ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
SITE REMEDIATION PROGRAM (AMENDMENTS TO 35 ILL. ADM. CODE 740)	)	R01-27 (Rulemaking - Land)

P.C. #4

IN THE MATTER OF:	)	
	)	
SITE REMEDIATION PROGRAM PROPOSED 35 ILL. ADM. CODE 740.SUBPART H (SCHOOLS, PUBLIC PARKS AND PLAYGROUNDS)	)	R01-29 (Rulemaking - Land) (Consolidated)

NOTICE OF FILING

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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 Agency's Post-Hearing Comments, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Mark Wight
Mark Wight
Assistant Counsel

DATE: May 2, 2001

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AGENCY'S POST-HEARING COMMENTS

The Illinois Environmental Protection Agency ("Agency") respectfully submits its post-hearing comments in the above-titled matters to the Illinois Pollution Control Board ("Board") pursuant to 35 Ill. Adm. Code 102.108 and the direction of the Hearing Officer at the close of the hearing on April 4, 2001.

I. OVERVIEW

To date, two hearings have been held on the Agency's proposal for the amendment of 35 Ill. Adm. Code 740: Site Remediation Program and the Citizens for a Better Environment ("CBE") proposal to add Subpart H to the Part 740 regulations. The hearings were held on February 28, 2001, in Springfield and on April 4, 2001, in Chicago. During the course of the hearings, approximately 325 pages of testimony, questions and responses have been gathered and fifteen exhibits admitted to the record. The Agency has filed one amendment to its original proposal. Before providing its post-hearing comments, the Agency wishes to take this opportunity to thank the attending Board members and their assistants, Hearing Officer Bobb Beauchamp, Chairman

Harry Walton and the members of the Site Remediation Advisory Committee ("SRAC"), and the other participants at the hearings for their substantial efforts in preparing the Agency's proposal and in working to refine it through the hearing process.

The Agency urges the Board to adopt for first notice the Agency's proposal as modified by the "Agency's Motion to Amend Original Agency Proposal," filed with the Board on March 13, 2001. In the Agency's opinion, the Site Remediation Program ("SRP") has worked remarkably well since its adoption by the Board in 1997. Therefore, the Agency's proposed amendments are relatively modest. The proposal would update the incorporations by reference and the testing methods at Appendix A. It would clarify ambiguities concerning the recording of No Further Remediation ("NFR") Letters and the effectiveness of late-recorded NFR Letters. It would establish special procedures for NFR Letters issued to certain Illinois Department of Transportation remediation sites. It would acknowledge the recently established profession of Licensed Professional Geologist ("LPG"). It would require analyses of soil and groundwater samples to be conducted by accredited laboratories, and it would provide for the establishment of soil management zones ("SMZ") to increase options and reduce time and cost for the redevelopment of remediation sites.

Judging by the reaction (or lack thereof) at the hearings, most of these proposed amendments have been viewed by the participants as satisfactory in concept and language. However, there has been some controversy, in particular with regard to the soil management zones and the LPG provisions. In addition, representatives of the Department of the Navy and the General Services Administration have offered amendments and testimony in support of special procedures for the perfection of NFR Letters issued to federal landholding entities. Finally,

representatives of CBE have proposed that a new Subpart H be added to Part 740 to ensure that interested and affected persons will be fully informed about environmental issues arising at remediation sites intended for use as public schools.

In the remainder of this document, the Agency will provide comments on the controversial portions of its own proposal, the amendments proposed on behalf of the federal landholding entities, and the extra requirements for the public schools. The absence of comment in this document should not be construed as acquiescence or agreement by the Agency for positions or revisions not otherwise expressly endorsed.

II. ISSUES RAISED BY AGENCY PROPOSAL

A. Soil Management Zones

The SMZ concept creates an exemption from the solid waste disposal regulations at 35 Ill. Adm. Code 811 through 815 that will facilitate redevelopment of contaminated sites by increasing the options for the on-site handling of contaminated soils and by reducing the cost and time for remediation. Among other uses, the exemption allows remediation waste (i.e., excavated, contaminated soil) to be used for regrading, structural fill or land reclamation, to be consolidated on site, or to be treated and redeposited following treatment.

