ORIGINAL

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
REVISION OF THE PETROLEUM	)	
UNDERGROUND STORAGE TANK	)	
REGULATIONS: PROPOSED	)	R00-26
AMENDMENTS TO 35 Ill. Adm. Code 732	)	(Rulemaking-Land)

P.C. #5

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
(Federal Express)

Joel Sternstein
Pollution Control Board
100 W. Randolph, Ste 11-5001
James R. Thompson Center
Chicago, Illinois 60601
(Federal Exress)

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

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

Service List

NOTICE OF FILING

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

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

By: Judy Dyer by MKR
Judith S. Dyer
Assistant Counsel
Division of Legal Counsel

By:
Kyle Rominger
Assistant Counsel
Division of Legal Counsel

Dated: May 1, 2001

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REVISION OF THE PETROLEUM	)	R00-26
UNDERGROUND STORAGE TANK	)	(Rulemaking - Land)
REGULATIONS: PROPOSED	)	
AMENDMENTS TO 35 Ill. Adm. Code 732	)	

COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES the Illinois Environmental Protection Agency ("Agency"), by its attorneys, and submits the following comments in the above-referenced rulemaking:

I. Off-site Access

Introduction

Part 732 currently contains a provision, set forth at Section 732.404(b)(1)(A), that owners or operators must design their corrective action plans such that, after complete performance of the plan, applicable indicator contaminants "are not present in groundwater, as a result of the release, in concentrations exceeding the remediation objectives referenced in Section 732.408 at the property boundary or 200 feet from the UST system, whichever is less." An exception to this requirement is provided, stating that "if an adjoining property owner will not allow the owner or operator access to his or her property so as to ascertain information sufficient to satisfy this requirement or if the owner cannot be located, adequate documentation of the owner or operator's efforts to gain access to the property shall satisfy this subsection (b)(1)(A)." This exception is intended to apply when an owner or operator encounters a recalcitrant or unavailable off-site property owner.

The Agency has proposed striking the portion of Section 732.404(b)(1)(A) that contains the exception. To replace the stricken portion, the Agency proposed the amendments set forth in Sections 732.404(c) and 732.411. These proposed amendments preserve the exception, but with the introduction of a "best efforts" concept, which is intended to establish a formal means for the

Agency to evaluate, on a site-specific basis, the adequacy of the effort made by the owner or operator to gain off-site access.

The Illinois Petroleum Council ("IPC") has proposed alternative language addressing off-site access. The IPC proposal differs from the Agency's proposed language in several respects. In these comments, the Agency presents, for the Board's consideration, support for the Agency's proposed language addressing this issue and feedback on the IPC proposal.

1. Support for Agency Proposed Language

The Agency submits the following comments in support of the language proposed by the Agency to address off-site access:

A. Content of Letter

Section 732.411(b), as proposed by the Agency, requires an owner or operator to provide, by certified mail, certain statements the Agency has identified as necessary to convey to an off-site property owner the possible ramifications of denying access. The off-site property owner must be apprised that, by denying access, he or she effectively forfeits his or her opportunity to have the owner or operator, as part of a LUST remediation effort, address contamination on his or her property resulting from a release for which the owner or operator is responsible, and that it will be more difficult to have the owner or operator clean up his or her property once an NFR letter has been issued.

The IPC has proposed modifications to the required contents of the letter. The Agency objects to some of the changes to this subsection proposed by IPC and has no objection to others; for specifics, see the discussion under the Agency's comments on the IPC proposal.

B. Use of Certified Letter

The Agency has proposed requiring that the letter sent to the off-site property owner be sent by certified mail. A certified letter is necessary due to the significance of the possible consequences

resulting from an owner or operator's failure to obtain off-site access. By denying access, the off-site property owner is in effect forfeiting his or her opportunity to have any contamination on his or her property for which the owner or operator is responsible addressed without litigation. A certified letter provides proof of receipt of the letter by the off-site owner.

The IPC suggested at hearing that a certified letter of the sort described might be an overly intimidating means of informing the off-site owner of the need to gain access to his or her property. The Agency does not intend that the letter be used as a means of first contact or in all cases. The Agency endorses the approach presented by IPC, in David Piotrowski's testimony, for attempting to gain access. Owners and operators are encouraged to pursue less intimidating efforts to obtain cooperation from off-site property owners. The certified letter is viewed as a more aggressive tactic, required only in instances in which an off-site property owner proves uncooperative after other means of gaining access have failed. In such cases, proof of delivery of a certified letter serves as documentation to the Agency of the owner's or operator's effort to gain access.

