

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD CLERK'S OFFICE

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JAN - 2 2002

IN THE MATTER OF:)
)
SITE REMEDIATION PROGRAM)
(AMENDMENTS TO 35 ILL.)
ADM. CODE 740))

R01-27
(Rulemaking - Land)

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
SITE REMEDIATION PROGRAM)
PROPOSED 35 ILL. ADM. CODE)
740.SUBPART H (PUBLIC SCHOOLS))
)

R01-29
(Rulemaking - Land)
(Consolidated)

P.C. #8

NOTICE OF FILING

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Department of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787

Attached Service List

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Mark Wight
Mark Wight
Assistant Counsel

DATE: December 28, 2001

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

RECEIVED
CLERK'S OFFICE
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ILLINOIS POLLUTION CONTROL BOARD

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SITE REMEDIATION PROGRAM) R01-29
PROPOSED 35 ILL. ADM. CODE) (Rulemaking - Land)
,740.SUBPART H (PUBLIC SCHOOLS)) (Consolidated)

AGENCY'S FIRST NOTICE COMMENTS

The Illinois Environmental Protection Agency ("Agency") respectfully submits its comments in the above-titled matters to the Illinois Pollution Control Board ("Board") pursuant to 35 Ill. Adm. Code 102.108 and the Board's First Notice Opinion and Order of November 1, 2001.

I. OVERVIEW

On February 28 and April 4, 2001, the Board held hearings in Springfield and Chicago on the Agency's proposed amendments to 35 Ill. Adm. Code 740 and the proposal by Citizens for a Better Environment ("CBE") to add Subpart H: Requirements Related to Schools. The amendments proposed by the Agency are intended to: (1) Update incorporations by reference and testing methods, and (2) Add or clarify provisions concerning the role of Licensed Professional Geologists in remediation activities, late-recorded No Further Remediation ("NFR") Letters, and

the recording of NFR Letters issued to certain Illinois Department of Transportation sites. In addition the Agency has proposed at least two substantive changes to the rules: (1) Establishment of "soil management zones," and (2) Requirements that chemical analyses of environmental samples be performed by laboratories accredited under 35 Ill. Adm. Code 186. During the course of the hearings, the United States Department of Defense ("DoD") and the General Services Administration ("GSA") also proposed procedures pertaining to the recording of NFR Letters issued to certain federally owned sites.

At the hearings, representatives of the Agency, CBE, DoD, GSA, the Site Remediation Advisory Committee, the Illinois Environmental Regulatory Group, Chicago Public Schools, the Illinois Society of Professional Engineers, and the Consulting Engineers Council of Illinois presented testimony. Following the hearings, several participants submitted post-hearing comments to the Board. On November 1, 2001, the Board issued an Opinion and Order adopting for First Notice the Agency's proposal as modified by the Board based on the hearings and comments. The Board's Opinion and Order also presents the CBE's modified proposal for Subpart H and requests additional comment. The Agency submits the following comments on the Board's November 1st Opinion and Order.

II. COMMENTS ON BOARD'S REVISIONS TO AGENCY PROPOSAL

The proposed rule substantially tracks the Agency's proposal as originally submitted and modified by the Agency during the course of the hearings. The Board has proposed some changes to the Agency's proposal based on the record developed at the hearings. Generally, the Agency accepts the changes made by the Board but offers the following specific comments as

well as suggestions for additional changes and a few corrections. The Agency believes that all of the revisions proposed in these comments are non-substantive and consistent with its original proposal and testimony at hearing.

Section 740.120:

The Agency supports the Board's decision not to include a definition of soil in the Part 740 regulations. For the reasons stated in the record and the Board's First Notice Opinion, this is a decision better left to the Agency and the Remediation Applicant on a site-specific basis. Significant disagreements generally will find avenues of appeal to the Board through denials of Remedial Action Plans or Remedial Action Completion Reports.

