BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO REGULATION	)	
OF PETROLEUM LEAKING UNDERGROUND	)	R01-26
STORAGE TANKS	)	(Rulemaking-Land)
35 ILL. ADM. CODE 732	)	

P.C. #13

NOTICE OF FILING

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

Matthew J. Dunn, Chief
Environmental Bureau
Office of the Attorney General
188 W. Randolph, 20th Floor
Chicago, Illinois 60601

Robert Lawley, Chief Legal Counsel
Dept. of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787

Joel Sterstein, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

See Attached Service List

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the Comments with Attachment of the ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon you.

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

By: Judith S. Dyer

Judith S. Dyer
Assistant Counsel
Division of Legal Counsel

Dated: January 4, 2002

Illinois Environmental Protection Agency
1021 N. Grand Ave. E.
P.O. Box 19276
Springfield, Illinois 62794-9276
(217/782-5544)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
Amendments to Regulation of	)	R01-26
Petroleum Leaking	)	(Rulemaking- Land)
Underground Storage Tanks:	)	
35 Ill. Adm. Code 732	)	

Comments of Illinois Environmental Protection Agency

Now comes the Illinois Environmental Protection Agency ("Agency"), by its attorney, and files the following comments in the above-referenced rulemaking:

1. Effective Date for Laboratory Certification Requirement - Section 732.106

The Agency proposes revising the effective date for the requirement to use an accredited laboratory for quantitative analyses of samples to January 1, 2003, rather than July 1, 2003, in order to be consistent with the effective date set forth in the Board's first notice order in the rulemaking amending the Site Remediation Program (In the Matter of: Site Remediation Program (Amendments to 35 Ill. Adm. Code 740) R01-27). The Agency's laboratory personnel foresee no problem completing certifications by the January 1, 2003, date if applications are submitted in a timely manner. The Agency sees no need to have separate compliance dates for each program.

2. Early Action Trigger Date for Purposes of Reimbursement - Section 732.202(g)

The Agency proposed to the Board that the language of Section 732.202(g) be amended to provide as follows:

> For purposes of reimbursement, the activities set forth in subsection (f) of this Section shall be performed within 45 days after ~~confirmation~~ initial notification to IEMA of a release, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days. The owner or operator shall notify the Agency in writing within 45 days of ~~confirmation~~ initial notification to IEMA of a release of such circumstances. Costs incurred beyond 45 days shall be eligible if the Agency determines that they are consistent with early action.

The Board declined to adopt the Agency's proposed change for the trigger date for reimbursement of costs for early action activities. In so declining, the Board stated,

> [I]t is not entirely clear from the Agency's proposal which of several required notifications to IEMA should be the trigger date. If the proposed

trigger date is the notification to IEMA required by Subsection 732.202(a) of the Board's regulations, then the Board finds that this proposed change is unnecessary. According to Subsection 732.202(a), an owner or operator of a UST must report a release of petroleum to the IEMA within 24 hours of confirmation of that release. The Agency's proposed language for Subsection 732.202(g) would simply give the owner or operator a maximum of another 24 hours to perform reimbursement activities during the Early Action period.

The Board notes that the other requirements in Section 732.202 are all tied to the confirmation of a release as opposed to notification of the IEMA. The Board chooses to keep the requirements in Section 732.202 consistent.

The Board also notes that there are other notifications to the IEMA during the UST remediation process which are required by the Office of the State Fire Marshal's ("OSFM") regulations. The Board is not sure if the Agency's proposed change in the trigger date might have referred to one of the OSFM-required notifications. For example, the owner or operator of

the UST is required to notify the IEMA of spills or overfills from an UST. And, the OSFM has a requirement similar to the Board's regarding notification to the IEMA after confirmation of a release from a UST.

Finally, the Board also notes that the issue of the trigger for the reimbursement date is somewhat controversial. See e.g. Broderick Teaming Company v. IEPA PCB 00-187 (December 7, 2000 and April 5, 2001). The Board invites the Agency to submit comments or an amended proposal during the first notice period to address these matters.

Board Order dated November 1, 2001, at 14.

In response to the Board's statements, the Agency would like to elaborate as to the merit in establishing the initial notification to IEMA as the trigger date for reimbursement of costs for early action activities, as proposed by the Agency. The Agency also proposes a modification to address concerns raised by the Board in its first notice order, in the Broderick case cited above and in the Board's most recent order in Ozinga Transportation Services v. Illinois Environmental Protection Agency, PCB 00-188 (December 20, 2001).

As the Board states, requirements to notify IEMA of a release are provided in several places. The Environmental Protection Act requires, as a prerequisite for access to the Underground Storage Tank Fund, that "[t]he owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment." 415 ILCS 5/57.9(a)(5) The Office of the State Fire Marshal ("OSFM") regulations require notification to IEMA of a suspected release (41 Ill. Adm. Code 170.560), a spill or overfill (41 Ill. Adm. Code 170.590) and a confirmation of a release (41 Ill. Adm. Code 170.600). In addition, the LUST regulations include a requirement to notify IEMA of a release within 24 hours of confirmation of the release (35 Ill. Adm. Code 732.202(a)).

