BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PC#7

IN THE MATTER OF:	)	
	)	
STANDARDS AND REQUIREMENTS	)	
FOR POTABLE WATER WELL	)	R06-023
SURVEYS AND FOR COMMUNITY	)	(Rulemaking – Land)
RELATIONS ACTIVITIES PERFORMED	)	
IN CONJUNCTION WITH AGENCY	)	
NOTICES OF THREATS FROM	)	
CONTAMINATION (35 ILL. ADM. CODE	)	
1505)	)	

NOTICE

Dorothy Gunn, Clerk
Illinois Pollution Control Board
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Chicago, Illinois 60601

Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the Illinois Environmental Protection Agency's Post-Hearing Comments, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Mark Wight

Mark Wight
Assistant Counsel
Division of Legal Counsel

DATE: June 23, 2006

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AGENCY'S POST-HEARING COMMENTS

The Illinois Environmental Protection Agency ("Agency") respectfully submits its post-hearing comments in the above-titled matter to the Illinois Pollution Control Board ("Board") pursuant to 35 Ill. Adm. Code 102.108 and the direction of the Hearing Officer at the close of the hearing on May 23, 2006.

I. OVERVIEW

The Agency's proposed rule at 35 Ill. Adm. Code 1505[1] originates in the statutory requirements of Title VI-D of the Environmental Protection Act ("Act"), as enacted by Public Act 94-314, effective July 25th, 2005. *See* 415 ILCS 5/25d-1 – 25d-10. Title VI-D of the Act is entitled "Right-To-Know." There are several components to Title VI-D. The main component is a requirement that the Agency provide notice to certain affected members of the public in

[1] The Agency notes the statement of the Hearing Officer concerning the revisions in the Board's forthcoming Second Notice Opinion and Order from the Agency's original Subtitle N to Subtitle O and from the Agency's original 35 Ill. Adm. Code 1505 to 35 Ill. Adm. Code 1605. *See* Transcript of May 23rd Hearing at 26-7. The Agency understands and concurs with the need for these revisions, but, for purposes of this document, the proposal still is referred to as Part 1505.

specified circumstances involving soil or groundwater contamination or other environmental threats. Title VI-D also authorizes the Agency to allow a responsible party who has implemented a community relations plan to provide the notice in lieu of the Agency. In conjunction with these notification requirements, Title VI-D required the Agency to propose rules for potable water well surveys and community relations activities within 180 days of the effective date of the legislation. The Agency's proposal was filed with the Board on January 20, 2006.

Two hearings have been held on the Agency's proposal, the first in Chicago on March 28th, 2006, and the second in Springfield on May 23rd, 2006. During the course of the hearings, approximately 165 pages of testimony, questions and responses have been gathered and nine exhibits admitted to the record. The Agency has filed two sets of amendments to its original proposal in the form of errata sheets. Before providing its post-hearing comments, the Agency wishes to take this opportunity to thank the attending Board members, their assistants and staff, Hearing Officer Amy Antoniolli, Deirdre K. Hirner of the Illinois Environmental Regulatory Group, and public-spirited citizens Bernadette Dinschel and Ann Muniz for their substantial efforts in working to refine the Agency's proposal through the hearing process.

II. AGENCY COMMENTS

The Agency urges the Board to adopt for second notice the Agency's proposal as amended by the first and second errata sheets. The proposal fully satisfies the rulemaking directive at Section 25d-7(a) of the Act. 415 ILCS 5/25d-7(a). Subpart B sets forth minimum requirements for the performance of potable water well surveys and the documentation of the results of those surveys to the Agency. The use of the Subpart B procedures is required whenever Board rules require the performance of a response action to address a release of

contaminants and a well survey is expressly or implicitly required as a part of that response action. In the pre-filed testimony of Scott Phillips, the Agency listed fourteen Parts of Title 35 of the Illinois Administrative Code that will be affected directly by the Subpart B requirements and four additional Parts that will be affected indirectly through at least one of the fourteen listed Parts or that already have equivalent procedures. Pre-Filed Testimony of Scott O. Phillips, Exh. 5 at 3-5. The Agency does not recommend listing the affected Parts in the Subpart B applicability section. The Agency's generic applicability language at Section 1505.205 is sufficiently broad to incorporate all of the listed Parts without acting as a limitation when rules requiring response actions are adopted in the future. However, the Agency does intend to include cross-references to Part 1505 well survey procedures whenever the listed Parts are opened for amendments in the future or new Parts with response action requirements are proposed.

