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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:)
)
BROWNFIELD SITE RESTORATION)
PROGRAM) No. R03-20
)
(AMENDMENTS TO 35 ILL. ADM.)
CODE 740))

TRANSCRIPT FROM THE PROCEEDINGS

taken before the HEARING OFFICER AMY C. ANTONIOLLI
by LORI ANN ASASKAS, CSR, RPR, a notary public
within and for the County of Cook and State of
Illinois, at Room 2-025 of the James R. Thompson
Center, 100 West Randolph Street, Chicago, Illinois,
on the 14th day of May, A.D., at 1:30 p.m.

1 A P P E A R A N C E S :

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ILLINOIS POLLUTION CONTROL BOARD
James R. Thompson Center
100 West Randolph Street - Suite 11-500
Chicago, Illinois 60601
(312) 814-3665
MS. AMY C. ANTONIOLLI, HEARING OFFICER

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ILLINOIS POLLUTION CONTROL BOARD MEMBERS

8

Mr. Nicholas Melas
Mr. Michael Tristano
Dr. G. Tanner Girard

10

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

12

Ms. Kimberly A. Geving

13

14

ALSO PRESENT

15

Mr. Anand Rao, IPCB, Technical Unit
Mr. William F. Murphy, IPCB, Attorney
Ms. Lisa Liu, IPCB, Environmental Scientist
Mr. Chris Perzan, Attorney General's Office

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I N D E X

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E X H I B I T S

Marked for
Identification

IEPA Exhibit No. 1..... 4

1 (Document marked as
2 IEPA Exhibit No. 1
3 for identification, 5/14/03.)

4 HEARING OFFICER ANTONIOLLI: Good
5 afternoon. Welcome to this hearing being held
6 by the Illinois Pollution Control Board on this
7 rainy afternoon.

8 My name is Amy Antonioli and
9 I have been appointed by the Board to serve as
10 hearing officer in this proceeding entitled,
11 In The Matter Of: Brownfield Site Restoration
12 Program, Amendments to 35 Illinois Administrative
13 Code, Part 740, Site Remediation Program. This
14 matter is docketed as R03-20.

15 Present today on behalf of the
16 Illinois Pollution Control Board and seated on my
17 right is Member Nicholas Melas. He is the lead
18 board member assigned to this matter. Seated
19 to the right of Member Melas is Member Michael
20 Tristano, who is also assigned to this matter.
21 Also present from the Board today is Dr. G. Tanner
22 Girard and Anand Rao from the technical unit and
23 Bill Murphy.

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1 is two-fold. First, this is a rulemaking that
2 is subject to Section 27(b) of the Environmental
3 Protection Act. Section 27(b) of the Act requires
4 the Board to request the Department of the Commerce
5 and Community Affairs, or DCEO, to conduct an
6 economic impact study on certain proposed rules
7 prior to the adoption of those rules.

8 If DCEO chooses to conduct an
9 impact study, DCEO has 30 to 45 days after such
10 request to produce a study of the economic impact
11 of the proposed rules. The Board must then make
12 the impact study or the explanation for not
13 conducting the study available to the public at
14 least 20 days before public hearing on the economic
15 impact of the proposed rules.

16 As required by 27(b), the Board
17 has requested by a letter dated April 3, 2003, that
18 DCEO conduct an economic study of this rulemaking.
19 An April 17, 2003, letter from DCEO formally claims
20 that DCEO will not perform economic impact studies
21 for current or future proposed rulemakings due to
22 the lack of staff and financial resources.

23
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(Whereupon, Lisa Liu
entered the proceedings.)

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1 HEARING OFFICER ANTONIOLLI: For the
2 record, I would just like to note that Lisa Liu from
3 the Board's technical unit is present today.

4 Accordingly, the Board relies
5 on the April 17, 2003, letter as DCEO's explanation
6 for not producing an economic impact study. We
7 have DCEO's April 17, 2003, letter available
8 at this side of the room today.

9 The second purpose of this
10 hearing is to allow any members of the public
11 who wish to testify the opportunity to do so
12 and also to ask questions of the proponent in
13 this matter, the Environmental Protection Agency.
14 However, there is no prefiled testimony today
15 for the hearing.

16 At this time I would ask if
17 Member Melas wishes to comment.

18 BOARD MEMBER MELAS: Other than to
19 welcome everybody, I think I have said enough at
20 the previous hearing.

21 HEARING OFFICER ANTONIOLLI: Okay.

22 Today is the second of two hearings scheduled so
23 far in this matter. The first hearing was held
24 on April 30, 2003, in Springfield.