In the face of this confusing multitude of requirements to notify IEMA, it may seem difficult to understand why the Agency proposed that the trigger date for reimbursement of early action activities be tied to notification to IEMA rather than release confirmation.

The Agency did not have in mind any particular requirement to notify IEMA in proposing use of the date of initial notification to IEMA as a trigger for reimbursement. Nor was there any intent to give the owner or operator extra time to perform reimbursable early action activities. Rather, the Agency was approaching this issue from an administrative angle, intending to use the date of the first notification to IEMA as a date certain, without regard to which technical reporting requirement such notification satisfies. Under this approach, whichever call to IEMA constitutes the initial notification triggers the early action reimbursement period.

Some background on the Agency's experience in administering the requirement to reimburse owners and operators for costs incurred in conducting early action is necessary to understand why the Agency endorses this approach. In practice, the main difficulty with tying the commencement of reimbursable early action to the confirmation of a release is that there is no mechanism for identifying the date of confirmation of a release. In contrast, the date of initial notification to IEMA is readily known.

The Agency becomes aware of releases through the receipt of IEMA incident reports. The date of notification to IEMA is the only reporting date the Agency receives. The OSFM does not track the confirmation of releases or provide such information to the Agency. The date of notification to IEMA is used, in effect, as the presumptive or constructive date of confirmation of the release for purposes of compliance with applicable laws and regulations regarding reimbursement and reporting. Changing the trigger for early action reimbursement to the date of initial notification to IEMA would comport with Agency practice.

Although it enables the Agency to establish a date certain for reimbursement, this administrative approach is admittedly technically flawed in that sometimes the initial notification to IEMA is of a suspected rather than confirmed release under the OSFM regulations. To address the flaw, the Agency proposes a modification to its initial proposal, as explained below.

The OSFM regulations require notification to IEMA upon confirmation of a suspected release. 41 Ill. Adm. Code 170.600 Seven days are allowed, pursuant to 41 Ill. Adm. Code 170.580, to complete confirmation steps. In practice,

however, an owner or operator might not comply with the OSFM requirement to confirm within 7 days of notification to IEMA of a suspected release. In fact, owners or operators might wait several months or even years to "confirm" the release. The Agency is then stuck with whatever date confirmation may have taken place as the commencement date of reimbursable early action. Owners and operators are in this manner allowed to obtain reimbursement for costs incurred long after the release occurs as early action costs, thereby benefiting from their violation of the OSFM regulations. This approach defeats the purpose of early action, which is to address emergency situations immediately and to prevent further releases.

The Board recognized this concern in its recent Ozinga decision, stating:

> Any extension of the confirmation date in this matter would frustrate the intention of early action. For example, with no limit on the time for confirmation, owners or operators could conceivably be reimbursed for confirmation and subsequent early action activities two or three years after the release is first suspected. The result is clearly not what is intended by early action.

Ozinga Transportation Services v. Illinois Environmental Protection Agency, PCB 00-188 (December 20, 2001) at 10.

In addition, as already mentioned, the Agency has no means to determine the date confirmation actually takes place. The owner or operator may or may not notify IEMA of confirmation; even if IEMA is timely notified, the incident report the Agency receives does not reflect whether the notification is for a confirmation of a previously-reported suspected release. Neither IEMA nor OSFM conveys this information to the Agency.

The Agency requests that its proposed language be revised to incorporate the 7-day period allowed under OSFM regulations for confirmation of a suspected release. This change would in effect create a presumption that the initial notification to IEMA is of a suspected release, thereby ensuring that owners and operators who initially report a suspected release are not deprived of a portion of the 45-day period to complete early action activities for purposes of reimbursement.

The Agency recognizes that a side effect of this proposed modification will be to allow owners and operators who initially report a confirmed release an additional 7 days - a total of 52 rather than 45 days - to complete

early action activities for purposes of reimbursement. However, the additional 7 days would serve as an administrative convenience inuring to the benefit of owners and operators without frustrating the intent of the LUST program. The additional 7 days is a limited, uniform period of time. The LUST regulations already allow extensions of time to complete early action activities under special circumstances with written approval from the Agency (Section 732.202(g)). The Board recognized the merit in adding the 7 days for confirmation in the Ozinga decision Ozinga at 10-11. ("Ozinga was required to confirm the release within seven days of the reporting of the release to IEMA - May 29, 1998. Early action activities were required to be performed within 45 days of that date - July 13, 1998."). Furthermore, this modification would relieve the Agency of any need to monitor compliance with the OSFM regulations, a responsibility properly belonging to the OSFM.

