmed that those changes are consistent with the Agency's intent and clarify the Agency's proposed language. PC 4 at 2.

Section 740.705(a)(2) calls for the budget plan to contain line item estimates of the costs that the Remediation Applicant anticipates.[2] Subsection (a)(2) sets forth a non-exhaustive list of items (*e.g.*, types of site investigation activities and remedial activities) that may be involved in the development and implementation of the Remedial Action Plan. Since the list is non-exhaustive, JCAR requested that Section 740.705(a)(2)(C)(ix), which states "Other treatment costs," and Section 740.705(a)(2)(E), which states "Other costs not included above," be deleted as unnecessary. The Board agrees and makes these changes for second notice.

Section 740.710: Application of Final Review of Remediation Costs

To be eligible for the tax credit, a Remediation Applicant must submit an application for final review of remediation costs (application) to the Agency and have the Agency approve the application. Tr.1 at 54-55. This section sets forth the information required in the application and procedures for the Agency's review of the application.

As proposed by the Agency, Section 740.710(a)(4) required a Remediation Applicant to include in its application the following certification: "None of the costs included in this application have been or will be reimbursed from any state government grant, the Underground Storage Tank Fund, or any policy of insurance[.]" The Agency argued that costs covered by insurance or other sources should not be considered eligible. The RCGA strongly disagreed, arguing that the statute allowed the exclusion of only those remediation costs for which a federal tax deduction or credit is taken. Exh. 5 at 8-9. The RCGA relied on the following statutory language:

> For the purposes of this Section, "unreimbursed eligible remediation costs" means costs approved by the Illinois Environmental Protection Agency ("Agency") under Section 58.14 of the Environmental Protection Act that were paid in performing environmental remediation at a site for which a No Further Remediation Letter was issued by the Agency and recorded under Section 58.10 of the Environmental Protection Act, and does not mean approved eligible remediation costs that are at any time deducted under the provisions of the Internal Revenue Code . . . . In no event shall unreimbursed eligible remediation costs include any costs taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code. Pub. Act 90-123, eff. July 21, 1997 (added 35 ILCS 5/201(l)).

The RCGA also argued that because only parties who have not caused or contributed to the contamination may receive tax credits, and because parties that clean up contaminated properties are providing a public service at their own risk, public policy favored a broad

[2] The Agency noted at hearing that a budget plan may contain not only estimated costs, but also costs already incurred, such as where investigative activities have been performed before submittal of a Remedial Action Plan. Tr.1 at 49.

interpretation of "unreimbursed eligible remediation costs." Exh. 5 at 9; Tr.2 at 74-78, 88-89.

At first notice, the Board generally agreed with the RCGA and modified this portion of the certification to read as follows:

> None of the costs included in this application have been or will be deducted at any time under the Internal Revenue Code or taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code[.]

Similarly, in the list of ineligible costs, the Board added costs for which a federal tax deduction or credit is taken, and deleted costs reimbursed by insurance, government grant, or the Underground Storage Tank Fund. See 35 Ill. Adm. Code 740.730(e).

In its public comment filed after first notice, the Agency stated that it disagrees with the Board's resolution of this issue. The Agency concluded, however, that "the Board's proposed revision only limits the Agency's ability to perform initial screening for the Department of Revenue ("DOR"). The Agency believes that the issue ultimately will be resolved by the DOR and, therefore, does not further contest the change." PC 4 at 2.

The Board notes that the legislature has passed SB 1291, which awaits the Governor's signature. Among other things, SB 1291 would eliminate references in Section 201(l) of the Income Tax Act to the exclusions for deductions and credits under the Internal Revenue Code. As of today, the Governor has not signed SB 1291 into law. Accordingly, for second notice, the Board will not delete the references in the rules to the Internal Revenue Code deductions and credits. Nevertheless, if the Governor signs SB 1291 before the Board's final adoption of these rules, the Board may make appropriate changes at the request of JCAR.

Section 740.715: Agency Review of Application for Final Review of Remediation Costs

Before discussing the comments that the Board received on this section, it is necessary to outline the relationship between Sections 740.705 and 740.715. As stated above, Section 740.705 addresses the Agency's review of estimated costs before the cleanup. Under Section 740.705, a Remediation Applicant may have the Agency approve a budget plan before beginning the cleanup. The budget plan will have line item estimates of costs for various activities. The Remediation Applicant is not required to submit a budget plan to be eligible for the tax credit, and may instead simply submit an application for final review of costs after the cleanup (see Section 740.710). The intended advantage of submitting the budget plan is to give the Remediation Applicant comfort, before the cleanup starts, that its costs will be allowed.

As part of the Agency's final review of costs after the cleanup, Section 740.715(c) allows a Remediation Applicant who previously obtained Agency approval of a budget plan to certify that actual remediation costs were at or below specific line item costs in the approved

budget plan. Where the Remediation Applicant does this, the Agency may, but is not required to, conduct further review of the actual costs incurred for certified line items. Where the Remediation Applicant's certification does not apply to all line items approved in the budget plan, the Agency must review the costs for the uncertified line items as if no budget plan had been approved.

Both Senator Watson and the RCGA commented that these rules do not adequately assure developers, in advance, as to which cleanup costs will be eligible for the tax credit. Senator Watson commented:

> [I]t appears that the Board has not given full consideration to the concerns of developers that they know in advance what costs would be reimbursed through the credits. I understand that these deals are often passed over because the developer cannot receive necessary assurances of the costs. To the extent that the Rules as they are currently drafted fail[] to adequately address this fact, they should be reconsidered. PC 6 at 2.

Similarly, the RCGA stated:

> [T]he failure to address the issue of how best to give the developer certainty with respect to costs will doom this program to failure. It is imperative that the developers know in advance what they may reasonably receive before undertaking the project. PC 5 at 2.

These comments echo issues raised at the hearings in this rulemaking. For example, at the first hearing, Board Member Hennessey asked Mr. King the following:

> Do you contemplate during the [] final review that you might actually revisit decisions about the type of clean-up technology; for example, in the example that you gave, excavation was a remedy, basically. Do you anticipate that the Agency might be able to look at costs that are finally submitted and say . . . what you really should have done is vapor extraction or some other type of remedy altogether different from what was proposed, and [that] ultimately may have been cheaper . . . but wasn't in [your] budget . . . ? Tr. 1 at 23.

Mr. King responded as follows:

> No. In that example, that would not be something that we would reconsider. . . . [I]f we have approved a type of activity relative to remediation, we are not going to come back and say, oh, wrong one. We changed our minds. That would be inappropriate, I think. Tr.1 at 24.

At the second hearing, Mr. Eugene Schmittgens, attorney for the RCGA, asked whether uncertified line items would be reviewed as if no budget plan had been approved:

> [I]f the Remedial Action Plan approved includes digging up 120 cubic yards of dirt and taking it off site, and there was a cost overrun with that line item dealing with the removal of the 120 cubic yards of that dirt, does that mean the Agency is going to revisit whether or not another remediation technology should have been considered or should have been undertaken? Tr.2 at 46.

Mr. King responded: "No, that's not what the language is intending." Tr.2 at 46. Mr. Schmittgens then asked:

> [W]ouldn't it be easier just to have a remedial action applicant just provide you information to justify the reasons for the overrun rather than undertaking what the courts would term a de novo review of that line item? Tr.2 at 47.

Mr. King responded that "in practice I think that's what will happen." Tr.2 at 47.

When asked what further review the Agency would undertake of a certified line item, Mr. King responded as follows:

> Sometimes what happens with these types of cases or situations is information reaches us in an independent sort of way, either through some review of something under another program or somebody is going out and inspecting a site. You know, it could turn out that based on that additional information there is some reason to believe that the costs that are indicated in that line item were not actually incurred. Tr.2 49-50 (emphasis added).

Mr. King agreed that if the Agency undertakes such further review, it would entail review of cost documentation to ensure the costs were actually incurred. Tr.2 at 50.

The Board finds that several items of agreement emerge from this portion of the record:

1) once the Agency approves an activity (*e.g.*, excavation of contaminated soil), it will not revisit the appropriateness of that activity when reviewing the application for final review; and

2) if the Agency decides to further review a certified line item, the review will be limited to confirming that the costs approved in the budget plan were actually incurred.