C. Best Efforts

The "best efforts" concept introduced by the Agency was taken from federal rules applicable to hazardous waste treatment, storage and disposal facilities. See 52 FR 45788, Attachment to Testimony of Doug Clay in Support of the Environmental Protection Agency's Proposal to Amend 32 Ill. Adm. Code 732. In the Preamble adopting amendments to those rules, the USEPA stressed the necessity of considering on a case by case basis what constitutes best efforts to gain off-site access.

Like the USEPA, in order to protect human health and the environment, the Agency must have the discretion, in the context of LUST remediations, to consider the site-specific circumstances in assessing whether the owner or operator has demonstrated "best efforts." At a minimum, the owner or operator must demonstrate that the off-site owner has received the certified letter required

pursuant to Section 732.411(b). Beyond that, the Agency must be able to consider whether any off-site contamination may have an impact on sensitive environments or parties other than the off-site owner, e.g. a daycare leasing the off-site property, residential renters on the property of the off-site property owner, other property owners, etc. The Agency must have the discretion to consider the scenarios identified by the IPC - the presence of free product, the presence of fire, explosion, and vapor hazards, and the presence of potable water wells, surface water, setback zones or regulated recharge areas. However, the Agency must also be able to take into consideration other scenarios creating a threat of harm in determining whether to deny an NFR letter for failure to obtain off-site access such as those noted above.

The Agency cannot anticipate, and thus cannot enumerate, all of the circumstances that would lead to a denial of an NFR for failure to gain access. Using the best efforts approach, with consideration of the factors outlined in the Agency's proposed subsection 732.411(d), the Agency certainly will be able to determine when circumstances warrant denial of an NFR letter. In the event of a denial by the Agency, the owner or operator is not without recourse, as the denial is appealable to the Board.

2. Evaluation of IPC Proposed Language

The Agency, after having an opportunity to review the language proposed by the IPC, has the following comments on the IPC proposal:

<u>732.404(c)</u>

The Agency has no objection to the addition of "or off-site" in the first sentence.

The Agency does not object to adding "of this Part" to the end of this Section, but does object to the remainder of the language added to the end of the paragraph. See discussion under 732.411(d)(2) for the basis of this objection.

Section 732.411(a)

The Agency has no objection to IPC's proposed relocation of this language to 732.411(f).

Section 732.411(b)

The Agency objects to striking "at a minimum" in the prefatory language of subsection (b). Depending upon site-specific circumstances, sending the described letter may or may not constitute the best efforts necessary to gain off-site access (for example, when an off-site property owner has denied an owner or operator access, but contamination on the off-site property threatens to contaminate groundwater downgradient from the off-site property). In cases where a letter is insufficient, the Agency needs the discretion to deny an owner or operator's request for an NFR letter due to the owner or operator's failure to use best efforts.

The Agency objects to all changes made to subsection (b)(1), due to the resulting lack of clarity. The language proposed by the Agency sufficiently describes an owner or operator's legal responsibility to remediate any contamination resulting from a release from the owner or operator's UST.

The Agency has no objection to changes made to subsection (b)(2).

The Agency has no objection to striking subsection (b)(3).

The Agency has no objection to the addition of new subsection (b)(3).

The Agency has no objection to striking subsection (b)(4), provided that IPC's proposed (b)(3) is added.

The Agency objects to striking subsection (b)(5). The Agency believes off-site property owners should be informed that they are not liable to pay for costs of remediating contamination caused by a release for which the owner or operator is responsible. The owner or operator should inform the off-site owner that the owner or operator will pay for remediation of contamination resulting from the owner or operator's release.

The Agency objects to the addition of new subsection (b)(4). "Work[ing] to resolve issues arising from release" does not accurately reflect the owner or operator's responsibility to remediate the contamination resulting from the release. The Agency would not object to language clarifying that the scope of the owner or operator's responsibility is limited to remediation of contamination resulting from the release for which the owner or operator is responsible.

The Agency objects to striking subsection (b)(5). As pointed out by Board Member Melas at the second hearing, this is a true statement (transcript p. 67). The consequences set forth are couched in terms of "may" rather than shall. Such a statement is needed to alert the off-site owner to the gravity of harm that may result from any contamination on his or her property.

The Agency has no objection to striking (b)(7), as long as the IPC's proposed (b)(3) is added.