For these reasons, the Agency urges the Board to adopt the language originally proposed by the Agency, with the modification described above, to read as follows:

> For purposes of reimbursement, the activities set forth in subsection (f) of this Section shall be

performed within 45 days after ~~confirmation~~ initial notification to IEMA of a release plus 7 days, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days. The owner or operator shall notify the Agency in writing of such circumstances within 45 days of ~~confirmation~~ initial notification to IEMA of a release plus 7 days ~~of such circumstances~~. Costs incurred beyond 45 days shall be eligible if the Agency determines that they are consistent with early action.

The Agency proposes use of the phrase "plus 7 days" rather than a change from "45 days" to "52 days" for two reasons. The first reason is to preserve the familiar 45 day timeframe for early action activities, consistent with the 45 day reporting requirement. The second reason is to reflect the rationale for making the change, which is to account for the 7-day period allowed under OSFM regulations for confirmation of a suspected release. However, the Agency would not object to a change from "45 days" to "52 days" in the alternative.

3. Response to Comment of the Illinois Department of Transportation

The Agency objects to the Comments of the Illinois Department of Transportation ("IDOT") filed with the Board on December 11, 2001. The "comments" are actually a new rulemaking proposal, not comments on any amendment the Board has published for adoption.

The purpose of the current comment period is to provide public notice of the regulations the Board intends to adopt and to allow the public to submit its comments on those regulations. IDOT's submission does not comment on any amendment the Board intends to adopt. It proposes an amendment to 35 Ill. Adm. Code 732.606(kk) that would make Highway Authority Agreements ("HAAs") settlement agreements for the purposes of indemnification from the LUST Fund. Although the Board proposes to amend Section 732.606(kk), the Board's amendment addresses the separate issue of reimbursing costs incurred for MTBE remediation. The Agency would be happy to discuss with IDOT any regulatory amendments that IDOT feels are necessary, as well as their possible inclusion in a future rulemaking proposal. However, neither the Board's procedural rules nor the Administrative Procedures Act allows IDOT to propose a new amendment at this point in the rulemaking process.

Amendments to the Board's regulations are properly initiated through the filing of a regulatory proposal. See 35 Ill. Adm. Code 102.200. A regulatory proposal must include, inter alia, a statement of the reasons supporting the proposal, a synopsis of testimony to be presented by the proponent and, because the proponent is not the Agency or the Department of Natural Resources, a petition signed by at least 200 persons. See 35 Ill. Adm. Code 102.202. IDOT's comments lack these items as well as others required by the Board's rules. Furthermore, the submission of a new proposed amendment at this time circumvents the established procedure for its proper review and analysis. The Board has not had an opportunity to receive testimony in support of or in opposition to the proposal, to hold public hearings on the proposal, or to receive post-hearing comments on the proposal. Even if the Board were to determine that testimony and public hearings are not necessary, public notice of the proposal has not been published in the Illinois Register and the public has not been provided an opportunity to comment on it as required under the Administrative Procedures Act. See 5 ILCS 100/5-40. IDOT should have offered its proposed amendment at one of the Board's hearings on the current rulemaking. Because

IDOT's proposal is improper at this time, it should not be accepted or adopted by the Board as part of the current rulemaking.

Assuming for the sake of argument that IDOT's proposal is procedurally proper, the Agency does not agree with the amendment IDOT asks the Board to adopt. Highway Authority Agreements ("HAA's") entered into between IDOT and an owner or operator are not settlement agreements for the purpose of indemnification from the LUST Fund. Indemnification is defined in Title XVI of the Act as:

> indemnification of an owner or operator for the amount of any judgment entered against the owner or operator in a court of law, for the amount of any final order or determination made against the owner or operator by an agency of State government or any subdivision thereof, or for the amount of any settlement entered into by the owner or operator, if the judgment, order, determination, or settlement arises out of bodily injury or property damage suffered as a result of a release of petroleum from an underground

storage tank owned or operated by the owner or operator.

415 ILCS 5/57.2.

In the context of the LUST Program, settlement agreements are agreements to settle a dispute in lieu of proceeding to a court judgment or a final administrative order or determination. Id. IDOT is not in the process of seeking a court judgment or a final administrative order or determination against an owner or operator when it enters into a HAA. Rather, as an alternative to having an owner or operator perform remedial activities in its right-of-way, IDOT is agreeing to prohibit certain uses of contaminated groundwater and limit access to contaminated soil below the right-of-way. Owners and operators likewise enter HAAs with IDOT as an alternative to conducting remedial action in IDOT's rights-of-way, not to settle a pending court or administrative action. Because HAAs are not settlement agreements for the purpose of indemnification from the LUST Fund, the Board should not adopt the amendment proposed by IDOT.