The Board agrees, as Senator Watson and the RCGA imply, that the rules proposed at first notice do not fully reflect these agreements. Accordingly, the Board changes Section 740.715(c)(2) for second notice as follows:

> If the budget plan determination~~decision~~ and certification are submitted pursuant to subsection (c)(1) of this Section, the Agency may, but is not required to, conduct further review of the certified line item costs incurred for development and implementation of the Remedial Action Plan and may approve such costs as submitted. The Agency's further review shall be limited to confirming that

> costs approved in the Agency's budget plan determination were actually incurred by the RA for development and implementation of the Remedial Action Plan~~If the certification in subsection (c)(1) of this Section does not apply to all line items as approved in the budget plan, the Agency shall conduct its review of the costs for the uncertified line items as if no budget plan had been approved~~.[3]

As modified, subsection (c)(2) addresses only certified line items. The stricken language above from subsection (c)(2) is now the first sentence in a new subsection (c)(3) addressing uncertified line items (new language is italicized):

> If the certification in subsection (c)(1) of this Section does not apply to all line items as approved in the budget plan, the Agency shall conduct its review of the costs for the uncertified line items as if no budget plan had been approved. *In that review, the Agency shall not reconsider the appropriateness of any activities, materials, labor, equipment, structures or services already approved by the Agency for development and implementation of the Remedial Action Plan.*

The listing of "activities, materials," etc. is borrowed from Sections 740.725(a), 740.725(b), and 740.730(w).

The Board's proposed changes to Section 740.715(c) should give developers adequate assurance, in advance, as to which cleanup costs will be eligible for the tax credit.

Section 740.720: Fees and Manner of Payment

This section sets forth the fees that a Remediation Applicant must submit with its budget plan and application for final review. As proposed at first notice, the review fees would be waived or reduced if (1) the total remediation costs are $100,000 or less; and (2) the Remediation Applicant certifies that the remediation site is (a) entirely within an enterprise zone as defined in the Illinois Enterprise Zone Act, 20 ILCS 655, and (b) entirely within one or more census tracts that DCCA has determined to contain a majority of households consisting of low and moderate income persons.

In its public comment, the Agency pointed out that the legislature deleted the latter part of the second requirement (relating to low and moderate income households) from the Income Tax Act and the Environmental Protection Act by passing SB 1705. If the Governor signs the bill into law, the Agency recommended that the Board delete the parallel language regarding this requirement contained in the first notice version of Section 740.720(c)(2), as follows:

> The RA must submit written certification in accordance with regulations of the Department of Commerce and Community Affairs (DCCA) that the remediation site is located entirely within an enterprise zone as defined in the Illinois

[3] "RA" stands for "Remediation Applicant." See 35 Ill. Adm. Code 740.120.

> Enterprise Zone Act [20 ILCS 655] ~~and entirely within one or more census tracts that have been determined by DCCA to contain a majority of households consisting of low and moderate income persons~~. The certification shall be submitted with the budget plan or application for final review and shall clearly identify the remediation site by name, address, tax parcel identification number(s) and Illinois inventory identification number. PC 4 at 2-3.

As of today, the Governor has not signed SB 1705. Accordingly, the Board cannot accept the Agency's proposed revision at this time. If the Governor signs this bill between second notice and the Board's final adoption of these rules, the Board could make the Agency's suggested change if JCAR requests it.

Section 740.725: Remediation Costs; Section 740.730: Ineligible Costs

Public Comments of Senator Watson and the RCGA

Both the RCGA and Senator Watson commented that "eligible remedation costs" should be more broadly construed than they are in the first notice rules. Senator Watson, a sponsor of the legislation that created the tax credit, stated:

> This legislation is designed to encourage the development of sites which are either contaminated, or perceived to be contaminated. Because the legislation excludes the individual or entity which contaminated the sites from receiving the tax credits created by this bill, only completely innocent developers are able to seek the benefits of the bill.
>
> To encourage such developers to use the credits, we intended that the bill be liberally construed to award credits. In addition, we specifically declined to define costs which would be eligible for the credits to give the Agency the flexibility to define those costs as necessary to encourage developers to use the program. Again, the purpose was to allow a developer to receive the credits, not preclude them. Developers seeking to remediate these properties should be encouraged and rewarded for doing so. The lack of a definitive statement regarding the costs to be awarded should not, in my opinion, be construed to be a statement by the legislature that the eligible costs should be narrowly construed. PC 6 at 1-2.

In a similar vein, the RCGA commented:

> [W]e remain concerned that the Board and the Agency have taken too narrow an approach regarding the application of the credits. We believe that the Rules fail to properly acknowledge the fact that the developers undertaking the remediation and development of these sites are not otherwise required to do so. The Rules, as proposed[,] fail to recognize this fact. We believe it is improper to pattern the Rules after the Underground Storage Tank program because that program compensates the party causing the contamination.

> In the case of the remediation tax credits, the developer should be given greater opportunity to receive compensation for its costs. These individuals are taking great risk and are serving an important need in the State of Illinois.
>
> The RCGA also feels that the Agency fails to recognize that the legislation was drafted without strict definitions of eligible costs because it was intended that the issue would be negotiated during these proceedings. The impact of the Rules as published in the first notice is that this agreement is being used against the developers and others who may wish to take advantage of the credits. PC 5 at 1-2.

While neither the RCGA nor Senator Watson proposed any specific amendments to the proposed rules in these comments, the Board assumes that these comments are in part directed at the Board's decision not to adopt the following language that the RCGA proposed at first notice:

> If the Agency has approved a Remedial Action Plan in accordance with Section 740.750, then the costs associated with the activities of the approved Remedial Action Plan shall be considered eligible remediation costs. Only costs associated with activities contained in an approved RAP will be eligible costs for purposes of receiving a remediation tax credit. Exh. 6 at 4.

Discussion

As an initial matter, the Board agrees that, as the RCGA argued, some of the costs identified as eligible or ineligible in these proposed rules are similar to those deemed eligible or ineligible under the Underground Storage Tank (UST) Fund program. However, the Board notes that the similarities between the costs deemed eligible and ineligible under these two programs inevitably arose because they both involve remediation of contaminated properties. For example, in both programs, eligible costs generally include the costs of destroying or dismantling and reassembling above-grade structures to the extent necessary to remediate the property. See 35 Ill. Adm. Code 732.605(a)(18) (UST Fund program) and 35 Ill. Adm. Code 740.725(a)(15) (tax credit program). The Board finds the inclusion of these costs reasonable in both programs. In the context of this rulemaking, the Board finds it appropriate to look to the UST Fund program for guidance on what costs should appropriately be considered costs of remediation rather than costs of development.

Second, the Board continues to believe that the RCGA's proposed language is overbroad. As the Agency explained, Remedial Action Plans have "very comprehensive levels of information," including information about the planned development of the site. Tr.2 at 101. The Agency believes this information is useful, but would not want the consequence of its approval of such a plan to mean that non-remedial activities are eligible for the tax credit. See Review of Remediation Costs for Environmental Remediation Tax Credit (Amendments to 35 Ill. Adm. Code 740) (April 16, 1998), R98-27, slip op. at 19. The Board agrees and continues to believe that the language that the RCGA has proposed could encompass the costs

of development unrelated to remediation. The statute authorizes a tax credit for remediation costs, not development costs.

Nevertheless, the Board believes that several changes to Sections 740.725 and 740.730 would encourage brownfield redevelopment while ensuring that tax credits are used for remediation costs. First, the Board wishes to revise the proposed Section 740.730(f), which describes certain ineligible costs. At first notice, this section read as follows:

> Costs associated with material improvements that serve incidentally as engineered barriers and that are not primarily designed or intended to eliminate or mitigate exposures to, or migration of, regulated substances or pesticides[.]