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1 Before we turn to the Agency's
2 proposal, I would like to ask if anyone objects
3 to, as I already explained, DCEO's explanation
4 for not submitting the environmental impact
5 statement?

6 Seeing no objections, I will
7 turn to the Agency and ask Ms. Geving if she
8 would like to present today on behalf of the
9 Agency a brief summary of the Agency's proposal.

10 MS. GEVING: Good afternoon. I'm
11 Kimberly Geving. I am assistant counsel for the
12 Illinois Environmental Protection Agency, Bureau
13 of Land.

14 This afternoon, Mr. King has
15 two items that he would like to address. He is
16 going to provide a brief summary of our proposal,
17 but first he is going to go through and summarize
18 errata sheet number two, which was filed with the
19 Board subsequent to the previous hearing.

20 At this time I would like to go

21 ahead and have Mr. King sworn and lay a foundation
22 for errata sheet number two.

23 HEARING OFFICER ANTONIOLLI: Sure.

24 Would you go ahead and swear in Mr. King?

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1 THE COURT REPORTER: Would you raise
2 your right hand, please?

3 MR. KING: Yes.

4 THE COURT REPORTER: Do you swear the
5 testimony that you are about to give will be the
6 truth, the whole truth, and nothing but the truth?

7 MR. KING: Yes.

8 (Witness sworn.)

9 WHEREUPON:

10 G A R Y K I N G

11 called as a witness herein, having been first duly
12 sworn, deposeth and saith as follows:

13 D I R E C T E X A M I N A T I O N

14 by Ms. Geving

15 Q. Mr. King, I'm going to show you
16 what has been marked as Exhibit No. 1 by the court
17 reporter and if you could identify that for the
18 record, please.

19 (Document tendered)

20 to the witness.)

21 BY THE WITNESS:

22 A. Yes. This is a document entitled
23 errata sheet number two and this document was
24 filed by the Agency with the Board in this

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1 proceeding.

2 BY MS. GEVING:

3 Q. Is that a true and accurate copy
4 of the item that was filed with the Board?

5 A. Yes, it appears to be so.

6 MS. GEVIN: At this time I
7 would make a motion for errata sheet
8 number two to be entered into the record.

9 HEARING OFFICER ANTONIOLLI: Are
10 there any objections to errata sheet number
11 two being entered as Exhibit No. 1?

12 Seeing none, I would admit
13 this as Exhibit No. 1.

14 (Exhibit No. 1 has been
15 admitted into the record
16 without objection.)

17 BY MS. GEVING:

18 Q. Mr. King, if you would like to,

19 proceed with your summary.

20 A. Yes. I would like to cover two
21 things on this rainy afternoon. First, this is
22 just a brief summary of errata sheet number two
23 and then secondly, I would like to just give a
24 summary of this rulemaking for those who were not

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1 in attendance at the -- at the April hearing.
2 It's going to be basically repetitive of what I
3 have to say on that point.

4 Errata sheet number two is the
5 result of questions that were posed by the -- by
6 the Board at the hearing on April 30th and as a
7 result of those questions, we concluded that there
8 should be some -- some changes to the Agency's
9 proposal. They are not ones that change the nature
10 of the proposal, but kind of -- kind of deal with
11 some -- the change from DCEO to the Department of
12 Commerce and Economic Opportunity and then a couple
13 of other clarification items. So that's basically
14 the summary on errata sheet number two.

15 Just to have a -- kind of go
16 briefly through why this proposal came -- came
17 forward to the Board, there was a legislation

18 that was passed that became effective in July
19 of 2002 and that was called the Brownfield Site
20 Restoration Program. That legislation was passed
21 in the hope that it would be an effective financial
22 incentive for the cleanup and reuse of Brownfield
23 sites in lieu of the environmental remediation
24 tax credit that sunset on December 31, 2001.

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1 That tax credit provision was
2 not used very often. I think over a period of
3 five years, it was used, I think, maybe four, maybe
4 five times that we had requests for application of
5 that credit. So there was some hope that a
6 different financial incentive would work a little
7 more effectively. The nub of this legislation and
8 the nub of the rules that we propose is that
9 basically you would have a reimbursement process for
10 persons who had spent funds cleaning up Brownfield
11 sites.

12 We took a lot of the language
13 that we put in the rule from the regulations that
14 were adopted by the Board relative to the tax
15 credits because it did have a lot of procedural
16 carry-overs and we used some of the procedural

17 principals that we used for the tank program.
18 So it was really a putting together of language
19 similar to what the Board has used in other
20 similar rules.