Subpart C also satisfies the statutory directive of Section 25d-7(a) of the Act to adopt rules for community relations activities. The proposal establishes minimum requirements for community relations plans that are developed and implemented in lieu of Agency notices required by Section 25d-3 of the Act. For those who accept an Agency offer to provide the notice in place of the Agency, there are two levels of community relations plans depending on the extent of offsite effects from the contamination. In general, this reflects the Agency's view that contamination incidents affecting larger numbers of off-site properties or wells require more intensive community relations activities. At either level, the plans must be reviewed and approved by the Agency prior to implementation. Contact lists for distribution of information must be developed along with the statutory notice documents, supplemental fact sheets, and other community outreach activities. Minimum requirements for the contact lists are specified in the

proposal. Both the notices and the fact sheets will provide the names of representatives of the authorized party and the Agency whom persons on the contact lists can reach for additional information. Community relations plans, including contact lists and fact sheets, must be updated to account for changes in circumstances. Web site document repositories are mandatory for incidents affecting more than five offsite properties or potable water wells, and, in some cases, physical document repositories also will be required. Taken together, all these components provide the basis and means by which the community dialogue envisioned in Section 25d-7(a) can develop and sustain itself throughout the course of any response actions.

Judging by the Agency's outreach efforts and the response at hearing, only one issue of significant controversy has emerged. That is the issue of whether the contact list provisions should require without exception the mandatory identification and notification of occupants of offsite properties affected or threatened by soil or groundwater contamination.[2] The proposal currently requires the identification and notification of such occupants "to the extent reasonably practicable." *See* Sections 1505.310(b)(2), 1505.315(b)(2)(D), 1505.Appendix A.

Ms. Dinschel and Ms. Muniz, both having experienced the contamination of their private wells by groundwater contamination migrating from nearby sites, argued strongly for an absolute identification and notification requirement for occupants. They noted that, while owners of affected properties should be notified, occupants of such properties are the ones directly at risk. It would be unconscionable not to notify occupants, and owners, for a variety of reasons, cannot always be counted on to provide that information to their tenants. Pre-Filed Testimony of

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[2] The absence of comment in this document on any other matters or issues raised at hearing should not be construed as acquiescence or agreement by the Agency for positions or revisions not otherwise expressly endorsed.

Bernadette Dinschel, Exh. A at 1-2, Tr. 1 at 96-102[3]; Pre-Filed Testimony of Ann Muniz, Exh. B at 6-8, Tr. 2 at 33-36. Ms. Dinschel and Ms. Muniz further stated that the qualifying language, "to the extent reasonably practicable," creates a loophole for "perceived inconvenience" or willful evasion of the requirement, and both testified to personal experiences that have left them justifiably suspicious of responsible parties and government agencies. Pre-Filed Testimony of Bernadette Dinschel, Exh. A at 2; Testimony of Ann Muniz, Tr. 2 at 36.

On the other hand, Ms. Hirner of the Illinois Environmental Regulatory Group stated that the statutory provisions require only the identification and notification of owners of affected properties. Pre-Filed Testimony of Deirdre K. Hirner, Exh. 4 at 4-5; Tr. 1 at 115-17. Ms. Hirner agreed in principle that occupants of affected properties should be notified but pointed out the difficulties in practice of doing so. She stated her organization's concern that an absolute requirement exposes the regulated community to enforcement actions even if the authorized party agrees that all occupants should be notified and has made good faith efforts to do so, only to have a few occupants fall through the cracks. Testimony of Deirdre K. Hirner, Tr. 1 at 115-17, Tr. 2 at 44-45.

Insofar as the Agency's statutory obligation to provide notice, Ms. Hirner is correct that the obligation extends only to the owners of properties affected or threatened by soil or groundwater contamination. 415 ILCS 5/25d-3(a), (b). However, when responsible parties are authorized to provide the notice in lieu of the Agency, it must be done in the broader context of

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[3] The transcript of the March 28, 2006, hearing is cited as "Tr. 1 at ___"; the transcript of the May 23, 2006, hearing is cited as "Tr. 2 at ___."

implementing a community relations plan. 415 ILCS 5/25d-3(c). The community relations concept includes more than affected property owners and more than simple notice. Section 25d-7(a) of the Act indicates that the community relations activities adopted by the Board must foster and maintain a dialogue with the community. The Agency's position is that the dialogue with the broader community must include first and foremost the occupants of affected properties, those who may be directly at risk from migrating contamination. Rather than being inconsistent with the statutory requirements for notices provided in lieu of the Agency, notification of occupants is implicit in the statutory requirements for community relations activities. That is why the Agency has expressly included occupants of affected properties among the parties who must be identified for the contact lists.