At the first hearing, Mr. King described how the Agency envisioned Section 740.730(f) should work. The Board quotes extensively from the transcript because the hypotheticals in Mr. King's testimony will serve as the basis for later discussion. Mr. King testified:

> [I]f you had a design for a project, and that design included a parking lot, for instance, and they decided to -- and if they found some contamination on the property and then decided to redesign the project so that now the parking lot could serve as a barrier over the contamination, we would see -- in that kind of situation, because of the fact they have redesigned the project to place an engineered barrier over the contamination, that that would not be -- that would not be incidental. That would be an eligible cost. If, for instance -- on the other hand, if they had the project designed, and there was to be a building in a parking lot, and they found contamination where they were going to be building anyways, and so they got -- they came in and justified that as an engineered barrier, we would consider that to be then that engineered barrier only working incidentally, in that situation will not be remediation cost. We came up with another example. If you think about a site being designed with a site berm, and sometimes sites will be designed with a berm around the perimeter so that people don't have to observe what is going on on the other side for purposes of work activities. And normally you thought about putting a site berm six feet high, if the berm were being designed for those site purposes, and it turned out there was contamination there under there, it could serve as an engineered barrier; but again, it would be an incidental reason. If, on the other hand, the contamination -- let's just say that the contamination went beyond the bounds of the existing or the initially-designed berm, and they decided to extend the berm an additional 100 feet to cover the contamination and have it serve as an engineered barrier, in that case it could be -- it could be eligible as a remediation cost, but we wouldn't -- we would say that not at six feet high, you know. In essence they would get it to three feet high, because that would be the amount of cover they would need for the additional cover. So the additional six feet on top of that would not be considered remediation cost. Tr.1 at 30-33 (emphasis added).

At the second hearing, Ms. Kelsey Lundy of the RCGA testified on Section 740.730(f):

> It is important that the Agency clarify under what circumstances a cost would be denied. The application of this restriction on a Brownfields project is important. There are a number of industrial structures which can be incorporated into engineered barriers. Parking lots can be relocated to provide caps. Loading docks can be constructed to incorporate berms to prevent the migration of contaminants. These are but two examples of structures which can have multiple uses. It does not make economic sense to require the construction of two structures when one can provide the benefit of two. Creative design changes should be encouraged to make these projects as economically viable as possible by incorporating a number of uses into one structure. Tr.2 at 68-69 (emphasis added).

The Board finds that the manner of Agency review under Section 740.730(f) described by Mr. King may prove difficult to implement. The question of ineligibility would turn on whether a barrier (such as a parking lot, berm, or concrete pad) was "originally designed" to cover contamination or whether it had to be "redesigned" to do so. The language itself of subsection (f) invites difficult inquiries into intent ("not primarily designed or intended to eliminate or mitigate . . ."). These distinctions could present difficult issues of proof and it is questionable whether they advance any policy objective.

The Board therefore proposes the following change to Section 740.730(f) for second notice:

> Costs associated with material improvements to the extent that such improvements are not necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part ~~that serve incidentally as engineered barriers and that are not primarily designed or intended to eliminate or mitigate exposures to, or migration of, regulated substances or pesticides~~[.]

This approach will not require the Agency or the Board to determine which design came first or whether a structure was primarily intended to eliminate or mitigate contaminant exposure. The question instead will turn on the extent to which the structure is not necessary to achieve the remediation objectives. In Mr. King's hypothetical of the six foot berm, the costs for the extra three feet of berm would not be eligible where only three feet are necessary for an engineered barrier under the approved Remedial Action Plan. Whether the berm was originally designed for that location and whether it was primarily intended for aesthetic reasons or as a contaminant barrier would be irrelevant. The modified subsection (f) is also more consistent with Sections 740.725(a)(13) and (14), which allow costs for barriers to the extent necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan.[4]

[4] At first notice, Sections 740.725(a)(13) and (14) referred only to barriers of "clay, soil or other appropriate geologic materials." For clarity on cost eligibility and for consistency with the requirements on engineered barriers in the Tiered Approach to Corrective Action Objectives (see 35 Ill. Adm. Code 742.1105), the Board expands the list of materials in

Furthermore, if the structure is in fact serving as an engineered barrier, then it is fair to construe the costs as "remediation" costs, even if the structure happens to also serve another purpose associated with "development." It must also be remembered that with a statutory limit on the tax credit of $40,000 per year and $150,000 per site, this credit will not be funding large development projects by itself. See Tr.2 at 76 (Ms. Lundy of the RCGA testified: "These credits are but one tool to create a cleaner environment in the State of Illinois. In and of themselves, they are insufficient to finance the entire [brownfields] project.")

The Board makes a similar change to the ineligible costs described in Section 740.730(k):

> Costs associated with replacement of above-grade structures destroyed or damaged during remediation activities to the extent such destruction or damage and such replacement is not necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part[.]

This modification is consistent with the intent behind the subsection as expressed by the Agency at hearing. See Tr.1 at 33, 82-84; Tr.2 at 28-30. It also makes subsection (k) more consistent with Section 740.725(a)(12), which allows costs for the removal or replacement of concrete, asphalt, or paving to the extent such removal or replacement is necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan. Mr. King provided examples of how these provisions should work:

> [I]f you had contamination under an existing parking lot, let's say, and the conclusion relative to the Remedial Action Plan was that that contamination needed to be removed, breaking up and removing the concrete, and then removing that contamination underneath, that would be all part of remedial action and that would be an eligible item as would backfilling. . . . However, the paving would only become eligible if it was necessary as an engineered barrier. If it was not needed as an engineered barrier then the replacement of the paving would not be an eligible item. . . . [I]f you are building a building above that pavement grade, that barrier grade, we want to make it clear that you cannot build a building and take that . . . as an environmental remediation tax credit. Tr.2 at 29-30.

The Board agrees. In the last example of this passage, the building is not serving as an engineered barrier, but rather is built on top of an engineered barrier. The Board believes that its proposed modifications clarify how these related provisions will work.

Sections 740.725(a)(13) and (14) at second notice to read as follows: "clay, soil, concrete, asphalt or other appropriate ~~geologic~~ materials." Mr. King testified that the list of materials proposed by the Agency was not intended to exclude other materials from eligibility. Tr.1 at 85-86.

The Board declines to make any further changes to Sections 740.725 or 740.730. The Board emphasizes that as modified, Section 740.725 does not allow the Agency to exclude legitimate remediation costs. Section 740.725(a) lists sixteen specific types of remediation costs that may be eligible, and Section 740.725(b) provides that other costs will be eligible "if the RA submits detailed information demonstrating that those items are essential for compliance with this Part 740, 35 Ill. Adm. Code 742 and the approved Remedial Action Plan."[5] To the extent that Section 740.725 does identify specific costs that are eligible, the Board believes that it provides predictability that should encourage remediation of brownfields.

Section 740.730(l)

At first notice, the Agency proposed to allow, as eligible costs, a Remedation Applicant's costs of obtaining a special waste generator identification number not to exceed $25. Exh. 2 at 5, 6. The Board rejected this proposal, adopting instead the RCGA's proposal to exclude only those costs of obtaining that identification number in excess of the lesser of $250 or actual time spent. See Review of Remediation Costs for Environmental Remediation Tax Credit (Amendments to 35 Ill. Adm. Code 740) (April 16, 1998), R98-27, slip op. at 17.

In its public comment following the first notice, the Agency maintained its objection to this revision, stating that it "is at a loss to anticipate any circumstances where $250 would be justified but will be unable to reject that amount as 'unreasonable' because it has been endorsed in the rules." PC 4 at 3. Upon further reflection, the Board agrees that $250 may be excessive, and its inclusion in the rules may make it difficult for the Agency to reject that figure. However, the Board believes that a $25 cap is still too low. The Board concludes that $100 is a more appropriate cap, and includes it in this second notice. For clarity, the Board also moves this provision from Section 740.730, which contains exclusions, to Section 740.725, which lists eligible remediation costs, and revises the language accordingly (see Section 740.725(a)(16)).

Section 740.730(i)

Lastly, as an ineligible cost, the Agency's proposed Section 740.730(i) referred to costs incurred as a result of "negligence or unprofessional conduct as defined in Section 25 of the Professional Engineering Practice Act of 1989." The definitions of that statute are in Section 4 rather than Section 25, and they do not include a definition of "unprofessional conduct." Instead, there is a definition of "negligence in the practice of professional engineering." See 225 ILCS 325/4(l). The Board makes corresponding changes to Section 740.730(i).

CONCLUSION

[5] At second notice, the Board replaces the word "essential" in Section 740.725(b) with the word "necessary" for consistency and to avoid any potential suggestion that the Agency is to apply varying standards of review. The Board makes the same change in Section 740.730(w).

The Board finds that the Agency's proposal, with the Board's revisions, is economically reasonable and technically feasible. The Board adopts the following proposal for second notice.