21 One of the things that, you
22 know, really nobody could have -- well, I suppose
23 somebody could have predicted that the state was
24 going to enter this very bad economic times that

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1 we have entered, but, you know, certainly the
2 proponents of the bill were not anticipating that
3 we were going to have the kind of deficits that
4 we have run into.

5 So the notion that there would
6 be extra money available to reimburse private
7 parties from state funds relative to the cleanup
8 of Brownfield sites is really, you know, it's
9 going to be -- we have allocated some money within
10 the IEPA's budget to have some measure of
11 reimbursement, but it's not going to go very
12 far.

13 So part of the reason why I
14 don't think there has been a whole lot of interest
15 in this proceeding from a public standpoint is

16 the fact that I just don't think this is going
17 to be used too much, certainly over the next few
18 years. Nonetheless, we are required by the
19 statute to come forward and propose a set of
20 rules and that's what we have done. That's kind
21 of my summary.

22 HEARING OFFICER ANTONIOLLI: Okay.

23 Thank you, Mr. King.

24 We can turn now to questions. Do

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1 any Board members or any members of the technical
2 unit that are here or other staff in attendance have
3 any questions or care to make any comments?

4 Seeing no questions at this time,
5 if the board members don't object, we will take a
6 10-minute recess to see if anyone shows and are
7 there any objections to taking a recess?

8 MR. PERZAN: Yes, please.

9 HEARING OFFICER ANTONIOLLI: Oh, go
10 ahead.

11 MR. PERZAN: My name is Chris Perzan,
12 P-E-R-Z-A-N. I'm with the attorney general's
13 office. I have a couple of very quick questions --
14 minor questions on the language.

15 HEARING OFFICER ANTONIOLLI: Please,
16 go ahead.

17 THE COURT REPORTER: Could you have
18 Mr. Perzan step forward so his back is not to me. I
19 can't hear him back there.

20 BOARD MEMBER MELAS: Could you step
21 forward so the court reporter can hear you?

22 THE COURT REPORTER: Thank you.

23

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1 C R O S S - E X A M I N A T I O N

2 by Mr. Perzan

3 Q. I was wondering in 740.815 if it would
4 be helpful to have a provision where the Agency
5 could request information that is possibly missing
6 or deficient from an application and give an RA time
7 to submit additional information during the review?
8 These are somewhat in the nature of comments as
9 well.

10 A. Was there a specific section in the
11 report? You are looking at .815 or .915 as we
12 modified it in the proposal, but are you looking
13 at a specific subsection?

14 Q. No. Actually, what I was thinking
15 is whether or not it would be helpful to have an
16 additional subsection that would allow the Agency
17 to request additional information.

18 A. During the course of the review?

19 Q. Yes.

20 A. Well, I don't think that really would
21 be necessary. I mean, I don't know -- we do that --
22 the normal process is we complete our review, send
23 out a request for information as to the deficiencies
24 and then that retriggers the clock as far as any new

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1 submittal. If we somehow set up an interim
2 provision within the 60 days of the rules, then I
3 don't know what that does as far as restarting the
4 clock. I'm just not sure. We have informally --
5 you know, we have -- if it's something that's a
6 minor piece of information that's not in the
7 documentation that was submitted to us, we have,
8 you know, typically called people and asked them
9 to submit it and tried to do that without restarting
10 the clock.

11 Q. Another question was is there --

12 I don't think there is in the regs as they are

13 proposed, but is there a mechanism by which funds
14 may be withheld or a request denied for people who
15 are already delinquent in some debt to the state
16 and that comes up in the context of the procurement
17 code as a provision that does that. The cite is
18 30 IL CS 500/50-11(a).

19 A. As I understand it, the normal
20 procedure -- the way that's picked up is if we're
21 going to approve of payments, the payment is not
22 issued by the Agency. The payment is issued by
23 the comptroller's office as, you know, a typical
24 state of Illinois check. If that -- if somebody

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1 has on file a withholding requirement, there is
2 a procedure by which people can have payments
3 withheld from other agencies. If that procedure
4 has been followed, I assume the comptroller would
5 just deduct the delinquent amount from the check
6 being issued.

7 Q. That's the offset system?

8 A. Right.

9 Q. Which does exist?

10 A. Right.

11 Q. But it has to actually -- there

12 actually has to be a question and the procurement
13 code has a similar provision to what I mentioned
14 in addition to the offset and I'm just thinking of
15 it as an additional safeguard or just throwing it
16 out for general consideration. Maybe it wouldn't
17 be a bad thing to look at that provision. It's just
18 a suggestion.

19 A. Yes. I think it would have -- I
20 mean, we do -- the comptroller offset provision
21 is used. I just don't know about the advisability
22 of setting up an additional procedural mechanism.
23 I think the comptroller offset provision has worked
24 okay in the past.