While the SMZ concept has met with broad support, at least two issues have arisen during the hearings. The Agency's condition at 740.535(b)(8)(B) provides that soil containing contaminants of concern above the concentrations in 35 Ill. Adm. Code 742.Appendix B: Table A (Tier 1 objectives for residential properties) or approved by the Agency pursuant to 35 Ill. Adm. Code 742.510(c) may not be treated or placed closer to any residential property contiguous to the remediation site. This condition has been criticized as unnecessary on the grounds that the Tiered

Approach to Corrective Action Objectives ("TACO") (35 Ill. Adm. Code 742) is sufficiently protective without it. Testimony of Harry R. Walton, Tr. 2 at 126 - 9.[1] Also, it has been proposed that a definition of "soil" be added to prevent the Agency from taking an unnecessarily restrictive view of what constitutes soil when the naturally-occurring materials most people think of as soil are contaminated or mixed with slag, ash, construction and demolition debris, and so forth. Prefiled Testimony of Harry R. Walton, Exhibit 6 (R01-27) at 3 - 4. The absence of a liberal definition of soil will prevent "the maximum utility of the Soil Management Zone (SMZ) for its intended purpose of providing an exemption from the solid waste disposal regulations." Prefiled Testimony of Harry R. Walton, Exhibit 6 (R01-27) at 2.

As a threshold matter, the Agency does not agree that immediately maximizing the breadth of the solid waste disposal exemption is the proper starting point for the experiment with SMZs. As stated above, the SMZ creates an exemption for a practice that currently would be a violation of the Environmental Protection Act. 415 ILCS 5/21(d)(2).[2] Prudence dictates that such exemptions be approached cautiously. It is reasonable to proceed slowly to see how well the exemption works and whether or not there are unanticipated problems or abuses. In the Agency's opinion, its proposal will allow many if not most sites interested in using an SMZ to design a redevelopment plan satisfying all the requirements proposed in Section 740.535. This represents fundamental change from what exists currently. The entire concept can be revisited for adjustments at a later date whether experience demonstrates that the exemption is working well or creating problems.

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1 References to the hearing transcripts will be cited as Tr. 1 or Tr. 2 with the former referring to the hearing held in Springfield on February 28, 2001, and the latter referring to the hearing held in Chicago on April 4, 2001.

2 Section 21(d)(1) also might be violated where a defined remediation site crosses property boundaries.

1. Definition of "Soil"

The Agency opposes the attempt to define "soil" in these regulations. This is an issue that was discussed at length when developing the TACO regulations. "Soil" is a term that appears tens if not hundreds of times in Part 742. If it were to be defined, TACO would be the place to do it, but it was generally concluded at that time that a generic definition could not be achieved because there are too many considerations. Nevertheless, TACO has functioned well without it. If soil must be defined, the definition should be based on sound principles of geology and not on an artificial construct calculated to gain maximum advantage from the SMZ concept. However, geology texts consulted by the Agency have not defined soil per se but are far more specific, describing instead different soil types such as clay, silt, and loam.

The Agency understands the concern that frequently the soil found at remediation sites is contaminated or mixed with slag, ash, refuse, or demolition debris including concrete, asphalt, brick, wood, and so forth. Whether or not these substances or others would limit or prevent activities in an SMZ must depend on a variety of site-specific factors such as type, amount, and size, and the effect on the TACO equations. The object is to prevent redistribution around the site of materials that should have been (or should now be) landfilled as a result of these factors. The Agency's position is that the call must be made by the Agency on a site-specific basis working with the Remediation Applicant and the consultant to evaluate the information shown in the site investigation. *See generally* Testimony of Lawrence W. Eastep and Gary King, Tr.1 at 20 - 8.