ORDER

The Board proposes for second notice the following amendments to 35 Ill. Adm. Code 740. Deletions from first notice are shown as double-underlined strike-outs, and additions from first notice are double-underlined. The Clerk of the Board is directed to file these proposed rules with the Joint Committee on Administrative Rules.

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE G: WASTE DISPOSAL
CHAPTER I: POLLUTION CONTROL BOARD

PART 740
SITE REMEDIATION PROGRAM

SUBPART A: GENERAL

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740.105 Applicability
740.110 Permit Waiver
740.115 Agency Authority
740.120 Definitions
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SUBPART B: APPLICATIONS AND AGREEMENTS FOR REVIEW AND EVALUATION SERVICES

Section
740.200 General
740.205 Submittal of Application and Agreement
740.210 Contents of Application and Agreement
740.215 Approval or Denial of Application and Agreement
740.220 Acceptance and Modification of Application and Agreement
740.225 Termination of Agreement by the Remediation Applicant (RA)
740.230 Termination of Agreement by the Agency
740.235 Use of Review and Evaluation Licensed Professional Engineer (RELPE)

SUBPART C: RECORDKEEPING, BILLING AND PAYMENT

Section
740.300 General

SUBPART D: SITE INVESTIGATIONS, DETERMINATION OF REMEDIATION OBJECTIVES, PREPARATION OF PLANS AND REPORTS

SUBPART E: SUBMITTAL AND REVIEW OF PLANS AND REPORTS

SUBPART F: NO FURTHER REMEDIATION LETTERS AND RECORDING REQUIREMENTS

SUBPART G: REVIEW OF REMEDIATION COSTS FOR ENVIRONMENTAL REMEDIATION TAX CREDIT

AUTHORITY: Implementing Sections 58 through 58.14 and authorized by Sections 58.5, 58.6, 58.7, 58.11 and 58.14 of the Environmental Protection Act [415 ILCS 5/58 through 58.14].

SOURCE: Adopted in R97-11 at 21 Ill. Reg. 7889, effective July 1, 1997; amended in R98-27 at 22 Ill. Reg. _____, effective _____.

NOTE: Capitalization denotes statutory language. In this Part, the abbreviation µg is used to indicate micrograms.

SUBPART A: GENERAL

Section 740.100 Purpose

The purpose of this Part is to establish~~ESTABLISH~~ THE PROCEDURES FOR THE INVESTIGATIVE~~INVESTIGATION~~ AND REMEDIAL ACTIVITIES~~REMEDIATION~~ AT SITES WHERE THERE IS A RELEASE, THREATENED RELEASE, OR SUSPECTED RELEASE OF HAZARDOUS SUBSTANCES, PESTICIDES, OR PETROLEUM AND FOR THE REVIEW AND APPROVAL OF THOSE ACTIVITIES. (Section 58.1(a)(1) of the Act) The purpose of this Part is also to establish procedures to be followed to obtain Illinois Environmental Protection Agency review and approval of remediation costs before applying

for the environmental remediation tax credit under Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)].

(Source: Amended at 22 Ill. Reg. _____, effective _____)

Section 740.120 Definitions

Except as stated in this Section, or unless a different meaning of a word or term is clear from the context, the definition of words or terms in this Part shall be the same as that applied to the same words or terms in the Environmental Protection Act.

"Act" means the Environmental Protection Act [415 ILCS 5].

"Agency" means the Illinois Environmental Protection Agency.

~~"AGENCY" MEANS THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY. (Section 3.01 of the Act)~~

"Agency travel costs" means costs incurred and documented for travel in accordance with 80 Ill. Adm. Code 2800 and 3000 by individuals employed by the Agency. Such costs include costs for lodging, meals, travel, automobile mileage, vehicle leasing, tolls, taxi fares, parking and miscellaneous items.

"AGRICHEMICAL FACILITY" MEANS A SITE ON WHICH AGRICULTURAL PESTICIDES ARE STORED OR HANDLED, OR BOTH, IN PREPARATION FOR END USE, OR DISTRIBUTED. THE TERM DOES NOT INCLUDE BASIC MANUFACTURING FACILITY SITES. (Section 58.2 of the Act)

"ASTM" MEANS THE AMERICAN SOCIETY FOR TESTING AND MATERIALS. (Section 58.2 of the Act)

"Authorized agent" means a person who is authorized by written consent or by law to act on behalf of an owner, operator, or Remediation Applicant.

"Board" means the Pollution Control Board.

"Contaminant of concern" or "REGULATED SUBSTANCE OF CONCERN" MEANS ANY CONTAMINANT THAT IS EXPECTED TO BE PRESENT AT THE SITE BASED UPON PAST AND CURRENT LAND USES AND ASSOCIATED RELEASES THAT ARE KNOWN TO THE REMEDIATION APPLICANT BASED UPON REASONABLE INQUIRY. (Section 58.2 of the Act)

"Costs" means all costs incurred by the Agency in providing services pursuant to a Review and Evaluation Services Agreement.

"Groundwater management zone" or "GMZ" means a three dimensional region containing groundwater being managed to mitigate impairment caused by the release of contaminants of concern at a remediation site.

"Indirect costs" means those costs that ~~incurred by the Agency which~~ cannot be attributed directly to a specific site but are necessary to support the site-specific activities, including, but not limited to, such expenses as managerial and administrative services, building rent and maintenance, utilities, telephone and office supplies.

"Laboratory costs" means costs for services and materials associated with identifying, analyzing, and quantifying chemical compounds in samples at a laboratory.

"LICENSED PROFESSIONAL ENGINEER" or~~OR~~ "LPE" MEANS A PERSON, CORPORATION OR PARTNERSHIP LICENSED UNDER THE LAWS OF THIS STATE TO PRACTICE PROFESSIONAL ENGINEERING. (Section 58.2 of the Act)

"Other contractual costs" means costs for contractual services not otherwise specifically identified, including, but not limited to, printing, blueprints, photography, film processing, computer services and overnight mail.

"PERSON" MEANS INDIVIDUAL, TRUST, FIRM, JOINT STOCK COMPANY, JOINT VENTURE, CONSORTIUM, COMMERCIAL ENTITY, CORPORATION (INCLUDING A GOVERNMENT CORPORATION), PARTNERSHIP, ASSOCIATION, STATE, MUNICIPALITY, COMMISSION, POLITICAL SUBDIVISION OF A STATE, OR ANY INTERSTATE BODY, INCLUDING THE UNITED STATES GOVERNMENT AND EACH DEPARTMENT, AGENCY, AND INSTRUMENTALITY OF THE UNITED STATES. (Section 58.2 of the Act)

"Personal services costs" means costs relative to the employment of individuals by the Agency. Such costs include, but are not limited to, hourly wages and fringe benefits.

"PESTICIDE" MEANS ANY SUBSTANCE OR MIXTURE OF SUBSTANCES INTENDED FOR PREVENTING, DESTROYING, REPELLING, OR MITIGATING ANY PEST OR ANY SUBSTANCE OR MIXTURE OF SUBSTANCES INTENDED FOR USE AS A PLANT REGULATOR, DEFOLIANT OR DESSICCANT. (Illinois Pesticide Act [415 ILCS 60/4])

“Practical quantitation limit” or “PQL” or “Estimated quantitation limit” means the lowest concentration that can be reliably measured within specified limits of precision and accuracy for a specific laboratory analytical method during routine laboratory operating conditions in accordance with “Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods,” EPA Publication No. SW-846, incorporated by reference at Section 740.125 of this Part. For filtered water samples, PQL also means the Method Detection Limit or Estimated Detection Limit in accordance with the applicable method revision in: “Methods for the Determination of Metals in Environmental Samples,” EPA Publication No. EPA/600/4-91/010; “Methods for the Determination of Organic Compounds in Drinking Water,” EPA Publication No. EPA/600/4-88/039; “Methods for the Determination of Organic Compounds in Drinking Water, Supplement II,” EPA Publication No. EPA/600/R-92/129; or “Methods for the Determination of Organic Compounds in Drinking Water, Supplement III,” EPA Publication No. EPA/600/R-95/131, all of which are incorporated by reference at Section 740.125 of this Part.

“"Reasonably obtainable"" means that a copy or reasonable facsimile of the record must be obtainable from a private entity or government agency by request and upon payment of a processing fee, if any.