Even if HAAs were considered settlement agreements for the purpose of indemnification, the costs IDOT hopes to

have paid by the LUST Fund do not fall within the costs that are reimbursable as indemnification costs. As stated above, "indemnification" means indemnification for the amount of any judgment, order, determination or settlement agreement "if the judgment, order, determination, or settlement arises out of bodily injury or property damage." 415 ILCS 5/57.2. The payments owners and operators make under IDOT's HAAs are not damages for bodily injury or property damage. Rather, the payments "reimburse the Department for reasonable costs it has incurred in protecting human health and the environment, including, but not limited to, identifying, investigating, handling, storing and disposing of contaminated soil and groundwater." IDOT "Master Agreement, Tiered Approach to Corrective-Action Objectives Agreement" at par. 7 (copy attached). IDOT merely uses its HAA to make owners and operators pay its costs of protecting human health and the environment when its work involves contaminated soil or groundwater that it allowed to remain below its right-of-way. Because the costs owners and operators agree to pay to IDOT under its HAA are not damages for bodily injury or property damage, they are not indemnification costs that can be reimbursed from the LUST Fund.

In its comments IDOT expresses concern over owners and operators having to choose between (1) remediating a right-of-way and receiving reimbursement from the LUST Fund for eligible corrective action costs and (2) entering into a HAA -- and in the case of IDOT's HAA agreeing to pay IDOT's costs of protecting human health and the environment. IDOT claims this choice is the result of the Agency's position on indemnification. The Agency's position on indemnification, however, merely reflects the governing provisions of Title XVI. Any "Hobson's choice" owners and operators face is created by the terms of IDOT's own HAA. One of the many non-requisite provisions IDOT includes in its HAA is a requirement that owner and operators reimburse IDOT for costs it incurs when it runs across the contamination it allowed the owner or operator to leave under its right-of-way. Such payments may be advantageous for IDOT, but they are not required by the LUST or TACO regulations. Neither the LUST regulations nor the TACO regulations require IDOT to perform any work in the right-of-way after entering a HAA. When the Agency issues an NFR letter based upon a HAA it has determined that the HAA is adequately protective of human health and the environment. Any work in the right of way performed by IDOT is

undertaken upon IDOT's own initiative. There are many ways IDOT could alleviate its concern over the burden its HAAs place upon many owners and operators. For example, IDOT could carefully limit its work in rights-of-way where contamination is left in place or it could look to sources of funding other than payments from owners and operators. IDOT cannot, however, use the LUST Fund to recoup its expenses by characterizing them as costs for which an owner or operator may seek indemnification.

3. Exemptions from Recording for Federal Landholding Facilities - Sections 732.300(b)(1), 732.309(a), 732.312(i) and 732.409(b)

In order to carry through the exemption set forth in Section 732.703(d) from the duty to record a No Further Remediation Letter, applicable to sites located on Federally Owned Property for which the Federal Landholding Entity does not have the authority under federal law to record institutional controls on the chain of title, the Agency proposes a minor revision to Sections 732.300(b)(1), 732.309(a), 732.312(i) and 732.409(b), as follows:

Section 732.300(b)(1) - amend the first sentence of the Agency's proposed language as indicated by double-underlining:

With the exception of Federal Landholding Entities subject to Section 732.703(d), the owner or operator must sign and submit, with the corrective action completion report, a form prescribed and provided by the Agency addressing ownership of the site.

Section 732.309(a) - amend the following sentence of the Agency's proposed language as indicated by double-underlining:

For No Further Action sites, with the exception of Federal Landholding Entities subject to Section 732.703(d), the owner or operator must sign and submit, with the site classification report, a form prescribed and provided by the Agency addressing ownership of the site.

Section 732.312(i) - amend the following sentence of the Agency's proposed language as indicated by double-underlining:

With the exception of Federal Landholding Entities subject to Section 732.703(d), the owner or operator must sign and submit, with the site classification completion report, a form prescribed

and provided by the Agency addressing ownership of the site.

Section 732.409(b) - amend the following sentence of the Agency's proposed language as indicated by double-underlining:

With the exception of Federal Landholding Entities subject to Section 732.703(d), the owner or operator must sign and submit, with the corrective action completion report, a form prescribed and provided by the Agency addressing ownership of the site.

The Agency respectfully requests that the Board consider these comments in response to the Board's first notice proposal in this rulemaking.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Judith S. Dyer
Judith S. Dyer
Assistant Counsel

Kyle Rominger
Assistant Counsel

Date: January 4, 2002

THIS DOCUMENT SUBMITTED ON RECYCLED PAPER

IDOT - UST OWNER/OPERATOR
HIGHWAY AUTHORITY AGREEMENT
INITIAL INFORMATION FORM
FOR LEAKING UNDERGROUND
STORAGE TANK SITES

OVERVIEW

The purpose of this document is to notify the Illinois Department of Transportation (IDOT) of the extent of hydrocarbon impact within soil and/or groundwater and to provide the necessary initial information needed to enter into a highway authority agreement, pursuant to 35 IAC 742.1020.