2. Section 740.535(b)(8)(B): Treatment or Placement of Contaminated Soil Closer to Contiguous Residential Property

Because the practice of redepositing or redistributing contaminated soils at a remediation site is currently a violation of the Environmental Protection Act ("Act") unless done in accordance

with the applicable disposal regulations, the Agency has proposed that the exemption be used only under strictly controlled conditions. One of the conditions placed on the use of SMZs is that soil containing contaminants of concern above the concentrations in 35 Ill. Adm. Code 742.Appendix B: Table A (Tier 1 objectives for residential properties) or approved by the Agency pursuant to 35 Ill. Adm. Code 742.510(c) may not be treated or placed closer to any residential property contiguous to the remediation site.[3] The Agency proposed this condition largely to prevent negative reaction and public resistance to the SRP and SMZ activities. Testimony of Gary King, Tr. 1 at 35 - 6.

The condition has been criticized as unnecessary because TACO itself is protective. Contaminated soil moved anywhere on-site could be made safe using the TACO procedures. The Agency has responded that the basis for the condition has more to do with perceptions than risk analysis. However, this does not mean the perceptions are unjustified and unimportant or that the condition is unreasonable. The Agency has learned through numerous experiences with releases and the siting of pollution control facilities that the public seldom reacts positively to the news that contamination or potential contamination has been found in or moved to the vicinity of their homes. It's one thing to learn that contamination is in the vicinity as the result of an accident or mishandling of the contaminants and still another to learn that new or additional contamination is

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3 Because the issues raised by subsection 740.535(b)(8)(B) often were characterized at hearing as whether or not an SMZ could be established on site if it violated this condition, a clarification is important. The issue is not where the SMZ can be established but what may be done with contaminated soil within the SMZ once the SMZ is established. The condition at Section 740.535(b)(8)(B) applies to "soil containing contaminants of concern . . ." A soil management zone may be established at the boundary between the remediation site and a contiguous residential property as long as contaminated soil within the SMZ is not moved closer to the residential property (e.g., contaminated soil within the SMZ may be moved laterally to the residential property or it may be moved away from the residential property). In addition, SMZs may contain both contaminated and uncontaminated areas. Within the SMZ, contaminated areas may be consolidated but not in violation of the conditions under Sections 740.535(b)(8)(A) and (b)(8)(B).

being placed in the vicinity as authorized by law. There is a qualitative difference in how the contaminated soil arrived at the point of controversy that potentially compounds the negative reaction.

There is a second reason why the public perception problem may be magnified. It is too simplistic to say that the potential public concern is unjustified because TACO is protective. The protectiveness of TACO is not automatic. Unless sites are cleaned to levels allowing unrestricted use, the protectiveness of TACO depends on a relatively complex set of circumstances playing out according to script over an indefinite period of time. TACO is based on a quid pro quo. Greater amounts and concentrations of contamination may be left in place in return for assuming the obligation to manage the remaining risk until it is demonstrated that the risk is no longer present. There are two tools for managing risk, institutional controls and engineered barriers. An honest assessment must contemplate that, over time, some percentage of institutional controls and engineered barriers will be compromised or fail. Institutional controls will be forgotten or ignored. Engineered barriers will break down through normal deterioration and neglect or intentional disregard.[4]

Consider that the following scenarios are possible under the SMZ proposal. Concentrations of soil contaminants in an area may be increased by moving soil with higher concentrations to an

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4 The Agency has no data on failure rates for either form of control. TACO is a fairly recent development in Illinois, and Illinois was one of the leaders in implementing risk-based corrective action. It is not expected that failure rates would be apparent at this early stage. However, for those who question whether the long-term effectiveness of institutional controls is a valid concern, a good discussion of their strengths and weaknesses can be found in the U.S. EPA publication, "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA corrective Action Cleanups," Office of Solid Waste and Emergency Response (OSWER 9355.0-74FS-P; EPA 540-F-00-5, Sept. 2000). As a result of the failure potential, the document recommends layering institutional controls or implementing them in series. Among other safeguards receiving attention nationally is financial assurance for both institutional controls and engineered barriers.

area containing the same contaminants but in lower concentrations. Any number of contaminants that did not previously exist in an area may be moved to that area as long as there is at least one contaminant of concern in the area above its Tier 1 objective. In the Agency's opinion, increasing concentrations or numbers of contaminants closer to residences will be a needless provocation to the public with the further potential for negative impact on the SRP and SMZs. Because redepositing remediation waste is not currently allowed outside of landfills, there is no imperative for opening the SMZ to this specific practice. Nothing is lost by retaining this small portion of the broader prohibition that exists today.