The Agency's original proposal filed with the Board on January 20, 2006, did contain an absolute notification requirement for occupants. However, in its Errata Sheet No. 1, filed with the Board on March 14, 2006, the Agency revised its proposal by adding the language "to the extent reasonably practicable." The concept came from comments received during Agency outreach activities, but the decision to propose the change was based on the Agency's own experience with identifying and notifying occupants. When conducting its community relations activities, the Agency makes every effort to contact occupants, often using a number of different tactics to do so. Depending on the scope and location of the contamination and factors such as population density and transience, it can be difficult, especially over the course of a remediation that could take months or years. *See* Pre-Filed Testimony of Kurt D. Neibergall, Exh. 3 at 8-10; Testimony of Kurt Neibergall and Testimony of Carol Fuller, Tr. 1 at 41-48. While the Agency has gone to great lengths to identify and notify occupants and has reason to believe its efforts

have been very successful, it could not testify that each and every occupant of every affected property that has been the subject of its efforts has received the information being distributed. Thus, the Agency workgroup concluded that the addition of the qualifying language is appropriate.

Nonetheless, there are several approaches that the Agency has used to identify occupants, and all of them would be considered "reasonably practicable" by the Agency. Identifying occupants starts with identifying addresses – locations of affected properties where occupants might be found – and then identifying the actual occupants, if any. In no particular order, approaches used individually or in concert by the Agency to gather relevant information include, but are not limited to: 1) Reviews of county property records, 2) reviews of local street guides, 3) use of local library resources, 4) use of commercial mailing lists, 5) interviews with local public water supply operators and municipal officials, 6) windshield or walking surveys of affected neighborhoods, and 7) door-to-door canvassing including interviews and distribution of door hangers. All of these methods have their limitations. For example, local street guides and commercial mailing lists are not continuously updated and therefore may be outdated. Letters relying on these sources of information may have to be addressed by name to the last known occupant "or current resident" so that delivery will be completed even if there has been a change of occupants. However, if enough of these methods are used, a high degree of success can be achieved.

Whether or not the contested language becomes a loophole for abuse largely will depend on the Agency's administration of the program, but several checks are built into the proposal. The "occupant provisions" also contain a requirement that the authorized party include a

description of the methods used to identify the occupants for the contact list. Sections 1505.310(b)(2), 1505.315(b)(2)(D). Contact lists are subject to review and approval by the Agency. Sections 1505.325 and 1505.330. The Agency has the authority to reject insufficient efforts and to require additional or alternative methods such as those described above by using denials and approvals with conditions. Section 1505.330(c). Problems with the implementation of community relations plans can be identified through the Agency's compliance monitoring efforts and by complaints from the public and local officials. If disagreements on the matter between the Agency and the authorized party reach the appeal stage, the Board will have its own opportunity to define what is "reasonably practicable." For these reasons, the Agency remains committed to its proposed language for the inclusion of occupants on the contact lists.

III. CONCLUSION

As stated above, the Agency's proposal is entirely consistent with the statutory requirements under Title VI-D. It establishes minimum standards and requirements for performing potable water supply well surveys as part of response actions required by Board rules and for the documentation necessary for reporting the results of those surveys to the Agency. These procedures should help to ensure that potable water supply wells that could be affected or threatened by groundwater contamination are accurately identified and located. The proposal also creates a framework in which authorized parties implementing community relations plans can provide notices to interested and affected persons in place of the notices required to be given by the Agency under Section 25d-3(a) of the Act. The framework ensures Agency involvement in planning the community relations activities and Agency oversight of the implementation of the community relations activities. The Agency urges the Board to adopt the Agency's proposal as

amended by Errata Sheets No. 1 and 2.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Mark Wight
Mark Wight
Assistant Counsel

Date: June 23, 2006

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THIS DOCUMENT SUBMITTED ON RECYCLED PAPER

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Agency's Post-Hearing Comments upon the persons to whom they are directed, by placing a copy of each in an envelope addressed to:

Dorothy Gunn, Clerk
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(First Class Mail)

Bill Richardson
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(Attached Service List – **First Class Mail**)

and mailing them from Springfield, Illinois on June 23, 2006, with sufficient postage affixed as indicated above.

Meredith Kelly

SUBSCRIBED AND SWORN TO BEFORE ME

This 23 day of June, 2006.

Brenda Boehner
Notary Public

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-3-2009

THIS FILING SUBMITTED ON RECYCLED PAPER

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