

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAR 28 2001

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
SITE REMEDIATION PROGRAM:) R01-27
AMENDMENTS TO 35 ILL. ADM. CODE) (Rulemaking - Land)
740)

IN THE MATTER OF:)
)
SITE REMEDIATION PROGRAM:) R0 1-29
PROPOSED 35 ILL. ADM. CODE) (Rulemaking - Land)
740.SUBPART H (SCHOOLS, PUBLIC) (Consolidated)
PARKS, AND PLAYGROUNDS))

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

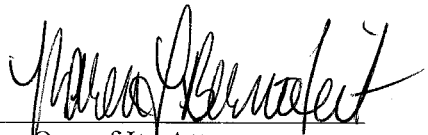
Bobb A. Beauchamp, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the **PRE-FILED TESTIMONY**

OF HARRY R. WALTON, copies of which are herewith served upon you.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
One of Its Attorneys

Dated: March 26, 2001

Katherine D. Hodge
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

Karen L. Bernoteit
Illinois Environmental
Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217) 522-5512

CERTIFICATE OF SERVICE

I, Karen L. Bernoteit, the undersigned, certify that I have served a copy of the attached PRE-FILED TESTIMONY OF HARRY R. WALTON upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Bobb A. Beauchamp, Esq
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

SEE ATTACHED SERVICE LIST.

by depositing said documents in the United States Mail in Springfield, Illinois on
March 26, 2001.



Karen L. Bernoteit

SERVICE LIST

Erin Curley
Midwest Engineering Services, Inc.
4243 W 166th St
Oak Forest, IL 60452

William G. Dickett
Sidley & Austin
10 S Dearborn Ste 5200
Chicago, IL 60603

William G. Dixon, Jr.
Practical Environmental Consultants
919 N Plum Grove Rd Ste H
Schaumburg, IL 60173

Matthew J. Dunn
Chief
Office of the Attorney General
Center, 100 W. Randolph, 12th Floor
Chicago, IL 60601

Steve Gobelman
IDOT
Bureau of Design & Env.
2300 Dirksen Parkway Rm 330
Springfield, IL 62764

Daniel J. Goodwin
Goodwin Environmental Consultants
400 Bruns Lane
Springfield, IL 62702

Holly D. Harley
Esq
Chicago Legal Clinic
205 W Monroe St 4th FL
Chicago, IL 60606

Katherine D. Hodge
Hodge & Dwyer
P O Box 5776
Springfield, IL 62705-5776

Stephen Kirschner
Advanced GeoServices Corp.
Route 202 & 1 Brandywine One Ste 202
Chadds Ford, IL 19317

Robert T. Lawley
Chief Legal Counsel
Department of Natural Resources
524 S. Second Street
Springfield, IL 62701-1787

Brent Manning
Director
Department of Natural Resources
524 S Second St
Springfield, IL 62701

John Mital
Rapps Engineering & Applied Science
821 S Durkin Dr
Springfield, IL 62704

Monte Nienkerk
Clayton Environmental Consultants
3140 Finley Rd
Downers Grove, IL 60515

Stefan A. Noe
Citizens for a Better Environment
205 W Monroe St 4th FL
Chicago, IL 60606

Jeryl Olson
Seyfarth, Shaw,
Fairweather & Geraldson
55 E. Monroe Ste 4300
Chicago, IL 60603

Karen Prena
Mayer, Brown & Platt
290 S LaSalle St Ste 3900
Chicago, IL 60603

Michael W. Rapps
P.E.
Rapps Engineering & Applied Science
821 S. Durkin Dr.
Springfield, IL 62704

John Reimann
INDECK
600 N Buffalo Grove Rd Ste 300
Buffalo Grove, IL 60089

Jim Ryan
Office of the Attorney General
100 W Randolph
Chicago, IL 60601

Ala E. Sassila
Carnow, Conibear & Associated, Ltd.
333 W Wacker Dr Ste 1400
Chicago, IL 60606

SERVICE LIST

Thomas V. Skinner
Director
IL Environmental Protection Agency
1021 N. Grand Ave. East P O Box 19276
Springfield, IL 62794-9276

Wayne Smith
P.G.
Pioneer Environmental, Inc.
1000 N Halsted Ste Ste 202
Chicago, IL 60622

Mark Wight
Assistant Counsel
IL Environmental Protection Agency
1021 N. Grand Ave. East P O Box 19276
Springfield, IL 62794-9276

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PRE-FILED TESTIMONY OF HARRY R. WALTON

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one if its attorneys, Karen L. Bernoteit, and submits the following Pre-filed Testimony of Harry R. Walton for presentation at the April 4, 2001 hearing scheduled in the above-referenced matter.