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1 Q. I think I have one other quick, minor
2 comment. 748.930, which sets out ineligible costs,
3 it has ineligible costs incurred in two places,
4 in (f) and (g), costs incurred by negligence of any
5 contractor or subcontractor or other person and
6 I was just -- perhaps this is intended to be
7 included, but I would suggest possibly including
8 gross negligence or willful misconduct in there.
9 In other places in the regulations -- in other
10 state regulations, it tends to have all three.

11 A. I don't have -- you know, most of
12 these, we've drawn from the underground storage
13 tank rules and one of the things I would not
14 want to do is get out of sync with those. We
15 want to kind of -- because the people who are
16 going to be administering the provisions as
17 far as making eligibility determinations
18 under these rules are the same people making
19 the tank rules.

20 I think we should be consistent
21 across the board in making those determinations.
22 I think it's something that we would need to think
23 about, you know, doing it in a way that's consistent
24 across all of these rules.

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1 Q. And actually, just to follow-up,
2 when I was suggesting that first thing for RA's
3 that may be delinquent in debt, I was sort of
4 thinking it might be one of the things that
5 could be included in ineligible cost that equals
6 a delinquent amount would be ineligible for
7 reimbursement, but that was where I was thinking if
8 it went anywhere, it could be there. That's all I
9 have.

10 A. Okay.

11 HEARING OFFICER ANTONIOLLI: Thank
12 you for your comments and your questions,
13 Mr. Perzan.

14 MR. TRISTANO: Could you repeat those
15 three things again that you said are typically used?
16 I didn't hear you.

17 MR. PERZAN: Do you mean in the
18 contexts of negligence?

19 MR. TRISTANO: Yes.

20 MR. PERZAN: Well, negligence,
21 gross negligence and willful misconduct. If you
22 have negligence, you could probably assume that
23 gross and willful misconduct, which are worse,
24 are included, but I think it's probably safest

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1 to make it clear that all three would be types
2 of conduct that would render costs ineligible.

3 BY THE WITNESS:

4 A. In the context that we have the rules
5 here, you know, it would be an issue of gross
6 negligence or willful misconduct on the part of the
7 contractor or subcontractor or somebody practicing
8 professional engineering. In that situation,

9 probably it would rise to the level just about of
10 fraud and then we take it and look at issues of
11 licensure if you are talking about a professional
12 engineer.

13 Most of the -- most of the
14 occurrences that we would see would be relative
15 to a negligence situation where some -- some act
16 of misperformance on the field that occurs. I
17 mean, one typically we find is, you know, there
18 is a well at a site and some guy takes a backhoe
19 and runs over the well. Well, we're not going
20 to pay for the repair of that well if somebody
21 runs it over. That would be an issue of some
22 negligence.

23 BY MR. PERZAN:

24 Q. Well, there have been and there

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1 could be or something that I would think of would
2 be deliberate falsification of some portion of
3 test results or whatever. So it's probably very
4 rare.

5 A. Right.

6 HEARING OFFICER ANTONIOLLI: Are there
7 any further questions?

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1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF C O O K)

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4 I, LORI ANN ASAUSKAS, a notary public
5 within and for the County of Cook and State of

6 Illinois, do hereby certify that heretofore,
7 to-wit, on the 14th day of May, A.D., 2003,
8 personally appeared before me at Room 2-025 of
9 the James R. Thompson Center, in the City of
10 Chicago, County of Cook and State of Illinois,
11 a certain cause now pending and undetermined
12 before the Illinois Pollution Control Board in
13 the above-entitled cause.

14 I further certify that any said
15 witnesses were by me first duly sworn to testify
16 the truth, the whole truth and nothing but the truth
17 in the cause aforesaid; that the testimony then
18 given by them were by me reduced to writing by means
19 of shorthand in the presence of said witness and
20 afterwards transcribed upon a computer, and the
21 foregoing is a true and correct transcript of the
22 testimony so given by them as aforesaid.

23 I further certify that the taking of
24 this hearing was pursuant to notice, and that there

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1 were present at the taking of the hearing of the
2 aforementioned parties.

3 I further certify that I am not
4 counsel for nor in any way related to any of the

5 parties to this hearing, nor am I in any way
6 interested in the outcome thereof.

7 In testimony whereof I have hereunto
8 set my hand and affixed my notarial seal this
9 19th day of May, A.D., 2003.

10

11

LORI ANN ASAUSKAS, CSR, RPR.
Notary Public, Cook County, IL
Illinois License No. 084-002890

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