B. Licensed Professional Geologists

Testimony and comments of Mr. Bruce S. Bonczyk on behalf of the Illinois Society of Professional Engineers ("ISPE") and the Consulting Engineers Council of Illinois ("CECI") object to the "proposed inclusion of terminology and regulations which allows for licensed professional geologists to perform certain functions assigned to licensed professional engineers in the enabling legislation for the SRP program." Testimony of Bruce S. Bonczyk, Tr. 2 at 161. Mr. Bonczyk's argument on behalf of his clients is that the Agency may not propose and the Board may not adopt SRP regulations containing references to LPGs because there is no statutory basis for it. "Memorandum of Law in Support of the Motion to Oppose Certain Proposed Amendments of the Environmental Protection Agency's Proposal to Amend 35 Ill. Adm. Code 740," at 3 (March 27, 2001). On its face, the SRP enabling legislation (415 ILCS 5. 58 - 58.12) refers only to LPEs and assigns certain duties only to LPE's. Neither the Agency, in developing its proposal, nor the Board, in considering adoption of the Agency's proposal, have the authority to look beyond the express

language of Title XVII. *Id.* at 4; Testimony of Bruce S. Bonczyk, Tr. 2 at 161.

The Agency has included LPGs in its proposal only to the extent authorized by the Professional Geologist Licensing Act ("PGLA") (225 ILCS 745). Although the PGLA is an expression of legislative intent regarding the practice of professional geology that is much more broad than the involvement of geologists in environmental activities, the PGLA clearly expresses the understanding of the General Assembly that geologists have an important role to play in environmental activities conducted in Illinois. 225 ILCS 745/5(a), (c), (f). Further, the examples of the practice of professional geology provided in the definition section of the PGLA clearly include activities that might be part of environmental remediation activities conducted under the SRP and necessary for the application of the TACO methodology (sampling and analysis of earth materials and interpretation of data; planning of data gathering activities and preparation of geological maps and cross sections for the purpose of evaluating site-specific geological conditions; planning, review and supervision of activities and interpretation of data regarding groundwater; the conduct of environmental property audits). *Id.* § 745/15.

It is not the Agency's position that LPGs may do everything on site that LPEs may do, but the PGLA clearly states that they are qualified to do some of them. For example, Section 15 of the PGLA expressly authorizes LPGs to conduct environmental property audits. While the environmental audit is not defined in the PGLA, it is defined in the "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" (ASTM E 1527 - 00), which is the basis for the SRP comprehensive site investigation. Sections 3.3.11 and 3.3.13 of the ASTM document indicate that the environmental audit is more rigorous than an environmental site assessment, but may include an environmental site assessment. Because other

activities in addition to the environmental site assessment may be required to complete a site investigation, the Agency's proposal does not authorize LPGs to sign off on site investigation reports. Similar reasoning applies to the signing of the other plans and reports required by the SRP rules, which would remain the responsibility of the LPEs.

Mr. Bonczyk's conclusion as to the Board's authority to adopt regulations is too narrow. The legislature need not spell out each and every detail for administrative agencies to exercise their rulemaking authority. A grant of authority to adopt rules includes the power to do all that is reasonably necessary to perform the duty conferred by statute, and the courts have so held repeatedly. *Oak Liquors, Inc. v. Zagel*, 90 Ill. App. 3d 379, 380 - 82; 413 N.E.2d 56, 58 - 9 (1st Dist. 1980) (holding the Department of Revenue did not exceed its general grant of authority to adopt rules for hearings by imposing a good faith deposit as a precondition to granting a tax liability hearing even though the enabling act did not expressly provide for deposits and the hearings could have been held without them); *see Land and Lakes Co. v. Illinois Pollution Control Bd.*, 245 Ill. App. 3d 631, 640, 616 N.E.2d 349, 355 (3rd Dist. 1993) (citing *Reichhold Chemicals, Inc. v. Pollution Control Board* in holding that the Environmental Protection Act's grant to the Board of authority to adopt procedural rules "as necessary to accomplish the purposes of this Act" was sufficient authority for the Board to authorize by rule reconsideration of its rulings even where the courts had consistently held that administrative agencies may allow rehearings only when authorized to do so by statute).