Applicant Information

UST Owner:
Address:

Operator (if different):
Address:

Telephone No:
Fax No:
Name and Title of Person Authorized to Sign for Owner:
Name and Title of Person Authorized to Sign for Operator (if different):

Applicant's Attorney

Name:
Address:
Telephone No:

Environmental Consultant

Name:
Address:
Telephone No:

Property Adjacent to the Right-of-Way

Address:

Right-of-Way(s) requiring Highway Agreement

Highway Number(s):
Street Name (if any):

(Check one or both)
☐ Soil Impact in Right-of-Way
☐ Groundwater Impact in Right-of-Way

Regulatory Information

IEMA Incident Number:
IEPA Project Manager:

IEPA Status:

(Check one)
☐ Conditional Approval
☐ Approval Pending
☐ Other _____

ATTACHMENT

Sampling in the Right-of-Way

(Check one)
☐Right-of-Way sampled

☐Right-of-Way impractical to sample
(Sampling was done adjacent to Right-of-Way.)

Person(s) to be Notified in Agreement

Name:
Address:

Nature and extent of Hydrocarbon Impact Information – For Exhibit A
The Closure Report/Closure Response Letter will document the nature and extent of hydrocarbon impact in the right-of-way.

Soil: Refer to Figure 1 – Estimated Soil Impact in the Right-of-Way Map Using Tier One Residential Corrective Action Objectives

Groundwater: Refer to Figure 2 – Estimated Groundwater Impact in the Right-of-Way Map Using Tier One Corrective Action Objectives

Tables showing soil and groundwater sampling results in the right-of-way (if sampled) and/or adjacent to it need to be submitted and keyed to Figures 1 and 2. Samples above Tier 1 One Residential Corrective Action Objectives need to be highlighted.

Area Covered by Highway Authority Agreement – For Exhibit B

(Check one)
☐Refer to Figure 3 – Proposed Highway Authority Agreement Location Map
☐Location not proposed (The Department will draw map based on Figures 1 and 2.)

Attachments:
☐Figure 1 Estimated Soil Impact Map
☐Figure 2 Estimated Groundwater Impact Map
☐Figure 3 Proposed Highway Agreement Location Map
☐Tables Showing Sampling Results
☐Closure Report
☐Other

1-31-00

MASTER AGREEMENT

TIERED APPROACH TO CORRECTIVE-ACTION OBJECTIVES AGREEMENT

This Agreement is entered into this _____ day of _____, 2000 pursuant to 35 Ill. Admin. Code Section 742.1020 by and between (1) _____("Owner") and (2) _____("Operator") referred to herein as "Owner/Operator," and the State of Illinois Department of Transportation ("Department"), as follows:

1. This Agreement is not binding upon the Department until it is executed by the undersigned representative of the Department and prior to execution, this Agreement constitutes an offer by Owner/Operator. The duly authorized representatives of Owner/Operator have signed this Agreement and this Agreement is binding upon them, their successors and assigns.

2.a. Owner/Operator is pursuing a corrective action of a Site and of the right-of-way adjacent to the boundary of the Site located at (3)_____ (the "Site").

2.b. Attached as Exhibit A are site maps prepared by Owner/Operator which show the area of estimated contaminant impacted soil and/or groundwater at the time of this Agreement in the right-of-way above Tier 1 residential levels under 35 Ill. Admin. Code Part 742. Also shown in Exhibit A are tables prepared by Owner/Operator showing the concentration of contaminants of concern, hereafter "Contaminants," in soil and/or groundwater within the Site and which shows the applicable Tier 1 soil remediation objectives for residential property and Tier 1 objectives for groundwater of the Illinois Pollution Control Board ("IPCB") which are exceeded along the boundary of the Site adjacent to the Right-of-Way. The right-of-way, and only the right-of-way, as described in Exhibit B, hereinafter the "Right-of-Way," adjacent to the site is subject to this Agreement. As the drawings in the Exhibits are not surveyed plats, the boundary of the

Right-of-Way in the Exhibits may be an approximation of the actual right-of-way lines. The Right-of-Way is impractical to sample for Contaminants; however, the parties believe that the area of the Right-of-Way is adequate to encompass soil and/or groundwater within the Right-of-Way possibly impacted with Contaminants from a release at the Site.

2.c. The Illinois Emergency Management Agency has assigned incident number (4) _____ to this release at the Site.

2.d. Owner/Operator intends to request risk-based, site specific soil and/or groundwater remediation objectives from the Illinois Environmental Protection Agency ("IEPA") under 35 Ill. Admin. Code Part 742.

2.e. Under these rules, use of risk-based, site specific remediation objectives in the Right-of-Way may require the use of a Highway Authority Agreement as defined in 35 Ill. Admin. Code Section 742.1020.