“"Recognized environmental condition"" means the presence or likely presence of any regulated substance or pesticide under conditions that indicate a release, threatened release or suspected release of any regulated substance or pesticide at, on, to or from a remediation site into structures, surface water, sediments, groundwater, soil, fill or geologic materials. The term shall not include de minimis conditions that do not present a threat to human health or the environment.

“"REGULATED SUBSTANCE"" MEANS ANY HAZARDOUS SUBSTANCE AS DEFINED UNDER SECTION 101(14) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (P.L. 96-510) AND PETROLEUM PRODUCTS, INCLUDING CRUDE OIL OR ANY FRACTION THEREOF, NATURAL GAS, NATURAL GAS LIQUIDS, LIQUEFIED NATURAL GAS, OR SYNTHETIC GAS USABLE FOR FUEL (OR MIXTURES OF NATURAL GAS AND SUCH SYNTHETIC GAS). (Section 58.2 of the Act)

“"REGULATED SUBSTANCE OF CONCERN"" or “"contaminant of concern"" MEANS ANY CONTAMINANT THAT IS EXPECTED TO BE PRESENT AT THE SITE BASED UPON PAST AND CURRENT LAND USES AND ASSOCIATED RELEASES THAT ARE KNOWN TO THE REMEDIATION APPLICANT BASED UPON REASONABLE INQUIRY. (Section 58.2 of the Act)

"RELEASE" MEANS ANY SPILLING, LEAKING, PUMPING, POURING, EMITTING, EMPTYING, DISCHARGING, INJECTING, ESCAPING, LEACHING, DUMPING, OR DISPOSING INTO THE ENVIRONMENT, BUT EXCLUDES (A) ANY RELEASE WHICH RESULTS IN EXPOSURE TO PERSONS SOLELY WITHIN A WORKPLACE, WITH RESPECT TO A CLAIM WHICH SUCH PERSONS MAY ASSERT AGAINST THE EMPLOYER OF~~OR~~ SUCH PERSONS; (B) EMISSIONS FROM THE ENGINE EXHAUST OF A MOTOR VEHICLE, ROLLING STOCK, AIRCRAFT, VESSEL, OR PIPELINE PUMPING STATION ENGINE; (C) RELEASE OF SOURCE, BYPRODUCT, OR SPECIAL NUCLEAR MATERIAL FROM A NUCLEAR INCIDENT, AS THOSE TERMS ARE DEFINED IN THE federal~~FEDERAL~~ ATOMIC ENERGY ACT OF 1954, IF SUCH RELEASE IS SUBJECT TO REQUIREMENTS WITH RESPECT TO FINANCIAL PROTECTION ESTABLISHED BY THE NUCLEAR REGULATORY COMMISSION UNDER SECTION 170 OF SUCH ACT; AND (D) THE NORMAL APPLICATION OF FERTILIZER. (Section 3.33 of the Act)

"REMEDIAL ACTION" MEANS ACTIVITIES ASSOCIATED WITH COMPLIANCE WITH THE PROVISIONS OF SECTIONS 58.6 AND 58.7 of the Act, including, but not limited to, the conduct of site investigations, preparation of work plans and reports, removal or treatment of contaminants, construction and maintenance of engineered barriers, and/or implementation of institutional controls. (Section 58.2 of the Act)

"REMEDIATION APPLICANT" or~~OR~~ "RA" MEANS ANY PERSON SEEKING TO PERFORM OR PERFORMING INVESTIGATIVE OR REMEDIAL ACTIVITIES UNDER Title~~TITLE~~ XVII of the Act~~OF THE ACT~~, INCLUDING THE OWNER OR OPERATOR OF THE SITE OR PERSONS AUTHORIZED BY LAW OR CONSENT TO ACT ON BEHALF OF OR IN LIEU OF THE OWNER OR OPERATOR OF THE SITE. (Section 58.2 of the Act)

"REMEDIATION COSTS" MEANS REASONABLE COSTS PAID FOR INVESTIGATING AND REMEDIATING REGULATED SUBSTANCES OF CONCERN CONSISTENT WITH THE REMEDY SELECTED FOR the~~THE~~ SITE. FOR PURPOSES OF Subpart G of this Part, "REMEDIATION COSTS" SHALL NOT INCLUDE COSTS INCURRED PRIOR TO JANUARY 1, 1998, COSTS INCURRED AFTER THE ISSUANCE OF A NO FURTHER REMEDIATION LETTER UNDER Subpart F of this Part, OR COSTS INCURRED MORE THAN 12 MONTHS PRIOR TO ACCEPTANCE INTO THE SITE REMEDIATION PROGRAM under this Part. (Section 58.2 of the Act)

"Remediation objective" means a goal to be achieved in performing remedial action, including but not limited to the concentration of a contaminant, an engineered barrier or engineered control, or an institutional control established under Section 58.5 of the Act or Section 740.Subpart D of this Part.

"Remediation site" means the single location, place, tract of land, or parcel or portion of any parcel of property, including contiguous property separated by a public right-of-way, for which review, evaluation, and approval of any plan or report has been requested by the Remediation Applicant in its application for review and evaluation services. This term also includes, but is not limited to, all buildings and improvements present at that location, place, or tract of land.

"RESIDENTIAL PROPERTY" MEANS ANY REAL PROPERTY THAT IS USED FOR HABITATION BY INDIVIDUALS, orOR where children have the opportunity for exposure to contaminants through soil ingestion or inhalation at educational facilities, health care facilities, child care facilities, or outdoor recreational areas. (Section 58.2 of the Act)

""Review and Evaluation Licensed Professional Engineer"" or ""RELPE"" means the licensed professional engineer with whom a Remediation Applicant (RA) has contracted to perform review and evaluation services under the direction of the Agency.

""SITE"" MEANS ANY SINGLE LOCATION, PLACE, TRACT OF LAND OR PARCEL OF PROPERTY OR PORTION THEREOF, INCLUDING CONTIGUOUS PROPERTY SEPARATED BY A PUBLIC RIGHT-OF-WAY. (Section 58.2 of the Act) This term also includes, but is not limited to, all buildings and improvements present at that location, place or tract of land.

(Source: Amended at 22 Ill. Reg. ____, effective _____)

SUBPART E: SUBMITTAL AND REVIEW OF PLANS AND REPORTS

Section 740.505 Reviews of Plans and Reports

a) ALL REVIEWS carried out under this CARRIED OUT UNDER THIS Part SHALL BE CARRIED OUT BY THE AGENCY OR A RELPE (Review and Evaluation Licensed Professional Engineer), BOTH UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER. (Section 58.7(d) of the Act)

b) PLANS, REPORTS AND relatedRELATED ACTIVITIES WHICH THE AGENCY OR A RELPE MAY REVIEW INCLUDE, but are not limited to:

1) SITE INVESTIGATION REPORTS AND RELATED ACTIVITIES;

2) REMEDIATION OBJECTIVES REPORTS;

3) REMEDIAL ACTION PLANS AND RELATED ACTIVITIES; AND

4) REMEDIAL ACTION COMPLETION REPORTS AND RELATED ACTIVITIES. (Section 58.7(d)(2) of the Act)

c) ONLY THE AGENCY SHALL HAVE THE AUTHORITY TO APPROVE, DISAPPROVE, OR APPROVE WITH CONDITIONS A PLAN OR REPORT AS A RESULT OF THE REVIEW PROCESS, INCLUDING THOSE PLANS OR REPORTS REVIEWED BY A RELPE. (Section 58.7(d)(3) of the Act)

d) Except as provided in subsection (d)(5) below and Section 740.705(cd) of this Part, the Agency shall have 60 days from the receipt of any plan or report to conduct a review and make a final determination to approve or disapprove the plan or report, or approve the plan or report with conditions. All reviews shall be based on the standards set forth in this Subpart E.

1) The Agency's record of the date of receipt of a plan or report shall be deemed conclusive unless a contrary date is proven by a dated, signed receipt from the Agency or certified or registered mail.

2) Submittal of an amended plan or report restarts the time for review.

3) The RA may waive the time line for review upon a request from the Agency or at the RA's discretion.

4) The Agency shall not be required to review any plan or report submitted out of the sequence for plans and reports set forth in this Part.