Section 732.411(d)

The Agency objects to striking subsection (d). The Agency needs to make the owner or operator aware of the information that will be considered in determining, based on site-specific conditions, whether the owner or operator has used best efforts to gain off-site access. Current regulations require that the owner or operator provide "adequate documentation" of his or her inability to gain access. The Agency's practice has been to consider the information listed in proposed subsection (d) in implementing this requirement. Thus, this language clarifies what the Agency currently considers in determining whether the owner or operator has provided "adequate documentation." The proposed amendments set forth the information the Agency will consider in determining whether the owner or operator has conducted "best efforts."

The concept of "best efforts," taken from the USEPA, is intended to allow consideration of site-specific circumstances. There will be no additional cost to the owner or operator in having the Agency consider the enumerated factors, as the information listed will already have been submitted

by the owner or operator in the course of the LUST remediation effort.

Section 732.411(e)

The Agency objects to the striking of "and otherwise entitled to such issuance" in subsection (e). The owner or operator is required to meet all other applicable requirements in Part 732 prior to obtaining an NFR letter. This language conveys that point.

The Agency objects to replacing "an inability" with "that it has been unable" in subsection (e)(2). The owner or operator must demonstrate a lack of ability or means to obtain access not only during the period prior to the submission of a corrective action completion report but also afterwards.

The Agency objects to the language added at the end of subsection (e)(2) ("and the Agency has not found that the contamination remaining off-site poses an imminent threat of harm to human health or the environment"). By restricting the scope of the standard to threats that are imminent, this language creates a less stringent standard than that set forth in the Act. As the Agency points out in its discussion of the "best efforts"concept, circumstances at a site may warrant denial of an NFR letter in cases where there is not an imminent threat of harm to human health or the environment. Also, the proposed language places the burden on the Agency to make a finding. The burden should be on the owner or operator to demonstrate to the Agency that it has complied with the requirements of this Section. In addition, even if this language were not objectionable on other grounds, it would not belong in this subsection. Subsections (e)(1) and (e)(2) provide requirements applicable to the owner or operator, not the Agency, i.e. the owner or operator must either complete any requisite off-site corrective action or demonstrate to the Agency's satisfaction an inability to obtain off-site access despite the use of best efforts. Tacking on a requirement in this subsection that is applicable to the Agency - that the Agency make a finding as to the degree of threat posed by contamination remaining on the off-site property - does not make sense.

The Agency objects to subsection (e) in its entirety. As already stated, the Agency objects to the proposed "imminent threat of harm" standard as not sufficiently stringent. In addition, the factors proposed by IPC reference immediate threats only to human safety. The Agency's concerns do not fit within these limited specific scenarios. The language does not take into account the vast array of circumstances that may be present at a site and threaten human health and the environment. The Agency proposed a case-by-case, site-specific evaluation of each site, rather than an enumeration of specific circumstances, due to the wide variety of circumstances that may be present and the inability to cover every situation.

Section 732.411(f)

The Agency has no objection to the relocation of this language from subsection 732.411(a).

II. Licensed Professional Geologist Certifications

In their Motion to Oppose Certain Proposed Amendments, which the Board has indicated will be taken as comments, the Illinois Society of Professional Engineers ("ISPE") and the Consulting Engineers Council of Illinois ("CECI") assert the Agency has "exceeded the authority of its rulemaking powers" by proposing the amendments now before the Board. (ISPE and CECI Motion p.1) They further claim "the Agency has insufficient statutory authority as a matter of law to include [Licensed Professional Geologists] via its rulemaking process." (ISPE and CECI Motion p.1)

The Agency has not exceeded its rulemaking powers in the current proceeding. Part 732 contains Board regulations, not Agency regulations. The Agency has no rulemaking powers in this proceeding. It merely proposed amendments to the Board's regulations as allowed by Section 28 of the Illinois Environmental Protection Act [415 ILCS 5/28(a)] ("Any person may present written proposals for the adoption, amendment, or repeal of the Board's regulations.") The Act does not

place any limitations on amendments proposed by the Agency. The Act places limitations only on proposals by others. See 415 ILCS 5/28(a) (non-Agency proposals must be supported by an adequate statement of reasons, must be accompanied by a petition signed by at least 200 persons, cannot be plainly devoid of merit and cannot deal with a subject on which a hearing has been held within the preceding 6 months).