3. The Department holds a fee simple interest or a dedication for highway purposes in the Right-of-Way, or the Right-of-Way is a platted street, and has jurisdiction of the Right-of-Way. For purposes of this Agreement, "jurisdiction" means that the Department exercises access control over the use of groundwater beneath the Right-of-Way and over access to the soil beneath the Right-of-Way because it requires a permit for that access.

4.a. Under 35 Ill. Admin. Code Section 742.1020, this Agreement is intended to be an acceptable "Highway Authority Agreement" to IEPA, as the Department is willing to agree that it will not allow the use of groundwater under the highway Right-of-Way as a potable or other domestic supply of water and that it will limit access as described herein to soil under the highway Right-of-Way that is contaminated from the release at levels above residential Tier 1 remediation objectives.

4.b. The IEPA and Illinois Attorney General ("AG") must review and approve this Agreement, and this Agreement shall be referenced in the IEPA's "No Further Remediation" determination in the chain of title for the Site in the county where the Site is located.

4.c. This Agreement shall be null and void as a Highway Authority Agreement should the IEPA or AG not approve it or should it not be referenced in the "No Further Remediation" determination, provided, however, that this Agreement shall be effective between the Owner/Operator and the Department immediately upon signature by their representatives.

5. The Department promises IEPA and the Owner/Operator that it will prohibit the use of groundwater that is contaminated from the release at the Site at levels above Tier 1 remediation objectives beneath its Right-of-Way as a potable or other domestic supply of water and will limit access to soil as described herein under the Right-of-Way that is contaminated from the release at the Site at levels above Tier 1 remediation objectives. As the pavement in the Right-of-Way may be considered an engineered barrier, the Owner/Operator agrees to reimburse the Department for maintenance activities requested by Owner/Operator in writing in order to maintain it as a barrier. The Department does not otherwise agree to perform maintenance of the Right-of-Way, nor does it agree that the highway Right-of-Way will always remain a highway or that it will maintain the Right-of-Way as an engineered barrier.

6. The Owner/Operator agrees to indemnify and hold harmless the Department, and other highway authorities, if any, maintaining the highway Right-of-Way by an agreement with the Department, and the Department's agents, contractors or employees for all obligations asserted against or costs incurred by them, including attorney's fees and court costs, associated with the release of Contaminants from the Site, regardless

whether said obligations or costs were caused by the negligence, but not the gross negligence, of them.

7. As an additional consideration, Owner/Operator agrees to reimburse the Department for the reasonable costs it has incurred in protecting human health and the environment, including, but not limited to, identifying, investigating, handling, storing and disposing of contaminated soil and groundwater in the Right-of-Way as a result of the release of contaminants at this Site. The Department has documented those costs for Owner. Those costs amount to (5) $_____. If costs have been incurred, a cashier's check made payable to "Treasurer, State of Illinois" shall be tendered to the Department of Transportation at the time Owner/Operator furnishes a signed Agreement to the Department for its signature. That check will be deposited when this Agreement is signed by all necessary parties.

8. This Agreement shall be binding upon all successors in interest to the Owner/ Operator or highway Right-of-Way. A successor in interest of the Department would include a highway authority to which the Department would transfer jurisdiction of the highway.

9. Violation of the terms of this Agreement by Owner/Operator, or their successors in interest, may be grounds for voidance of this Agreement as a Highway Authority Agreement. Violation of the terms of this Agreement by the Department will not void this Agreement, unless the IEPA has determined that the violation is grounds for voiding this Agreement as a Highway Authority Agreement and the Department has not cured the violation within such time as IEPA has granted to cure the violation.

10. This Agreement shall continue in effect from the date of this Agreement until the Right-of-Way is demonstrated to be suitable for unrestricted use and there is no longer a need for this Agreement as a Highway Authority Agreement, and the IEPA has, upon written request to the IEPA by the Owner/Operator and notice to the Department,

amended the notice in the chain of title of the Site to reflect unencumbered future use of that highway Right-of-Way.

11. This Agreement is in settlement of claims the Department may have arising from the release of Contaminants into the Right-of-Way associated with incident number (6) _____.

12. This Agreement does not limit the Department's ability to construct, reconstruct, improve, repair, maintain and operate a highway upon its property or to allow others to use the highway Right-of-Way by permit. To that extent, the Department reserves the right and the right of those using its property under permit to remove contaminated soil or groundwater above Tier 1 residential remediation objectives from its Right-of-Way and to dispose of them as they deem appropriate not inconsistent with applicable environmental regulations so as to avoid causing a further release of the Contaminants and to protect human health and the environment.

