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MAY 05 2005

STATE OF ILLINOIS
Pollution Control Board

PC# 39

May 2, 2005

Marie Tipsord
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

Re: In Re Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks; R04-22 and R04-23 (Consolidated)

Dear Ms. Tipsord:

Pursuant to the March 11, 2005 hearing officer order in the above rulemaking, I am submitting these comments on the proposed rules.

By way of background, I am an environmental lawyer with over 20 years of experience. I have appeared before the Board and given oral and written testimony in a number of rulemakings over the last ten years related to the U.S.T. program and TACO objectives.

Recent discussions with Illinois EPA personnel have uncovered a potential ambiguity which ought to be clarified in the pending Part 732 and 734 rules. At several points in the proposed rules, the rules provide in substance something like the following: Unless the owner or operator submits a report pursuant to Section 734.210(h)(3) of this Part demonstrating that the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants have been met, the owner or operator must investigate the site, conduct corrective action, and . . . (See, e.g., Section 734.300.) The ambiguity is created because some of the "most stringent Tier 1 remediation objectives" may be for pathways which have been severed by preexisting institutional controls. The most important example would be in the City of Chicago where the Tier 1 soil criteria for the migration to the groundwater pathway have been met throughout the City by the City's adoption of (and the Illinois EPA's approval of) the City of Chicago groundwater ordinance as an approved institutional control.

With regard to a site in the City of Chicago, the Illinois EPA staff have expressed concerns recently that the proposed Section 734 regulations would require the owner or operator to investigate and delineate contamination which is above the Tier 1 criteria only for the migration of groundwater pathway but below those criteria for all the other

remaining pathways. Essentially, the owner would be delineating contamination that already is addressed by the existing City of Chicago groundwater ordinance institutional control. Similar provisions exist in other places in the regulations such as Sections 734.310, 734.315, 734.320, 734.325 and 734.335.

There is no regulatory basis to require an owner or operator to delineate contamination where the only pathway for which the contamination exceeds the most stringent Tier 1 remediation objectives is a pathway which already is controlled by an existing approved institutional control. In other provisions in the proposed regulations, and in the Board's opinion in this matter, the regulations endorse the proposition that the failure to use available groundwater ordinances as an institutional control may result in certain corrective action costs being ineligible for payment from the fund. See the Board Note to Proposed Section 734.410; Section 734.630 (ccc). According to the Board's February 17, 2005 opinion at page 21, the proposed regulations are intended to require owners or operators to use a groundwater ordinance as an institutional control if the ordinance already has been approved by the Illinois EPA. This prevents sites from seeking reimbursement for costs which are unnecessary because of preexisting approved institutional controls and would seem to be consistent with the overall purpose of the rulemaking to streamline the UST reimbursement program and to reduce requests for unnecessary costs.

I suggest that the Board amend the proposed provision at part 734.300 to provide as follows:

“Unless the owner or operator submits a report pursuant to Section 734.210(h)(3) of this Part demonstrating that the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants have been met for all pathways not otherwise controlled by an approved institutional control, the owner or operator must investigate the site, conduct corrective action, and prepare plans, budgets, and reports in accordance with the requirements of this subpart C.

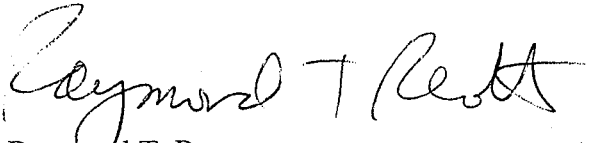
The additional language is shown as an underlined insert. The Board should make similar parallel revisions to the other sections containing similar phrasing such as Sections 734.310, 315 and 320.

In addition, the exclusion from the recoverable costs contained in proposed Section 734.630(ccc) is too narrowly drawn. As currently worded, the exclusion relates only to costs “associated with groundwater remediation” if a groundwater ordinance already approved by the Agency for use as an institutional control in accordance with 35 Ill. Adm. Code 742 can be used as an institutional control for the release being remediated. That provision ought to be slightly broader to make it clear that the excluded costs include costs “associated with groundwater remediation or soil remediation if 1) the only basis for the soil remediation is the migration to groundwater pathway and 2) a groundwater ordinance already approved by the Agency would make the remediation of the soil pathway unnecessary.” The current wording would appear to invite parties to submit requests for reimbursement for soil remediation costs where the only basis for that

soil remediation would be the migration to groundwater pathway already addressed by an approved institutional control. This could be a very frequent occurrence within the City of Chicago as well as the other communities around Illinois which have adopted groundwater ordinances approved by the Agency as institutional controls pursuant to Section 742.

Because of the length of the proposed rule making and the various opinions and submissions in this matter, it is possible that there are additional instances where the same language ought to be conformed to the changes suggested above. I suggest that the Board staff conduct a comprehensive search of the pending rulemaking proposal to identify any such parallel provision which would need to be conformed.

Sincerely yours,

A handwritten signature in cursive script that reads "Raymond T. Reott". The signature is written in black ink and is positioned above the typed name.

Raymond T. Reott
RTR/ld

CC: Jorge Mihalopoulos
Rulemaking Service List