The decision of whether the proposed amendments are appropriate and should be adopted as regulations will be made by the Board. As set forth in the Agency's Memorandum of Law in Appendix A, much of the work required under Part 732 constitutes the "practice of professional geology" under the Licensed Professional Geologists Act, and Licensed Professional Geologists are authorized by that Act to certify such work. Furthermore, the Board has already determined it has the authority to adopt regulations allowing Licensed Professional Geologist certifications. The Board's Livestock Waste Regulations, 35 Ill. Adm. Code 506, require certifications by either a Licensed Professional Engineer or a Licensed Professional Geologist. The Agency has merely proposed amendments that allow Licensed Professional Geologists to provide certifications in Part 732 as well.

In addition to the above, the relief the ISPE and the CECI request in their Motion is improper. They ask the Board to strike from the Agency's proposal any reference to Licensed Professional Geologists. They also ask the Board to strike the testimony of Douglas Clay. However, there is no provision in the Environmental Protection Act or in the Board's procedural rules that allows such a remedy. Furthermore, such a remedy would subvert the rulemaking process. Illinois' rulemaking procedures are designed to be open. The Board holds public hearings in order to invite and receive testimony and public comments on proposed changes to its regulations. Any testimony presented at a hearing is recorded and made available to the public along with all written comments the Board receives. 415 ILCS 5/28(a). As required by the Illinois

Administrative Procedure Act, the Board also accepts public comments during the first notice period after the proposed amendments are published in the Illinois Register. See 5 ILCS 100/5-40(b). The Board then takes the testimony and comments into consideration prior to adopting any amendments to its regulations.

Striking portions of an amendatory proposal or the testimony submitted at a public hearing would be contrary to the rulemaking process and undermine this proceeding. The ISPE and the CECI are asking the Board to reject the proposed amendments before it has a chance to review all of the testimony and comments submitted or yet to be submitted in this proceeding. If the ISPE and the CECI do not agree with the proposed amendments, they may submit witness testimony or comments in opposition to it, as they have done. The Board can then consider that information along with all other information it receives. A request to strike portions of the Agency's proposal and the public record of this proceeding, however, is inappropriate.

III. LUST Fact Sheet 12

At the second hearing, the Board asked the Agency to submit a copy of the LUST Section's Fact Sheet 12. Transcript of April 3, 2001, hearing at 95. A copy of that document is provided in Appendix B.

IV. Department of Professional Regulation Letter

At the second hearing a member of the audience noted that the letter from the Department of Professional Regulation admitted as Hearing Exhibit 21 appears to contain incorrect titles for each of the paragraphs quoting portions of the Professional Engineering Practices Act and the Professional Geologist Licensing Act. Transcript of April 3, 2001, hearing at 86. The Agency agreed to check the letter to see if the titles are incorrect. (Id. at 87) The titles are incorrect. The paragraph starting with "Professional Engineering Practice Act" should instead begin with

"Professional Geologist Licensing Act" and vice versa. The citations given after each title are correct as shown in the letter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Judith S. Dyer, Assistant Counsel

Kyle Rominger, Assistant Counsel

DATED: 5-1-01

1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-3397

THIS FILING IS SUBMITTED ON RECYCLED PAPER

APPENDIX A

MEMORANDUM OF LAW IN SUPPORT OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S COMMENTS

In their Memorandum of Law In Support of their Motion to Proposed Certain Proposed Amendments and in their testimony the Illinois Society of Professional Engineers ("ISPE") and the Consulting Engineers Council of Illinois ("CECI") argue the Board does not have the authority to add the proposed Licensed Professional Geologist certifications to its Part 732 regulations. They base their argument on two propositions: 1) Title XVI of the Environmental Protection Act does not contain a provision allowing Licensed Professional Geologists to certify the work required therein and 2) the legislature did not intend to allow Licensed Professional Geologists to perform physical soil classifications under Section 57.7 of the Act.

The Board has already determined it has the authority to require Licensed Professional Geologist certifications under its regulations. The Board's Livestock Waste Regulations, 35 Ill. Adm. Code 506, contain three provisions requiring certifications by either a Licensed Professional Engineer or a Licensed Professional Geologist. Under 35 Ill. Adm. Code 506.106(b), requests for alternatives, waivers and modifications to the Livestock Waste Regulations must contain a certification from a Licensed Professional Engineer or a Licensed Professional Geologist that the alternative, waiver or modification is at least as protective as the stated requirements. 35 Ill. Adm. Code 506.202(e) requires either a Licensed Professional Engineer or a Licensed Professional Geologist to conduct site investigations used to determine whether aquifer material is present within 50 feet of the planned bottom of a lagoon. That subsection further requires the supervising Licensed Professional Engineer or Licensed Professional Geologist "to certify that the site investigation meets all the applicable requirements of [Section 506.202], and whether aquifer material shall be considered present (or not present) within 50 feet of the planned bottom of the lagoon in accordance with Section 506.203. Such certification shall include all supporting data and justification." 35 Ill. Adm. Code 506.202(e). Finally, 35 Ill. Adm. Code 506.203(b)(7) requires a

certification from either a Licensed Professional Engineer or a Licensed Professional Geologist as part of the earthen livestock waste lagoon registration form.