Testimony of Harry R. Walton

My name is Harry R. Walton and I am testifying today on behalf of IERG and the Site Remediation Advisory Committee (SRAC) regarding the Illinois EPA's and the Citizens for a Better Environment's (CBE) proposed amendments to the SRP program at 35 Ill. Admin. Code Part 740. SRAC is a 10 member committee that was established under Section 58.11(a) of the Illinois Environmental Protection Act (Act) for the purpose of reviewing, evaluating and making recommendations regarding state laws, rules and procedures relating to site remediations. SRAC is also charged with making recommendations relating to the state's implementation of Title XVII of the Act that consists of the Site Remediation Program.

I have had more than 26 years of experience in assessment and remedial management of industrial/commercial property, former industrial property and waste disposal sites. I am a technical consultant to the IERG, I have represented the Illinois Manufacturer's Association on the Leaking Underground Storage Tanks (LUST) Advisory Committee, and represent the Illinois State Chamber of Commerce as Chairman of the SRAC. I represent IERG on regulatory issues concerning surface water, solid waste, groundwater, and remedial programs. I was active in the development and passage of the Illinois Site Remediation Program (Brownfields). On behalf of SRAC and IERG, I offered testimony to the Illinois Pollution Control Board to facilitate its understanding and acceptance of the Illinois EPA and SRAC consensus regulatory proposals for implementation of Illinois' Site Remediation Program.

Introduction to Testimony

My testimony today focuses on several aspects of the Illinois EPA's and CBE's proposed amendments to the site remediation program (SRP) at 35 Ill. Admin. Code Part 740. My testimony will address the following:

- The addition of a definition of "soil" to Part 740. This is necessary to ensure maximum utility of the Soil Management Zone (SMZ) for its intended purpose of providing an exemption from the solid waste disposal regulations. So doing will reduce the costs and time associated with the remediation;
- The need for the regulation to provide for a community relations plan for sites that are intended to be used for the construction of a school;

- The elective use of a community relations plan by a remediation applicant to negate the need for the Illinois EPA's proposed prohibition on shifting a SMZ closer to contiguous residential property; and
- The use of data, generated by a non-certified laboratory as part of the response action to a release, used for site characterization within the SRP program under the Illinois EPA's proposed amendments.

The Addition of a Definition of "Soil"

The addition of the SMZ under the Illinois EPA's proposed 35 Ill. Adm. Code 740.535 is strongly supported by both IERG and SRAC. Both of these organizations have held numerous discussions with the Illinois EPA about SMZs and have urged that SMZs become an explicit element of the SRP. In order to assure the maximum use of the SMZ for its intended purpose, IERG and SRAC urge that a definition of "soil" be added to 35 Ill. Adm. Code 740.120, otherwise, the utility of the SMZ could be severely restricted.

Absent a definition of soil, the Illinois EPA could consider materials such as slag, ash or bits of concrete, that may be part of a proposed SMZ, to be a component of a landfill that is being developed without a permit and, thus, not eligible for consideration as a SMZ. This would run contrary to the Illinois EPA's stated purpose of the SMZ: to facilitate the managing of contaminated soils and to lower the associated time and costs without creating additional risks to human health and the environment. See Illinois EPA's Statement of Reasons, filed January 12, 2001 at 8. While SRAC agrees with Illinois EPA that the SMZ should not be used to avoid the Board's landfill regulations, it should apply to manufacturing or commercial sites built on a subsurface matrix that

consists primarily of historic fill. In order to remedy this problem, a definition of soil must be added to Part 740, and is critical to ensure that SMZs can be used to the maximum extent possible, thus, fulfilling their intended purpose.