Section 740.125(b):

The Agency notes that the Board has revised the Agency's SW-846 amendment to include the most recent update, IIIA, as well as the earlier updates. The Agency believes that it is important to clarify that only the most recent method or procedure contained in those updates will be accepted by the Agency. For example, if a particular test method is updated in Update IIA and again in Update IIIA, only the test method provided in Update IIIA will be acceptable.

Section 740.405:

The Agency supports the Board's decision to acknowledge the role of Licensed Professional Geologists in environmental remediation activities under the SRP.

Section 740.410(b)(4):

To accompany the amendments requiring analyses of environmental samples by certified laboratories, the Agency proposes a revision to the certification statement signed by the

supervising Licensed Professional Engineer ("LPE"). Laboratories are certified pursuant to 35 Ill. Adm. Code 186. Under Section 186.190(n)(7), the laboratory must identify in its report any sample results with failures or deviations from the approved test methods or quality control criteria, such as data qualifiers. However, the laboratory is not required to determine whether the data are usable. That decision is left to the recipient of the data. For example, soil samples are collected at a site and are to be analyzed for volatile organic compounds. The soil samples are placed on ice inside a cooler, and the cooler is sealed. However, the samples do not reach the laboratory for three days, and the temperature inside the cooler is 7 degrees Celsius. This is above the 4 degrees Celsius specified in Section 186.185(c)(1) and outside the acceptable range of 0.1 to 6 degrees Celsius. The laboratory contacts the client that the temperature of the cooler is outside the requirements, but the client still requests the samples to be analyzed. The data would be qualified that the preservation requirements were not met. It then would be up to the LPE to evaluate the data and make a judgment with regard to its suitability.

The Agency proposes the following revisions to the certification language to affirm that reports, including any qualified data, from the certified laboratory have been reviewed by the LPE:

I attest that all site investigations or remedial activities, including review of laboratory data, that are the subject of this plan or report were performed under my direction and this document and all attachments were prepared under my direction or reviewed by me, and, to the best of my knowledge and belief, the work described in the plan or report has been designed or completed in accordance with the Act, 35 Ill. Adm. Code 740, and generally accepted engineering practices, and the information presented, including any qualified laboratory data, is accurate and complete.

Section 740.415(d)(6):

The Agency supports the extension of the effective date to January 1, 2003, for the requirement to submit sampling data analyzed by accredited laboratories. This extension also is found at Sections 740.425(b)(7), 740.435(b)(8) and 740.455(a)(6). The Agency notes that in a similar proposal for amendments to 35 Ill. Adm. Code 732: Regulation of Petroleum Leaking Underground Storage Tanks (PCB Docket No. R01-26), the Board has extended the effective date to July 1, 2003. The Agency will propose revising that extension to January 1, 2003, so that the two programs will have the same effective date for the requirement. The Agency's laboratory personnel foresee no problem completing certifications by the January date if applications are submitted in a timely manner.

Section 740.425(b)(2)(E):

Following recent communications with the DoD/GSA participants, the Agency has agreed to propose additional language changes to provide consistency with the proposed amendment at Section 740.622. The first of these is at subsection (b)(2)(E) where the Agency proposes the following: "A legal description or reference to a plat showing the boundaries of the remediation site, or, for a Federal Landholding Entity, a common address, notations in any available facility master land use plan, site specific GIS or GPS coordinates, plat maps, or any other means that identifies the site in question with particularity." This language tracks language appearing at Section 740.622(a)(1)(A). The DoD/GSA participants believe the flexibility provided by this language is necessary for Federal Landholding Entities needing to describe a parcel of land. This revision also should be made at Section 740.435(b)(2)(D).