The regulations of other state entities also recognize the enactment of the Professional Geologist Licensing Act ("PGLA"). The Illinois Historic Preservation Agency's regulations require state certified paleontologists to also be Licensed Professional Geologists. 17 Ill. Adm. Code 4190.407. The Illinois Department of Agriculture, in its Livestock Management Facility Regulations, requires construction plans for new livestock waste handing facilities to include supporting justification, data, and the results of site investigations from one of four specific categories of persons, one of which is Licensed Professional Geologists. 8 Ill. Adm. Code 900.503(c). Like the Board's regulations, the Department of Agriculture's regulations require a Licensed Professional Engineer or Licensed Professional Geologist certification as part of the earthen livestock waste lagoon registration form. 8 Ill. Adm. Code 900.603(b)(7). Furthermore, the Department of Agriculture's regulations require requests for a waiver of the livestock waste lagoon closure requirements to include a Licensed Professional Engineer or Licensed Professional Geologist certification. 8 Ill. Adm. Code 900.608(a)(2)(4). All of these regulations were regulations were adopted without an express legislative amendment to the enabling act of the respective agencies to address the effect of the PGLA.

As has been done in the regulations noted above, the Agency merely proposes to amend the petroleum underground storage tank regulations to reflect the enactment of the PGLA. The express legislative findings set forth in the PGLA clearly indicate the legislature targeted the PGLA toward state regulations such as the Board's, and intended Licensed Professional Geologists to perform the type of work that is required under Part 732. Those findings include:

> (a) In recent years, governmental bodies have increasingly come to rely upon advice from geologists when formulating laws and policies to protect the environment and the safety, property, and well-being of the citizens of this State.

(b) Some federal and State regulations require that geological investigations be performed and the geological conditions be interpreted.

(c) Expert opinions regarding the geological conditions of an area provided to regulatory bodies, State or local governmental agencies, and the public can have significant impacts on the environmental quality of this State and on the safety, property, and well being of its citizens.

. . .

(f) The environment and the safety, property, and well-being of the citizens of this State also are significantly threatened by geological hazards related to the acts of humans such as contamination of groundwater resources and mine subsidence.

(g) The advice of geologists is needed to guide the governmental bodies and the citizens of this State toward an appropriate level of preparedness for a future major earthquake within the New Madrid or Wabash Valley Seismic Zones and to assist the citizens and governmental bodies of this State in reducing their exposure to risks to the environment and to their safety, property, and well-being from other geological hazards, both natural and human-caused.

225 ILCS 745/5.

The PGLA's applicability to the work required under Part 732 is clear not only from the legislature's express findings, but also from the description of the work that must be performed by Licensed Professional Geologists. The work Licensed Professional Geologists can certify under the proposed amendments falls within the practice of professional geology. The PGLA defines the "practice of professional geology" as:

"the performance of, or the offer to perform, the services of a geologist, including consultation, investigation, evaluation, planning, mapping, inspection of geologic work, and other services that require extensive knowledge of geologic laws, formulas, principles, practice, and methods of data interpretation.

. . .

Examples of the practice of professional geology include, but are not limited to, the conduct of, or responsible charge for, the following types of activities: (i) mapping, sampling, and analysis of earth materials, interpretation of data, and the preparation of oral or written testimony regarding the probable geological causes of events; (ii) planning, review, and supervision of data gathering activities, interpretation of geological data gathered by direct and indirect means, preparation of geological maps, cross-sections, interpretive maps and reports for

> the purpose of evaluating regional or site specific geological conditions; (iii) the planning, review, and supervision of data gathering activities and interpretation of data on regional or site specific geological characteristics affecting groundwater; (iv) the interpretation of geological conditions on the surface and at depth at a specific site on the Earth's surface for the purpose of determining whether those conditions correspond to a geologic map of the site; and (v) the conducting of environmental property audits.

225 ILCS 745/15. The Agency requested confirmation from the Illinois Department of Professional Regulation ("DPR") that the work Licensed Professional Geologists could certify under the proposed amendments fell within the practice of professional geology. The DPR responded that it did. See Hearing Exhibit 21.