5) If any plans or reports are submitted concurrently, the Agency's timeline for review shall increase to a total of 90 days for all plans or reports so submitted.

e) Upon completion of the review, the Agency shall notify the RA in writing of its final determination on the plan or report. The Agency's notification shall be made in accordance with Section 740.215(b) of this Part. If the Agency disapproves a plan or report or approves a plan or report with conditions, the written notification shall contain the following information, as applicable:

1) An explanation of the specific type of information or documentation, if any, that the Agency deems the RA did not provide;

2) A listing of the Sections of Title XVII of the Act or this Part that may be violated if the plan or report is approved as submitted;

3) A statement of the specific reasons why Title XVII of the Act or this Part may be violated if the plan or report is approved as submitted;

4) A statement of the reasons for conditions if conditions are required.

f) The Agency may, to the extent consistent with review deadlines, provide the RA with a reasonable opportunity to correct deficiencies prior to sending a disapproval. However, the correction of such deficiencies by the submittal of additional information may, in the sole discretion of the Agency, restart the time for review.

g) If the RA has entered into a contract with a RELPE under Subpart B of this Part, the Agency shall assign plans and reports submitted by the RA to the RELPE for initial review.

1) The RELPE's review shall be conducted in accordance with this Subpart E.

2) Upon completion of the review, the RELPE shall recommend to the Agency approval or disapproval of the plan or report or approval of the plan or report with conditions.

3) Unless otherwise approved by the Agency in writing, the RELPE shall have 30 days to complete the review of a plan or report and forward the recommendation to the Agency. If any plans or reports have been submitted concurrently to the Agency, the RELPE shall have a total of 45 days to complete the review of all plans or reports so submitted, unless otherwise approved by the Agency in writing.

4) The recommendation of the RELPE shall be in writing, shall include reasons supporting the RELPE's recommendation, and shall be accompanied by all documents submitted by the RA and any other information relied upon by the RELPE in reaching a decision.

h) IF THE AGENCY DISAPPROVES OR APPROVES WITH CONDITIONS A PLAN OR REPORT OR FAILS TO ISSUE A FINAL determination~~DETERMINATION~~ WITHIN THE applicable review PERIOD AND THE RA HAS NOT AGREED TO A WAIVER OF THE DEADLINE, THE RA MAY, WITHIN 35 DAYS after receipt of the final determination or expiration of the deadline, FILE AN APPEAL with~~TO~~ THE BOARD. APPEALS TO THE BOARD SHALL BE IN THE MANNER PROVIDED FOR THE REVIEW OF PERMIT DECISIONS IN SECTION 40 OF THE ACT. (Section 58.7(d)(5) of the Act)

(Source: Amended at 22 Ill. Reg. _____, effective _____)

SUBPART G: REVIEW OF REMEDIATION COSTS FOR ENVIRONMENTAL REMEDIATION TAX CREDIT

Section 740.700 General

This Subpart sets forth the procedures to be followed by an RA to obtain Agency review and approval of remediation costs before applying for the environmental remediation tax credit under Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]. It contains procedures for preliminary reviews of estimated remediation costs and final reviews of remediation costs actually incurred, establishes fees for the Agency's reviews, provides for appeals of Agency determinations~~decisions~~, and includes examples of remediation costs and ineligible costs.

(Source: Added at 22 Ill. Reg. ____, effective _____)

Section 740.705 Preliminary Review of Estimated Remediation Costs

a) The RA for any remediation site enrolled in the Site Remediation Program may request a preliminary review of estimated remediation costs by submitting a budget plan along with the Remedial Action Plan required under Section 740.450 of this Part. No budget plan shall be accepted for review by the Agency unless a Remedial Action Plan satisfying the requirements of Section 740.450 of this Part also has been submitted. The budget plan shall be submitted on forms prescribed and provided by the Agency and shall include, but not be limited to, the following information:

1) Identification of applicant and remediation site:

A) The full legal name, address and telephone number of the RA, any authorized agents acting on behalf of the RA, and any contact persons to whom inquiries and correspondence must be addressed;

B) The address, site name, tax parcel identification number(s) and Illinois inventory identification number for the remediation site for which the environmental remediation tax credit is being sought and the date of acceptance of the site into the Site Remediation Program;

C) The Federal Employer Identification Number (FEIN) or Social Security Number (SSN) of the RA.

2) Line item estimates of the costs that the RA anticipates will be incurred for the development and implementation of the Remedial Action Plan, including but not limited to:

A) Site investigation activities:

i) Drilling costs;

ii) Physical soil analysis;

iii) Monitoring well installation;

iv) Disposal costs.

B) Sampling and analysis activities:

i) Soil analysis costs;

ii) Groundwater analysis costs;

iii) Well purging costs;

iv) Water disposal costs.

C) Remedial activities:

i) Groundwater remediation costs;

ii) Excavation and disposal costs;

iii) Land farming costs;

iv) Above-ground bio-remediation costs;

v) Land application costs;

vi) Low temperature thermal treatment costs;

vii) Backfill costs;

viii) In-situ soil remediation costs.~~;~~

~~ix) Other treatment costs.~~

D) Report preparation costs.

~~E) Other costs not included above.~~

3) A certification, signed by the RA or authorized agent and notarized, as follows:

I, _____ [name of RA, if individual, or authorized agent of RA], hereby certify that neither _____ ["I" if RA is certifying or name of RA if authorized agent is certifying], nor any related party (as described in Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]), nor any person whose tax attributes _____ ["I" if RA is certifying or name of RA if authorized agent is certifying] have [has] succeeded to under Section 381 of the Internal Revenue Code, caused or contributed in any material respect to the release or substantial threat of a release of regulated substance(s) or pesticide(s) that are identified and addressed in the Remedial Action Plan submitted for the site identified above.

4) The original signature of the RA or authorized agent acting on behalf of the RA.

b) The budget plan shall be accompanied by the applicable fee for review as provided in Section 740.720 of this Subpart. Budget plans shall be mailed or delivered to the address designated by the Agency on the forms. Requests that are hand-delivered shall be delivered during the Agency's normal business hours.

c) The time for the Agency to review the budget plan begins on the date that the Agency receives the budget plan. The Agency's record of the date of receipt of the budget plan shall be deemed conclusive unless a contrary date is proven by a dated, signed receipt from registered or certified mail. The RA may waive the time for review. The time frames for the Agency review are:

1) If the budget plan is submitted with the Remedial Action Plan, the submission of the budget plan shall be deemed an automatic 60-day waiver of the applicable review period for the Remedial Action Plan, as set forth in Section 740.505(d) of this Part. In this instance, the Agency shall have 120 days from its receipt of the two documents to make ~~a~~its final determination on the two documents.

2) If the budget plan is not submitted with the Remedial Action Plan, the budget plan may not be submitted until after the Agency has made a final determination on the Remedial Action Plan. If the budget plan is submitted after the Agency has approved or approved with conditions the Remedial

Action Plan, the Agency shall have 60 days from its receipt of the budget plan to make a final determination on the budget plan.

3) If an amended Remedial Action Plan or amended budget plan is submitted before an Agency final determination on the Remedial Action Plan and budget plan, the Agency shall have 120 days from its receipt of the amended document to make a final determination on the two documents.

4) If an amended budget plan is submitted without an amended Remedial Action Plan and after the Agency's final determination on the Remedial Action Plan, the Agency shall have 60 days from its receipt of the amended budget plan to make a final determination on the amended budget plan.

d) The Agency shall review the budget plan and the Remedial Action Plan to determine, in accordance with Sections 740.725 and 740.730 of this Part, whether the estimated costs are remediation costs. Upon completion of the preliminary review, the Agency shall notify the RA in writing of its final determination~~decision~~ to approve, disapprove or modify the estimated remediation costs submitted in the budget plan.

1) If a budget plan is disapproved or approved with modification of estimated remediation costs, the written notification shall contain the following information as applicable:

A) An explanation of the specific type of information or documentation, if any, that the Agency deems the RA did not provide;

B) The reasons for the disapproval or modification of estimated remediation costs;

C) Citations to statutory or regulatory provisions upon which the determination~~decision~~ is based.

2) The Agency may combine the notification of its final determination~~decision~~ on a budget plan with the notification of its final determination~~decision~~ on the corresponding Remedial Action Plan.