Section 740.425(b)(7)(B):

To provide a more definite certification for the regulated community and the Agency, the Agency proposes amending this subsection as follows: “Certification by an authorized agent of the laboratory as follows: ‘I attest that all analytical results that are the subject of this report were obtained by analyses performed by me or under my direction, and, to the best of my knowledge and belief, the analyses and report have been completed in accordance with the requirements of 35 Ill. Adm. Code 186 and the scope of this laboratory’s accreditation.’; ~~that all analyses have been performed in accordance with the requirements of 35 Ill. Adm. Code 186 and the scope of accreditation and~~”. This revision also should be made at Sections 740.435(b)(8)(B) and 740.455(a)(6)(B).

Section 740.535(b):

This subsection sets forth eight “requirements” that must be satisfied for approval of a request for a soil management zone (“SMZ”). These requirements are a mix of information that should be available and provided at the time of the request and information supporting proposals for certain actions to be taken once the SMZ is approved and implementation begins. However, the Agency’s proposed language states that the Remedial Action Plan must demonstrate that the requirements “will be satisfied,” possibly creating the interpretation that site investigation activities, definition of the dimensions of the SMZ, and so forth may be provided after the SMZ is approved. To clarify that this type of information must be provided at the time of the request as part of the Remedial Action Plan, the Agency proposes the following change: “. . . shall be classified as a soil management zone if the Remedial Action Plan provides the following

information and demonstrates that the following requirements will be satisfied:”. Changes in the original request for the SMZ may be accomplished through an amended Remedial Action Plan.

Section 740.535(b)(8):

The Agency’s views on this provision are well documented in the record and the Board’s First Notice Opinion.

Section 740.535(d)(3):

Also to provide consistency with Sections 740.621 and 740.622, the Agency proposes the following revision as agreed with the DoD/GSA participants: “Until the NFR Letter is perfected in accordance with Sections Section 740.620, 740.621 or 740.622 of this Part.”

Section 740.535(f)(2):

To correct an error in the Agency’s original proposal, the word “Objective” should be revised to the plural, “Objectives.”

Section 740.535(g)(2):

Again, to provide consistency with Sections 740.621 and 740.622, the Agency proposes the following revision as agreed with the DoD/GSA participants: “A No Further Remediation Letter addressing the contaminants that were the subject of the SMZ has been perfected under Sections Section 740.620, 740.621 or 740.622 of this Part. . . .”

Section 740.605(d):

Once again for the sake of consistency, the Agency proposes the following revision as agreed with the DoD/GSA participants: “The corrected letter shall become effective and shall be perfected as provided in Sections 740.620, ~~or~~ 740.621 or 740.622 of this Part.

Section 740.610:

Subsection (a)(1) should begin with a capital "A." In subsection (a)(4), "act" should be capitalized. In subsection (a)(9), the numeral "9" should not be stricken, and "agency" and "freedom of information act" should be capitalized. To provide consistency, the Agency proposes amending subsection (a)(7) as follows: "The recording obligations pursuant to title XVII of the Act and Sections Section 740.620, 740.621 or 740.622 of the Act.

Section 740.620(d):

The Agency proposes one final revision as agreed with the DoD/GSA participants: "The certification shall be recorded in accordance with this Section or Sections 740.621 or 740.622 as applicable, along with the No Further Remediation Letter or an affidavit. . . ."

Section 740.625(a)(10):

Section "740/627" should be revised to "740.622."

Appendix A, Table A:

To correct an error in the Agency's original proposal, 1,2-Dichloroethene (total) should be deleted along with its soil number, "10."

Appendix A, Table D:

To correct an error in the Agency's original proposal, Method 6020 should be added to barium.

III. COMMENTS ON CBE PROPOSAL

At the Table of Contents for Subpart H, Section 740.820 should be changed to "Establishment of Document Repository."