There is nothing in the PGLA that makes its applicability to work performed under the Environmental Protection Act contingent upon an amendment to the Act, or any other legislative action. Likewise, there is nothing in the Environmental Protection Act prohibiting Licensed Professional Geologists from certifying work constituting the practice of professional geology. The legislature did not intend every statute in Illinois to be amended to reflect the passage of the PGLA. The provisions of the PGLA apply concurrently with the provisions of the Environmental Protection Act and all other statutes. Therefore, like the Board's Livestock Waste Regulations, the regulations in Part 732 should acknowledge and reflect the legislature's adoption of the PGLA.

The second proposition in the ISPE's and the CECI's assertion that there is no statutory authority for Licensed Professional Geologist certifications is that the legislature did not intend to allow Licensed Professional Geologists to perform physical soil classifications pursuant to subsection 57.7(a) of the Environmental Protection Act. The rationale for this assertion is that the term "soil classification" is given as an example of work that constitutes "professional engineering practice" under the Professional Engineering Practice Act of 1989 ("PEPA") but is not given as an example of work that constitutes the "practice of professional geology" under the PGLA. The examples set forth in each act, however, are only examples. They are not exhaustive or exclusive

lists of the work each profession may perform. Furthermore, the term used in the PEPA is "soil classification," not "physical soil classification" as used in Section 57.7(a) of the Act.

It is axiomatic that geology involves work with soil, such as physical soil classification. The study of soil is the very essence of geology. Although the term "physical soil classification" is not specifically used in the PGLA as an example of the practice of professional geology, the following are examples of work that constitutes the practice of professional geology:

> (i) mapping, sampling, and analysis of earth materials, interpretation of data, and the preparation of oral or written testimony regarding the probable geological causes of events;
>
> (ii) planning, review, and supervision of data gathering activities, interpretation of geological data gathered by direct and indirect means, preparation of geological maps, cross-sections, interpretive maps and reports for the purpose of evaluating regional or site specific geological conditions;
>
> (iii) the planning, review, and supervision of data gathering activities and interpretation of data on regional or site specific geological characteristics affecting groundwater;
>
> (iv) the interpretation of geological conditions on the surface and at depth at a specific site on the Earth's surface for the purpose of determining whether those conditions correspond to a geologic map of the site; and
>
> (v) the conducting of environmental property audits.

225 ILCS 745/15. These examples are the type of work that constitutes physical soil classification under Part 732. See, e.g., attached DPR letter. Therefore, the Agency proposes to allow Licensed Professional Geologists to certify such work.

Although "soil classification" is given as a specific example of work that constitutes the practice of professional engineering, a further reading of the PEPA shows that it includes only "soil classification . . . incidental to the practice of professional engineering." 225 ILCS 325/4(o) (emphasis added). The PEPA defines "professional engineering practice" as "the consultation on, conception, investigation, evaluation, planning, and design of, and selection of materials and methods to be used in, administration of construction contracts for, or site observation of an

engineering system or facility, where such consultation, conception, investigation, evaluation, planning, design, selection, administration, or observation requires extensive knowledge of engineering laws, formulae, materials, practice, and construction methods." Id. (emphasis added). Therefore, "soil classification" falls within the practice of professional engineering only when it is incidental to specific work related to an engineering system of facility. Id. Furthermore, that work must require "extensive knowledge of engineering laws, formulae, materials, practice, and construction methods." Id. Because the "physical soil classification" required under subsection 57.7(a) of the Environmental Protection Act may not always be incidental to such work and therefore may not always fall within the definition of the practice of professional engineering, the legislature could not have intended physical soil classifications to be performed only by Licensed Professional Engineers.

A physical soil classification is the first step required after the completion of early action activities. It is performed concurrently with a groundwater investigation. See 415 ILCS 57.7(a). A site's classification as High Priority, Low Priority or No Further Action is then based upon the results of the physical soil classification and groundwater investigation. See 415 ILCS 57.7(b)(1). If a site is classified as Low Priority, the owner or operator is required to collect groundwater samples for three years. 415 ILCS 57.7(c)(2). If the site is classified as No Further Action, no remediation beyond early action activities is required. 415 ILCS 57.7(c)(3). Neither Low Priority nor No Further Action sites require an engineering system or facility. Therefore, the physical soil classification performed on such sites does not appear to be incidental to work related to an engineering system or facility that requires extensive knowledge of engineering laws, formulae, materials, practice and construction methods.