3) The Agency's notification of final determination~~decision~~ shall be by certified or registered mail postmarked with a date stamp and with return receipt requested. The Agency's determination~~decision~~ shall be deemed to have taken place on the postmarked date that the notice is mailed.

e) Revision and Resubmission

1) If the Agency disapproves a Remedial Action Plan or approves a Remedial Action Plan with conditions in accordance with Subpart E of this Part, the Agency may return the corresponding budget plan to the RA without review. If the Remedial Action Plan is amended as a result of the Agency action, the RA may submit a revised budget plan for review. No additional fee shall be required for this review.

2) If the Remedial Action Plan is amended by the RA and the RA intends to submit the Agency's final determination~~decision~~ on the budget plan in accordance with Section 740.715(c) of this Subpart, the budget plan shall be revised accordingly and resubmitted for Agency review. No additional fee shall be required for this review.

f) If the Agency disapproves or modifies the budget plan or fails to issue a final determination within the applicable review period, the RA may, within 35 days after ~~its~~ receipt of the final determination or expiration of the deadline, file an appeal with~~to~~ the Board. Appeals to the Board shall be in the manner provided for the review of permit decisions in Section 40 of the Act.

(Source: Added at 22 Ill. Reg. ____, effective _____)

Section 740.710 Application for Final Review of Remediation Costs

a) The RA for any remediation site enrolled in the Site Remediation Program may submit an application for final review of remediation costs. No application shall be submitted until a No Further Remediation Letter has been issued and the No Further Remediation Letter (or an affidavit under Section 740.620(a)(2) of this Part stating that the No Further Remediation Letter has issued by operation of law) has been recorded in the chain of title for the site, all in accordance with Title XVII of the Act and Subpart F of this Part. The application shall be submitted on forms prescribed and provided by the Agency and shall include, but not be limited to, the following information:

1) Identification of applicant and remediation site:

A) The full legal name, address and telephone number of the RA, any authorized agents acting on behalf of the RA, and any contact persons to whom inquiries and correspondence must be addressed;

B) The address, site name, tax parcel identification number(s)~~,~~ and Illinois inventory identification number for the remediation site for which the environmental remediation tax credit is being sought and the date of acceptance of the site into the Site Remediation Program;

C) The Federal Employer Identification Number (FEIN) or Social Security Number (SSN) of the RA;~~.~~

2) A true and correct copy of the No Further Remediation Letter(s) (or affidavit(s) under Section 740.620(a)(2) of this Part stating that the No Further Remediation Letter(s) has issued by operation of law) for the remediation site as recorded in the chain of title for the site and certified by the appropriate County Recorder or Registrar of Titles;

3) Itemization and documentation of remediation activities at the remediation site for which the environmental remediation tax credit is sought and for the costs of remediation incurred by the RA at the site, including invoices, billings and dated, legible receipts along with canceled checks or other Agency-approved methods of proof of payment;

4) A certification, signed by the RA or authorized agent and notarized, as follows:

I, _____ [name of RA, if individual, or authorized agent of RA], hereby certify that:

The site for which this application for an environmental remediation tax credit is submitted is the same site as the site for which the ~~attached~~ No Further Remediation Letter was issued;

All the costs included in this application were incurred at the site and for the regulated substance(s) or pesticide(s) for which the No Further Remediation Letter was issued;

The costs submitted were paid by _____ ["me" if RA is certifying or name of RA if authorized agent is certifying] and are accurate to the best of my knowledge and belief;

None of the costs included in this application were incurred before January 1, 1998, or more than 12 months before the enrollment of the site in the Site Remediation Program, or after the date of issuance of the No Further Remediation Letter;

None of the costs included in this application have been or will be deducted at any time under the Internal Revenue Code or taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code;

Neither _____ ["I" if RA is certifying or name of RA if authorized agent is certifying], nor any related party (as described in Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]), nor any person whose tax attributes _____ ["I" if RA is certifying or name of RA if authorized agent is certifying] have [has] succeeded to under Section 381 of the Internal Revenue Code, caused or contributed in any material respect to the release or substantial threat of a release of regulated substance(s) or pesticide(s) for which the No Further Remediation Letter was issued.

5) The original signature of the RA or of the authorized agent acting on behalf of the RA.

b) The application for final review shall be accompanied by the applicable fee for review as provided in Section 740.720 of this Subpart. Applications shall be mailed or delivered to the address designated by the Agency on the forms. Requests that are hand-delivered shall be delivered during the Agency's normal business hours.

c) The Agency's acceptance of a certification that neither the RA, nor any related party (as described in Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]), nor any person whose tax attributes the RA has succeeded to under Section 381 of the Internal Revenue Code, caused or contributed in any material respect to the release or substantial threat of a release for which the environmental remediation tax credit is requested shall not bind the Agency or the State and shall not be used as a defense with regard to any enforcement or cost recovery actions that may be initiated by the State or any other party.

(Source: Added at 22 Ill. Reg. ____, effective _____)

Section 740.715 Agency Review of Application for Final Review of Remediation Costs

a) The Agency shall review the application for final review of remediation costs to determine, in accordance with Sections 740.725 and 740.730 of this Part, whether the costs incurred are remediation costs.

b) The Agency shall have 60 days after the receipt of an application for final review to make ~~a~~its final determination on the application. The Agency's record of the date of receipt of the application shall be deemed conclusive unless a contrary date is proven by a dated, signed receipt from registered or certified mail. The RA may waive the time for review. Submittal of an amended application restarts the time for review.

c) Further Review by the Agency

1) If a preliminary review of a budget plan has been obtained under Section 740.705 of this Subpart, the RA may submit, along with the application, supporting documentation, and the applicable fee under Section 740.720 of this Subart, a copy of the Agency's final determination on the budget plan ~~decision~~ accompanied by a certification, signed by the RA or authorized agent and notarized, as follows:

I, _____ [name of RA, if individual, or name of authorized agent of RA], hereby certify that the actual remediation costs incurred at the site for line items _____ [list line items to which certification applies] and identified in the a~~A~~pplication for f~~F~~inal r~~R~~eview of r~~R~~emediation c~~C~~osts are equal to or less than the costs approved for the corresponding line items in the attached budget plan determination~~decision~~.

2) If the budget plan determination~~decision~~ and certification are submitted pursuant to subsection (c)(1) of this Section, the Agency may, but is not required to, conduct further review of the certified line item costs incurred for development and implementation of the Remedial Action Plan and may approve such costs as submitted. The Agency's further review shall be limited to confirming that costs approved in the Agency's budget plan determination were actually incurred by the RA for development and implementation of the Remedial Action Plan~~If the certification in subsection (c)(1) of this Section does not apply to all line items as approved in the budget plan, the Agency shall conduct its review of the costs for the uncertified line items as if no budget plan had been approved~~.

3) If the certification in subsection (c)(1) of this Section does not apply to all line items as approved in the budget plan, the Agency shall conduct its review of the costs for the uncertified line items as if no budget plan had been approved. In that review, the Agency shall not reconsider the appropriateness of any activities, materials, labor, equipment, structures or services already approved by the Agency for the development and implementation of the Remedial Action Plan.

d) Upon completion of the final review, the Agency shall notify the RA in writing of its final determination~~decision~~ to approve, disapprove or modify the remediation costs submitted in the application. If an application is disapproved or approved with modification of remediation costs, the written notification shall contain the following information as applicable:

1) An explanation of the specific type of information or documentation, if any, that the Agency deems the RA did not provide;

2) The reasons for the disapproval or modification of remediation costs;

3) Citations to statutory or regulatory provisions upon which the determination~~decision~~ is based.

e) The Agency's notification of final determination shall be by certified or registered mail postmarked with a date stamp and with return receipt requested. The Agency's determination shall be deemed to have taken place on the postmarked date that the notice is mailed.

f) If the Agency disapproves or modifies the application for final review or fails to issue a final determination within the applicable review period, the RA may, within 35 days after receipt of the final determination or expiration of the deadline, file an appeal with~~to~~ the Board. Appeals to the Board shall be in the manner provided for the review of permit decisions in Section 40 of the Act.

(Source: Added at 22 Ill. Reg. ____, effective _____)

Section 740.720 Fees and Manner of Payment

a) The fee for the preliminary review of estimated remediation costs conducted under Section 740.705 of this Subpart shall be as follows:

1) Except as provided in subsection (a)(2) of this Section, the fee for the preliminary review shall be $500 for each remediation site reviewed.