Section 740.805:

As a result of the adoption of SB1180 by the 92nd General Assembly (P.A. 92-0151; eff. July 24, 2001), there appears to be a conflict between this section and what is now required of public schools in counties with populations of more than 3,000,000 by Section 58.16 of the Act. Section 58.16 prohibits commencement of construction of such schools unless the property has been investigated for environmental contamination and enrolled in the SRP, if necessary, and has received the Agency's approval of its Remedial Action Plan.¹ Section 58.16 further prohibits occupancy of a building intended for use as a school unless the work required in the Remedial Action Plan has been completed. Completion of the work required by the Remedial Action Plan is marked by the approval of the Remedial Action Completion Report ("RACR") in accordance with Sections 740.455, 740.505 and 740.525 and Section 58.7(e)(4) of the Act wherein the Agency is expressly authorized to determine when remedial activities have been completed in accordance with the Remedial Action Plan. The conflict arises because proposed Section 740.805 prohibits use by the public of the site or any buildings on the site before an NFR Letter has been received from the Agency. For public schools in counties with populations of more than 3,000,000 this is more stringent than Section 58.16 because waiting for the NFR Letter may add at least 30 days to the time when occupancy may begin. See 35 Ill. Adm. Code 740.605(a).

To reconcile this conflict with the Act and to clarify the point at which remedial action is completed, the Agency suggests the following revisions: "... shall not be made available for use by children and the general public without first completing all work pursuant to the its Remedial Action Plan. ~~and receiving a NFR Letter from the Agency.~~ Work pursuant to the Remedial

¹ At this point, proposed Section 740.805 is less stringent than Section 58.16 since it applies only to sites enrolled in

Action Plan is deemed completed on the date the Agency issues its written final determination unconditionally approving the Remedial Action Completion Report. This section shall not be construed to exempt a RA from any additional requirements set forth in Section ~~58.16~~ 58.15 of the Environmental Protection Act [415 ILCS 5/~~58.16~~ 58.15].” The words “children and” are added to maintain consistency with proposed Section 740.800(a).

Section 740.810(a):

The certification statement need not be broken out into subsections. Instead, it should be combined into one paragraph beneath subsection (a)(2) and set off with quotation marks. The last phrase of the certification statement should read, “[t]he information presented is ~~in~~ accurate and complete.” Also, there are two subsections (a)(2). The second should be renumbered.

Section 740.810(b):

So as not to foreclose options such as opportunities to cure the failure to submit the report or defects in engineered barriers or institutional controls, the Agency suggests modifying the introductory language as follows: “In addition to any other remedies that may be available, the Agency may void the NFR Letter. . . .” In addition, it may be advisable to include a new provision at Section 740.625(a)(12) adding this to the list of reasons for avoidance of NFR Letters. Also, to clarify that the report must be submitted before every fifth anniversary and to maintain consistency with Section 740.810(a)(3), the Agency suggests the following: “An LPE’s report is not submitted to the Agency by every ~~any~~ fifth anniversary. . . .”

Section 740.810(d):

This provision would be more helpful if a time limit were provided. The Agency

the SRP but does not require public school sites to be enrolled in the SRP.

suggests: "If the site is transferred to a third-party, the transferor of the site shall is required to notify the Agency of such changes within 30 days of the completion of the transfer.

Section 740.815(b)(6):

"Contaminant" should be plural.

Section 740.820:

To ensure that the record kept at the document repository is complete, the Agency proposes the following: "... the RA shall establish a repository where all documents prepared by the RA for the Agency and by the Agency for the RA may be viewed"

Section 740.825:

This section requires within ten days of the submission of a Remedial Action Plan to the Agency the mailing of a fact sheet providing a significant amount of site information and a description of the steps proposed to address the contamination. However, Remedial Action Plans may be rejected or amended for a variety of reasons, and this could change the information sent in the original fact sheet. The question is whether additional fact sheets will be required for every Remedial Action Plan, including amended plans, or just the initial plan. The Agency suggests that the requirement be a one-time notice accompanying the initial plan. This serves the purpose of notifying the community of the general intent of the school system. The Agency's final determination for the plan and any amendments to the plan may be tracked through the document repository. The following change is suggested: "No later than 10 days after submission to the Agency of the initial a Remedial Action Plan for a remediation site intended for future use as a school. . . ."