Even at High Priority sites where corrective action is required, physical soil classifications are performed prior to classification of the sites. At the time the physical soil classification is

performed, the need for an engineering system or facility may be unknown. In such cases, the physical soil classification does not appear to be incidental to an engineering system or facility and therefore does not appear to fall within the practice of professional engineering. Furthermore, where corrective action is conducted, the use of an engineering system or facility might not be required. For example, the corrective action requirements of a particular site may be met solely through the use of institutional controls. At such sites, the physical soil classification would not be incidental to an engineering system or facility and therefore does not appear to fall within the practice of professional engineering. Because physical soil classification at so many sites may not fall under the practice of professional engineering, the legislature could not have intended to allow only Licensed Professional Engineers to perform such work.

In addition to their argument being inconsistent with the PEPA, representatives of the CECI and the ISPE acknowledge that soil classification under Part 732 is within the realm of geology. When asked what types of roles professional geologists currently fulfill in the environmental arena, James Huff stated geologists "do a lot of field work, soil classification work." Transcript of April 3, 2001 hearing at 41. Furthermore, Bruce Bonczyk said that physical soil classification would be within the expertise of a geologist. Id. at 55-56.

Besides raising legal issues, the ISPE and the CECI also claim there are practical problems with the proposed amendments. They state the Licensed Professional Geologist certification proposed in 35 Ill. Adm. Code 732.402 will disrupt the presumption against liability afforded to Licensed Professional Engineer certifications pursuant to 415 ILCS 5/57.10, "thereby detrimentally affecting the viability of the certification and the ability to ensure protection to owners, operators, heirs, etc." CECI and ISPE Memorandum of Law p.4. The presumption against liability in Section 57.10 protects Licensed Professional Engineers, not owners, operators and their heirs. The presumption states:

> By certifying such a statement, the Licensed Professional Engineer shall in no way be liable thereon, unless the engineer gave such certification despite his or her actual knowledge that the performed measures were not in compliance with applicable statutory or regulatory requirements or any plan submitted by the Agency.

415 ILCS 5/57.10(b) (emphasis added). The proposed amendments will not affect this presumption.

APPENDIX B

Illinois
Environmental
Protection Agency

Bureau of Land
1021 N. Grand Ave. E.
Springfield, IL 62794-9276

November 1997

Tiered Approach to Corrective Action Objectives (TACO)

Fact Sheet 12: Off-site Contamination

What should I do if I suspect that contaminants from my site have migrated onto someone else's property?

The Illinois EPA recommends you take the following steps:

1. Before beginning or resuming on-site sampling activities, inform your neighbors of the environmental investigation.

2. If during the investigation it appears that contamination has migrated off the property, you should request property access from the affected neighbors to complete the environmental investigation. Any work performed on a neighboring property must be done with the full knowledge and consent of the property owner.

3. After investigating the neighbor's property, the contaminant concentrations will determine what, if any, off-site cleanup is warranted. If remedial activities are needed, you should carry out those activities, making every effort to accommodate the concerns of your neighbors, including:

   - replacing and repairing any damaged landscape
   - conducting cleanup efforts during hours that will not disturb or disrupt any business transactions or residential activities
   - keeping the neighbor fully informed of the progress
   - keeping the neighbor, the neighbor's buildings, and underground utilities safe from any trucks, drilling rig, excavation machines, or other equipment.

If my site contaminated someone else's property, what are my potential liabilities?

If the off-site contamination threatens human health or safety, you may be subject to enforcement action by the Illinois EPA, the Attorney General's Office, or the State's Attorney. Furthermore, you may be liable for third-party lawsuits.

Does the Illinois EPA mediate property access disputes between a site owner or operator and an affected neighboring property owner?

The Illinois EPA can assist in explaining to neighboring property owners the program and regulatory requirements and health risks associated with the site. However, the access agreement is strictly between the site owner or operator and the neighboring property owner, with the site owner or operator responsible for any damage as a result of the access.

What if a neighbor of my site refuses to allow access to his/her property?

If a neighboring property owner denies access, the site owner should provide proof of denial to the Illinois EPA, and then proceed to clean up only those properties where access has been granted. Once the site owner meets all program requirements and the applicable TACO remediation objectives, the site qualifies to receive a No Further Remediation (NFR) letter.

Can a Site Remediation Program (SRP) participant receive a No Further Remediation determination for off-site property?