2) There shall be no fee for a preliminary review if the requirements of subsection (c) of this Section are satisfied.

b) The fee for the final review of remediation costs under Section 740.715 of this Subpart shall be as follows:

1) Except as provided in subsection (b)(2) of this Section, the fee for the final review shall be $1,000 for each remediation site reviewed.

2) The fee for the final review shall be $250 if the requirements of subsection (c) of this Section are satisfied.

c) To obtain the fee waiver under subsection (a)(2) of this Section or the reduced fee under subsection (b)(2) of this Section:

1) The total remediation costs for the site must be $100,000 or less; and

2) The RA must submit written certification in accordance with regulations of the Department of Commerce and Community Affairs (DCCA) that

the remediation site is located entirely within an enterprise zone as defined in the Illinois Enterprise Zone Act [20 ILCS 655] and entirely within one or more census tracts that have been determined by DCCA to contain a majority of households consisting of low and moderate income persons. The certification shall be submitted with the budget plan or application for final review and shall clearly identify the remediation site by name, address, tax parcel identification number(s) and Illinois inventory identification number.

d) The fee for a review under this Subpart G shall be in addition to any other fees, payments or assessments under Title XVII of the Act and this Part. The fee shall be paid by check or money order made payable to "Treasurer - State of Illinois, for Deposit in the Hazardous Waste Fund." The check or money order shall include the Illinois inventory identification number and the Federal Employer Identification Number (FEIN) or Social Security Number (SSN) of the RA.

(Source: Added at 22 Ill. Reg. ____, effective _____)

Section 740.725 Remediation Costs

a) Activities, materials, labor, equipment, structure and service costs that may be approved by the Agency as remediation costs for the environmental remediation tax credit under Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)] include, but are not limited to, the following:

1) Preparation of bid documents and contracts for procurement of contractors, subcontractors, analytical and testing laboratories, labor, services and suppliers of equipment and materials;

2) Engineering services performed in accordance with Section 58.6 of the Act and implementing regulations at Sections 740.235 and 740.405 of this Part;

3) Site assessment and remedial investigation activities conducted in accordance with Sections 740.410, 740.415, 740.420 and 740.430 of this Part;

4) Report or plan preparation conducted in accordance with Sections 740.425, 740.435, 740.445, 740.450 and 740.455 of this Part;

5) Collection, analysies or measurement of site samples in accordance with Section 740.415(d) of this Part;

6) Groundwater monitoring well installation, operation, maintenance and construction materials;

7) Removal, excavation, consolidation, preparation, containerization, packaging, transportation, treatment or off-site disposal of wastes, environmental media (e.g., soils, sediments, groundwater, surface water, debris), containers or equipment contaminated with regulated substances or pesticides at concentrations exceeding remediation objectives pursuant to an approved Remediation Objectives Report in accordance with Section 740.445 of this Part. Activities must be in compliance with all applicable state or federal statutes and regulations;

8) Clean backfill materials in quantities ~~minimally~~ necessary to replace soils excavated and disposed off-site that were contaminated with regulated substances or pesticides at levels exceeding remediation objectives pursuant to an approved Remediation Objectives Report in accordance with Section 740.445 of this Part;

9) Transportation, preparation and placement of clean backfill materials pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;

10) Design, testing, permitting, construction, monitoring and maintenance of on-site treatment systems pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;

11) Engineering costs associated with preparation of a budget plan in accordance with Section 740.705 of this Subpart or an a~~A~~pplication for f~~F~~inal r~~R~~eview of r~~R~~emediation c~~C~~osts in accordance with Section 740.710 of this Subpart if prepared before the issuance of the No Further Remediation Letter~~NFR letter~~ (by the Agency or by operation of law);

12) Removal or replacement of concrete, asphalt or paving to the extent necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;

13) Clay, soil, concrete, asphalt or other appropriate ~~geologic~~ materials as a cap, barrier or cover to the extent necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;

14) Placement of clay, soil, concrete, asphalt or other appropriate ~~geologic~~ materials as a cap, barrier or cover to the extent necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;

15) Destruction or dismantling and reassembly of above-grade structures to the extent ~~that are~~ necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;~~.~~

16) Costs associated with obtaining a special waste generator identification number not to exceed $100.

b) An RA may submit a request for review of remediation costs that includes an itemized accounting and documentation of costs associated with activities, materials, labor, equipment, structures or services not identified in subsection (a) of this Section if the RA submits detailed information demonstrating that those items are necessary~~essential~~ for compliance with this Part 740, 35 Ill. Adm. Code 742 and the approved Remedial Action Plan.

(Source: Added at 22 Ill. Reg. ____, effective _____)

Section 740.730 Ineligible Costs

Costs ineligible for the environmental remediation tax credit under Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)] include, but are not limited to, the following:

a) Costs not incurred by the RA;

b) Costs incurred for activities, materials, labor or services relative to remediation at a site other than the site for which the No Further Remediation Letter was issued;

c) Costs for remediating a release or substantial threat of a release of regulated substances or pesticides that was caused or contributed to in any material respect by the RA, any related party (as described in Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]) or any person whose~~who~~ tax attributes the RA has succeeded to under Section 381 of the Internal Revenue Code;

d) Costs incurred before January 1, 1998, or more than 12 months before enrollment of the site in the Site Remediation Program, or after the date of issuance of a No Further Remediation Letter issued pursuant to Section 58.10 of the Act and Subpart F of this Part;

e) Costs that have been or will be deducted at any time under the Internal Revenue Code or taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code;

f) Costs associated with material improvements to the extent that such improvements are not necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part~~that serve incidentally as engineered barriers and that are not primarily designed or intended to eliminate or mitigate exposures to, or migration of, regulated substances or pesticides~~;

g) Costs or losses resulting from business interruption;

h) Costs incurred as a result of vandalism, theft, negligence or fraudulent activity by the RA or the agent of the RA;

i) Costs incurred as a result of negligence in the practice of professional engineering ~~or unprofessional conduct~~ as defined in Section ~~425~~ of the Professional Engineering Practice Act of 1989 [225~~235~~ ILCS 325/~~425~~];

j) Costs incurred as a result of negligence ~~or unprofessional conduct~~ by any contractor, subcontractor, or other person providing remediation services at the site;

k) Costs associated with replacement of above-grade structures destroyed or damaged during remediation activities to the extent such destruction or damage and such replacement is not necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;

~~l)~~ ~~Costs associated with obtaining a special waste generator identification number in excess of the lesser of $250 or the actual time spent in obtaining a special waste generator identification number;~~

l~~m~~) Attorney fees;

m~~n~~) Purchase costs of non-consumable materials, supplies, equipment or tools, except that a reasonable rate may be charged for the usage of such materials, supplies, equipment or tools;

n~~o~~) Costs for repairs or replacement of equipment or tools due to neglect, improper or inadequate maintenance, improper use, loss or theft;

o~~p~~) Costs associated with activities that violate any provision of the Act or Board, Agency or Illinois Department of Transportation regulations;

p~~q~~) Costs associated with improperly installed or maintained groundwater monitoring wells;

qr) Costs associated with unnecessary, irrelevant or improperly conducted activities, including, but not limited to, data collection, testing, measurement, reporting, analysies, modeling, risk assessment or sample collection, transportation, measurement, analysies or testing;

rs) Stand-by or demurrage costs;

st) Interest or finance costs charged as direct costs;

tu) Insurance costs charged as direct costs;

uv) Indirect costs for personnel, labor, materials, services or equipment charged as direct costs;

vw) Costs associated with landscaping, vegetative cover, trees, shrubs and aesthetic considerations;

wx) Costs associated with activities, materials, labor, equipment, structures or services to the extent they are not necessaryessential for compliance with this Part 740, 35 Ill. Adm. Code 742 and the approved Remedial Action Plan;

xy) Costs determined to be incorrect as a result of a mathematical, billing or accounting error;

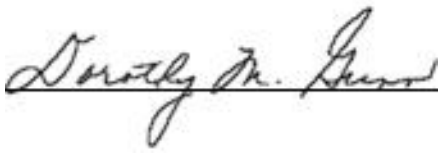
yz) Costs that are not adequately documented;

zaa) Costs that are determined to be unreasonable.

(Source: Added at 22 Ill. Reg. ____, effective _____)

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 8th day of July 1998 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board