IERG and SRAC propose the following language to amend 35 Ill. Admin. Code 740.120:

Soil means, for the purpose of a soil management zone, contaminated media which meets the requirements of 35 Ill. Adm. Code 742.305, managed pursuant to an Agency approved remedial action plan.

The addition of the above definition of soil will ensure that the establishment of a SMZ will not be considered the development of an unpermitted landfill which runs contrary to the proposed regulatory purpose of the SMZ which is “ . . .to allow the consideration and approval of on-site solutions to on-site contamination without violating the solid waste disposal regulations at 35 Ill. Adm. Code 807 or 811 – 815”. See Illinois EPA’s proposed 35 Ill. Admin. Code 740.535(a)(l). I urge the Board to adopt the above proposed definition of “soil” as a critical element of the amendments to the SRP necessary to maximize the utility of the SMZ.

Addition of a Community Relations Plan Requirement

IERG and SRAC both support the concept of a community relations plan (CRP) requirement that was proposed by CBE as a new Subpart H to 35 Ill. Adm. Code Part 740; however, IERG and SRAC believe this requirement should be limited to sites that are intended for future construction of a school. This CRP requirement would be an important component of the SRP that would serve the function of informing the community of intended action by the remediation applicant (RA), and providing for community input regarding issues related to the remediation of a site intended for the

construction of a school. The assessment of the need for and implementation of a CRP should be the responsibility of the remedial applicant.

The Addition of SMZ Conditions

The Illinois EPA's proposal contains a prohibition against treating or placing any soil or contaminants of concern above the Tier I TACO objectives for residential properties closer to any residential property contiguous to the remediation site. See Illinois EPA's proposed 35 Ill. Admin. Code 740.535(b)(8)(B). From testimony and responses to questions provided by Illinois EPA witnesses during the February 28, 2001 public hearing on the proposed amendments, it is clear that the above prohibition against moving a SMZ closer to a residential property is not based upon risk created by shifting a SMZ. During the February 28th public hearing, hearing participant, David Rieser, provided an example to Larry Eastep, Illinois EPA, in which he described a situation consisting of a large site within which a SMZ is moved closer to a residential area that would not present an increased risk to the residential area because of the size of the site. See Transcript of February 28, 2001 hearing at 31. Mr. Eastep responded in the following manner: "I am not sure it is a matter of risk that is being addressed here. This is as much a matter of public acceptance of this more than the risk. So we have not done any risk analysis of this." See Transcript at 31.

As an initial matter, IERG and SRAC believe that the best way to address public perception is for the Board and the Illinois EPA to apply TACO and its risk based approach consistently and not to carve exceptions for certain procedures. Even given this, IERG and SRAC believe the Illinois EPA's above articulated concern about public perception and acceptance of a SMZ would be remedied by the election of a remediation

applicant to use a CRP incorporated into a new Subpart H at 35 Ill. Admin. Code Part 740. The Illinois EPA's determination to allow a SMZ could be based on numerous factors including proximity to adjoining residential properties or use of a CRP to address adjoining residential properties. If conditions at and adjacent to the remedial site indicate that a CRP is appropriate, and the RA chooses to use a SMZ which results in soil being moved closer to a residential property, the RA should implement a CRP. This will ensure that the community surrounding the remediation site has notice that a RA is proposing to move a SMZ closer to a residential property. It will further provide an opportunity to provide input and, as a result, impact the decision making process. It is apparent from a statement made during the February 28, 2001 public hearing that the Illinois EPA believes community input in the SRP would at least, in part, alleviate the need for the prohibition against moving a SMZ closer to a residential property. Ms. Liu of the Board asked Larry Eastep, Illinois EPA, if public perception is the main factor for not placing soil closer to a residential property, whether including a public notice and hearing process in the rule, to allow people to express their beliefs regarding the project's potential for community betterment, could serve as a solution. See Transcript at 40. Mr. Eastep stated that this would address part of the problem because the SRP does not contain any real public notice or participation elements. See Transcript at 40. Mr. Eastep further explained that if someone wanted to propose public participation procedures the Illinois EPA would consider it. See Transcript at 40.