Yes, if it appears contamination has migrated off-site and provided 1) the permission of the off-site owner is obtained to investigate and remediate the off-site property, and 2) the "remediation site" includes the off-site area.

(Continued)

No, if it appears contamination has migrated off-site, and the off-site owner denies permission to investigate and remediate the off-site property. However, a site owner still qualifies to obtain an NFR letter for the on-site property.

Remember, it may not be necessary to investigate the neighboring property if the results of the on-site investigation determine that contamination has not impacted the off-site property.

Can I impose an institutional control on my neighbor's property?

Only if your neighbor agrees. Without your neighbor's consent, the Illinois EPA will not issue the NFR letter specifying off-site institutional controls. You must either re-negotiate with your neighbor to gain consent, or clean up the off-site contamination to residential remediation objectives.

Contaminants from my site have impacted groundwater next door. Can I use a city ordinance that prohibits drinking the groundwater as an institutional control? And, do I have to inform my neighbor or obtain their consent?

Local ordinances can serve as institutional controls if the ordinance effectively prohibits the use of private wells for drinking water and meets the procedural requirements specified in 742.1015.

You must notify your neighbor in writing, but their consent is not necessary.

I am an off-site property owner. How would I know if contamination has migrated onto my property?

There are three ways to determine if contamination has migrated onto your property:

1. Conduct an environmental investigation of your property.

2. Obtain copies from your neighbors of any environmental investigation reports they may have. Such reports are personal property, so it is at the discretion of the report's owner to make copies available.

3. Obtain public records on a particular site from the Illinois EPA by submitting a written request to the Freedom of Information Act Officer.

What recourse do neighboring property owners have if the site owner chooses to disregard the off-site contamination?

They can alert the Illinois EPA to the situation, and depending on the circumstances, the Illinois EPA may:

- refer a site or person to the Illinois Attorney General's Office or the State's Attorney for prosecution
- refer a site to the U.S. EPA for review and action
- expend state hazardous waste funds to initiate an investigation and cleanup at non-LUST sites.

Of course, affected property owners may at any time file a third party lawsuit against the site owner.

The Tiered Approach to Corrective Action Objectives (TACO) fact sheet series, based on 35 IAC Part 742, is for general information only and is not intended to replace, interpret, or modify laws, rules or regulations.

R01-26 SERVICE LIST

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

Revised March 12, 2001

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
Bianco	Christie	Chemical Industry Council of Illinois	9801 W. Higgins Road, Suite 515	Rosemont, IL	60018
Bonczyk	Bruce		601 W. Monroe	Springfield, IL	62704
Consalvo	Cindy	Pioneer Environmental	1000 N. Halsted Suite 202	Chicago, IL	60622
Dickett	William G.	Sidley & Austin	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.	Assistant Counsel Division of Legal Counsel Illinois Environmental Protection Agency	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
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
Liss	Kenneth W.	Andrews Engineering, Inc.	3535 Mayflower Boulevard	Springfield, IL	62707
Ludewig	Pat	Caterpillar Tech Center	Bld 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
Smith	Wayne	Pioneer Environmental	1000 N. Halsted Suite 202	Chicago, IL	60622
Sternstein	Joel J.	Hearing Officer Illinois Pollution Control Board	100 West Randolph Street Suite 11-500	Chicago, IL	60601
Sykuta	David A.	Illinois Petroleum Council	P.O. Box 12047	Springfield, IL	62791
Vlahos	Georgia	Counsel	2501A Paul Jones Street	Great Lakes, IL	60088-2845

R01-26 SERVICE LIST
In the Matter of: Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732
Revised March 12, 2001

		Naval Training Center			
Walker	Rodger	Walker Engineering	500 W. Herrin Street	Herrin, IL	62448
Watson	John	Gardner, Carton & Douglas	321 N. Clark Street	Chicago, IL	606 0
Zolyak	Gary T.	U.S. Army Environmental Center	Northern Regional Environmental Office, Building E-4480	Aberdeen Proving Ground, MD	210 0-5401

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Comments 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
(Federal Express)

Joel Sternstein
Pollution Control Board
100 W. Randolph, Ste 11-500
James R. Thompson Center
Chicago, Illinois 60601
(Federal Express)

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

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

Service List

and mailing it from Springfield, Illinois on 5-1-01 with sufficient postage affixed.

Christy R. Robyn

SUBSCRIBED AND SWORN TO BEFORE ME
this 1st day of May

Brenda Boehner
Notary Public

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-14-2001

THIS FILING IS SUBMITTED ON RECYCLED PAPER