Prior to taking any such action, the Department will first give Owner/Operator written notice, unless there is an immediate threat to the health or safety to any individual or to the public, that it intends to perform a site investigation in the Right-of-Way and remove or dispose of contaminated soil or groundwater to the extent necessary for its work. Failure to give notice is not a violation of this Agreement. The removal or disposal shall be based upon the site investigation (which may be modified by field conditions during excavation), which Owner/Operator may review or may perform, if requested to do so by the Department. If practicable, as determined by the Department, the Department may request Owner/Operator to remove and dispose of the contaminated soil and/or groundwater necessary for the Department's work in advance of that work.

The Owner/Operator shall reimburse the reasonable costs incurred by the Department to perform the site investigation and to dispose of any contaminated soil or groundwater, provided, however, that if notice to Owner/Operator has not been given and there was

no immediate threat to health or safety, reimbursement for those costs shall be limited to $10,000.00. There is a rebuttable presumption that the Contaminants found in the highway Right-of-Way arose from the release of Contaminants from the Site. Should Owner/Operator not reimburse the reasonable costs under the conditions set forth herein, this Agreement shall be null and void, at the Department's option, upon written notice to Owner/Operator by the Department that those costs have not been reimbursed. Owner/Operator may cure that problem within twenty working days by making payment, or may seek to enjoin that result.

13. Written notice required by this Agreement shall be mailed to the following:

If to Owner/Operator:

Name
Company
Street
City, State, Zip

If to Department:

District (No.) Engineer (Name)
Street
City, State, Zip

14. The Department's sole responsibility under this Agreement with respect to others using the highway Right-of-Way under permit from the Department is to include the following, or similar language, in the future standard permit provisions and to make an effort to notify its current permit holders of the following:

> As a condition of this permit, the permittee shall request the District Permit Office to identify sites in the Right-of-Way where access to contaminated soil or groundwater is governed by Tiered Approach to Corrective-Action Objectives ("TACO") Agreements. The permittee shall take measures before, during and after any access to these sites to protect worker safety and human health

and the environment. Excavated, contaminated soil should be managed off-site in accordance with all environmental laws.

Owner/Operator hereby releases the Department from liability for breach of this Agreement by others under permit and indemnifies the Department against claims that may arise from others under permit causing a breach of this Agreement. Owner/ Operator agrees that its personnel, if any, at the Site who are aware of this Agreement will notify anyone they know is excavating in the Right-of-Way about this Agreement.

15. Should the Department breach this Agreement, Owner/Operator's sole remedy is for an action for damages in the Illinois Court of Claims. Any and all claims for damages against the Department, its agents, contractors, employees or its successors in interest arising at any time for a breach of paragraph 5 of this Agreement are limited to an aggregate maximum of $20,000.00. No other breach by the Department, its agents, contractors, employees and its successors in interest of a provision of this Agreement is actionable in either law or equity by Owner/Operator against the Department or them and Owner/Operator hereby releases the Department, its agents, contractors, employees and its successors in interest for any cause of action it may have against them, other than as allowed in this paragraph, arising under this Agreement or environmental laws, regulations or common law governing the contaminated soil or groundwater in the highway Right-of-Way. Should the Department convey, vacate or transfer jurisdiction of that highway Right-of-Way, Owner/Operator may pursue an action under this Agreement against the successors in interest, other than a State agency, in a court of law.

16. This Agreement is entered into by the Department in recognition of laws passed by the General Assembly and regulations adopted by the Pollution Control Board which encourage a tiered-approach to remediating environmental contamination. This Agreement is entered into by the Department in the spirit of those laws and under its

right and obligations as a highway authority. Should any provisions of this Agreement be struck down as beyond the authority of the Department, however, this Agreement shall be null and void.

IN WITNESS WHEREOF, Owner/Operator, (8) _____, has caused this Agreement to be signed by its duly authorized representative.

BY: _____ DATE:_____
(Title)_____

IN WITNESS WHEREOF, the Department has caused this Agreement to be signed by its Secretary.

Illinois Department of Transportation

BY: _____ DATE:_____
Kirk Brown
Secretary

This Agreement is approved on behalf of the Office of the Illinois Attorney General.

BY: _____ DATE:_____

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Comments with Attachment of the Illinois Environmental Protection Agency upon the person to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy M. Gunn, Clerk
IL. Pollution Control Board
James R. Thompson Center
100 W. Randolph, Ste 11-500
Chicago, Illinois 60601

Matthew J. Dunn, Chief
Environmental Bureau
Office of the Attorney General
188 W. Randolph, 20th Floor
Chicago, Illinois 60601

Robert Lawley, Chief Legal Counsel
Dept. of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787

Joel Sterstein, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

See Attached Service List

and mailing it from Springfield, Illinois on 1-4-02 with sufficient postage affixed.