IERG and SRAC recommend the following revision to the Illinois EPA's proposed 35 Ill. Admin. Code 740.535(b)(8)(B):

- b) Upon approval by the Agency of a Remedial Action Plan under Subpart E of this Part, soil that is the subject of a request for a soil management zone shall be

classified as a soil management zone if the Remedial Action Plan demonstrates that the following requirements will be satisfied:

8) Soil containing contaminants of concern above the concentrations in 35 Ill. Adm. Code 742.Appendix B: Table A (Tier 1 objectives for residential properties) or approved by the Agency pursuant to 35 Ill. Adm. Code 742.510(c) may not be Treated or placed in any area where all contaminants of concern within the remediation site are at or below the concentrations in 35 Ill. Adm. Code 742.Appendix B: Table A (Tier 1 objectives for residential properties) or approved by the Agency pursuant to 35 Ill. Adm. Code 742.510(c).

A) Treated or place in any area where all contaminants of concern within the remediation site are at or below the concentrations in 35 Ill. Adm. Code 742.Appendix B: Table A (Tier 1 objectives for residential properties) or approved by the Agency pursuant to 35 Ill. Adm. Code 742.510(c); or

B) Treated or placed closer to any residential property contiguous to the remediation site.

This suggested revision retains the Illinois EPA's proposed provision that soil containing contaminants of concern above designated regulatory concentrations not be treated or placed in an area where all contaminants of concern within the remediation site are at or below the designated regulatory concentrations. The above suggested revision removes the Illinois EPA's proposed provision that soil containing contaminants of concern above designated regulatory concentrations not be treated or placed closer to any residential property contiguous to the remediation site. IERG and SRAC urge the Board to adopt the above proposed revision in conjunction with the earlier described recommendation to adopt a CRP for inclusion as a new Subpart H to 35 Ill. Adm. Code Part 740 that is required for sites that are intended as locations for future school construction. Because the Illinois EPA's rationale for including this prohibition is based entirely on avoiding a public perception issue, the addition of a CRP component to the SRP, and the ability of a remediation applicant to elect to use the CRP, will negate the

need for a prohibition against moving a SMZ closer to a residential property. The addition of a CRP provision will allow the community to have an opportunity to impact the ultimate placement of the SMZ, and to evaluate any potential positive or negative aspects of this placement as part of a public participation process.

Use of Data Generated By a Non-Certified Laboratory

The Illinois EPA's proposed 35 Ill. Admin. Code 740.415(d)(6) contains a requirement that an accredited laboratory perform all quantitative analyses, of samples collected on or after July 1, 2002, and utilizing any of the approved test methods identified in 35 Ill. Admin. Code 186.180. IERG and SRAC would like to clarify the understanding that, under the Illinois EPA's proposed regulation, the use of data generated by a non-certified laboratory as part of the response action to a release could be used for site characterization under the SRP program. At the February 28th public hearing I asked Illinois EPA witness, Mr. Gregory Dunn, whether a team that utilized an in-house laboratory as part of a release response could make a demonstration to use that data, generated from a non-certified laboratory, to mitigate the release. See Transcript at 46. Mr. Dunn responded that if the data were used prior to entering the SRP and if it was reasonable and the Illinois EPA determined it was collected appropriately, it could be used. See Transcript at 46 and 47. IERG and SRAC would like to clarify that our understanding of the use of data generated by a non-certified laboratory under the Illinois EPA's proposal is allowable as I have just described.

Conclusion

IERG and SRAC urge the Board to consider the revisions to the Illinois EPA's and CBE's proposal that we have proposed today and the other issues identified in my testimony.

Thank you for the opportunity to testify today and I will be pleased to answer any questions regarding the matters presented in my testimony at this time.

IERG reserves the right to supplement or modify this pre-filed testimony.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
Karen L. Bernoteit

Dated: March 26, 2001

Karen L. Bernoteit
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217)522-5512