General Comment:

Several compliance issues are raised by Subpart H, but, except for the engineered barrier/institutional control reporting provision at Section 740.810, very little addresses standards for compliance, confirmation of compliance, and consequences for non-compliance. For example, under Section 740.820 several questions could arise. What if the document repository is not established? What if the repository is established but not until after the ten-day requirement? What if documents are omitted from the repository? What if the repository is not updated promptly and continuously? What constitutes promptness in this case?

Similar questions arise in other sections. Are these to be considered program issues to be evaluated by the Agency and affecting in some way the progress of the RA toward the NFR letter, or are they compliance issues to be settled in actions before the Board brought by the complaining parties?

IV. CONCLUSION

The Agency has reviewed the Board's First Notice Opinion and Order, and, with the exception of Section 740.535(b)(8) and the revisions proposed above, accepts and supports the revisions to the Agency's proposal as set forth by the Board. The Agency has proposed at least one substantive revision to the CBE proposal and raised at least one question (the compliance issue) the resolution of which may have a significant impact on the administration of Subpart H. Others may do the same during this public comment period. Because the proposal remains unsettled, the Agency believes the dockets should be severed to allow the CBE proposal to crystallize further in an additional hearing or a Second First Notice Opinion and Order subject to public comment, whichever the Board deems most effective for resolving remaining issues.

Unless substantive revisions are proposed by others and accepted by the Board, the Agency

proposal as revised herein is, in the Agency's opinion, ready for Second Notice.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Mark Wight
Mark Wight
Assistant Counsel

Date: December 28, 2001

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Springfield, Illinois 62794-9276
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THIS DOCUMENT SUBMITTED ON RECYCLED PAPER

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached First Notice Comments of the Illinois Environmental Protection Agency upon the persons to whom it is directed by placing copies in envelopes addressed to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601
(FEDERAL EXPRESS - OVERNIGHT)

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Environmental Bureau
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Attached Service List
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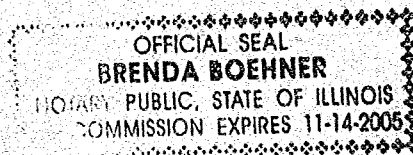
and mailing them from Springfield, Illinois on 12-28-01, with sufficient postage affixed as indicated above.

Michelle Kuhlman

SUBSCRIBED AND SWORN TO BEFORE ME

this 28th day of December, 2001.

Brenda Boehner
Notary Public



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P. 02/03

F-535

T-281 P. 002/003

+3128143669

From-ILLINOIS POLLUTION CONTROL BOARD

DEC-24-2001 09:20

Dec-24-01 00:17am

SERVICE LIST: R01-27 and R01-29 (consolidated)
 IN THE MATTER OF: SITE REMEDIATION PROGRAM: AMENDMENTS TO 35 ILL. ADM. CODE 740
 And
 IN THE MATTER OF: SITE REMEDIATION PROGRAM: PROPOSED 35 ILL. ADM. CODE 740.SUBPART H
 (SCHOOLS, PUBLIC PARKS, AND PLAYGROUNDS)
 November 15, 2001

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T-281

+3128143668

From-ILLINOIS POLLUTION CONTROL BOARD

DEC-24-2001 09:20

Dec-24-01 09:17am

SERVICE LIST: R01-27 and R01-29 (consolidated)
 IN THE MATTER OF: SITE REMEDIATION PROGRAM: AMENDMENTS TO 35 ILL. ADM. CODE 740
 And
 IN THE MATTER OF: SITE REMEDIATION PROGRAM: PROPOSED 35 ILL. ADM. CODE 740.SUBPART H
 (SCHOOLS, PUBLIC PARKS, AND PLAYGROUNDS)
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TOTAL P. 03