Nancy J. Lamport

SUBSCRIBED AND SWORN TO BEFORE ME
this 4th day of January

Brenda Boehner
Notary Public

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-14-2005

THIS FILING IS SUBMITTED ON RECYCLED PAPER

R01-26 SERVICE LIST

In the Matter of: Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732

Revised January 2, 2002

lname	fname	company	Address	citystate	zip
Anderson	Scott	Black & Veatch	101 N. Wacker Drive, Suite 1100	Chicago, IL	60606
Aronberg	Garry	Kuhlmann Design Group	15 East Washington	Belleville, IL	62220
Benczyk	Bruce		601 W. Monroe	Springfield, IL	62704
Carson, P.E.	Robert A.		924 Cherokee Drive	Springfield, IL	62707
Chappel, P.E.	Harry A.	Inland/Chappel Environmental	144 Laconwood	Springfield, IL	62707
Consalvo	Cindy	Pioneer Environmental	700 N. Sacramento Suite 101	Chicago, IL	60612
Dickett	William G.	Sidley Austin Brown & Wood	Bank One Plaza 10 South Dearborn Street	Chicago, IL	60603
Dombrowski	Leo P.	Wildman, Harrold, Allen & Dixon	225 W. Wacker Drive, Suite 3000	Chicago, IL	60606
Dye	Ron	CORE Geological Services, Inc.	2621 Montego, Suite C	Springfield, IL	62704
Dyer	Judith S.	IEPA, Division of Legal Counsel	1021 North Grand Avenue East P.O. Box 19276	Springfield, IL	62794-9276
Falbe, Esq.	Lawrence W.	Wildman, Harrold, Allen & Dixon	225 W. Wacker Drive, Suite 3000	Chicago, IL	60606-1229
Flynn	Neil F.	Attorney at Law	1035 South Second Street	Springfield, IL	62704
Frede	Lisa M.	Chemical Industry Council of Illinois	9801 W. Higgins Road, Suite 515	Rosemont, IL	60018
Glenn	Sid	Arcadis	35 East Wacker, Suite 1000	Chicago, IL	60601
Goodwin, P.E.	Daniel J.	Goodwin Environmental Consultants, Inc.	400 Bruns Lane	Springfield, IL	62702
Gray	Collin W.	SEECO Environmental Services, Inc.	7350 Duvon Drive	Tinley Park, IL	60477
Gunn	Dorothy	Clerk of the Board Illinois Pollution Control Board	100 West Randolph Street Suite 11-500	Chicago, IL	60601
Herlacher	Thomas L.	Herlacher Angleton Associates, LLC	8731 Bluff Road	Waterloo, IL	62298
Huff, P.E.	James E.	Huff & Huff, Inc.	512 W. Burlington, Suite 100	LaGrange, IL	60525
James	Kenneth	Carlson Environmental, Inc.	65 E. Wacker Place, Suite 1500	Chicago, IL	60601
Kelly, PE	Joe	United Science Industries, Inc.	P.O. Box 360	Woodlawn, IL	62898
Liss	Kenneth W.	Andrews Engineering, Inc.	3535 Mayflower Boulevard	Springfield, IL	62707
Ludewig	Pat	Caterpillar Tech Center, Bldg. F	P.O. Box 1875	Peoria, IL	61656-1875
Magel	Barbara	Karaganis & White, Ltd.	Suite 810, 414 N. Orleans	Chicago, IL	60610
Moncek	George F.	United Environmental Consultants, Inc.	119 East Palatine Road, Suite 101	Palatine, IL	60067
Nienkerk, P.G.	Monte M.	Senior Project Manager Clayton Group Services, Inc.	3140 Finley Road	Downers Grove, IL	60515
Rieser	David	Ross & Hardies	150 N. Michigan	Chicago, IL	60601
Schick	J. Randle	Assistant Chief Counsel IDOT	2300 Dirksen Parkway	Springfield, IL	62764
Smith	Wayne	Pioneer Environmental	700 N. Sacramento	Chicago, IL	60612

R01-26 SERVICE LIST

In the Matter of: Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732

Revised January 2, 2002

			Suite 101		
Smith	Suzanne D.	Sonnenschein Nath & Rosenthal	8000 Sears Tower	Chicago, IL	60606
Sternstein	Joel J.	Hearing Officer Illinois Pollution Control Board	100 West Randolph Street Suite 11-500	Chicago, IL	60601
Strubel	Dan	Speedway Super America, LLC	P.O. Box 1500	Springfield, OH	45001
Sykuta	David A.	Illinois Petroleum Council	P.O. Box 12047	Springfield, IL	62791
Vahos	Georgia	Counsel Naval Training Center	2501A Paul Jones Street	Great Lakes, IL	60088-2845
Walker	Rodger	Walker Engineering	500 W. Herrin Street	Herrin, IL	62448
Watson	John	Gardner, Carton & Douglas	321 N. Clark Street	Chicago, IL	60610
Zolyak	Gary T.	U.S. Army Environmental Center	Northern Regional Environmental Office, Building E-4480	Aberdeen Proving Ground, MD	21010-5401