Section 58.11(c) of Title XVII grants the Board broad authority to adopt "rules that are consistent with [Title XVII]. . . ." Nothing in the Agency's proposal divests LPEs of any duties or responsibilities assigned in Title XVII. Nothing in Title XVII excludes LPGs from applying their

expertise at SRP remediation sites. Nothing in the Agency's proposal contravenes the legislative intent so as to make the proposal unlawful if adopted by the Board. Moreover, the Agency's proposal is consistent with the legislative intent set forth in the PGLA, and the Agency has found no case law holding that an administrative body may not look to expressions of legislative intent outside the regulatory enabling legislation as long as the final product is consistent with that enabling legislation. The Agency urges the Board to retain the proposed amendments simply acknowledging in the SRP what the PGLA already has acknowledged statewide by law -- that LPGs have valuable skills that may be useful at environmental remediation sites.

C. Special Procedures for Federal Landholding Entities

Richard Butterworth of the General Services Administration and Georgia Vlahos of the Department of the Navy testified at hearing that special procedures for perfecting NFR Letters are needed for federal landholding entities because of legal limitations on the ability of these entities to deed record land use restrictions on federal property. Testimony of Richard R. Butterworth, Jr., Tr. 2 at 99; Testimony of Georgia Vlahos, Tr. 2 at 110. The testimony of Mr. Butterworth explains the nature of those limitations in detail, and they need not be repeated here. Testimony of Richard R. Butterworth, Jr., Tr. 2 at 99 - 107. As a result of these recording limitations, the Department of the Navy and other Department of Defense ("DoD") component agencies worked with the United States Environmental Protection Agency and the Illinois EPA to develop for use in Illinois the concept of the Land Use Control Memorandum of Agreement ("LUC MOA").

The LUC MOA concept, already a part of the TACO regulations, will be used as the basis for an alternative procedure for perfecting NFR Letters issued to federal landholding entities and containing land use restrictions. Ms. Vlahos and Mr. Butterworth testified to the many safeguards

built into the LUC MOAs to ensure that land use restrictions are maintained while the property remains in the possession of the federal landholding entity and that the restrictions are transferred with the property once it passes from federal ownership. Testimony of Georgia Vlahos, Tr. 2 at 114; Testimony of Richard R. Butterworth, Jr., Tr. 2 at 106. The DoD component agencies worked with the Agency to develop amendments to Part 740 implementing the alternative procedure. The Agency fully supports the amendments attached to Ms. Vlahos's pre-filed testimony (Exhibit 4, R01-27) as modified by her testimony at hearing. Testimony of Georgia Vlahos, Tr. 2 at 116 - 7. The Agency requests that the Board accept the DoD amendments to Part 740.

III. CBE PROPOSAL

Citizens for a Better Environment ("CBE") has proposed a new Subpart H for Part 740 that would create extra procedures for remediation sites entering the SRP and intended for use as public schools. The proposal has evolved since its initial submission in January 2001. The version currently before the Board was filed on April 2, 2001. As stated at the hearing on April 4, 2001, the Agency has several concerns of a general nature with this proposal, including manpower and budgetary concerns and lack of specificity in some of the requirements. Comments of Mark Wight, Tr. 2 at 166 - 8. However, the CBE stated in testimony that it intended to submit a revised proposal following the April 4th hearing as a result of its communications with other interested entities (Testimony of Stefan Noe, Tr. 2 at 51 - 2), and the Agency has offered additional comments to CBE since that hearing. Because a revised proposal is expected, the Agency offers no specific comments on the April 2nd version at this time, but it reserves the right to testify or comment as appropriate in the future.

IV. CONCLUSION

As stated above, the SRP has been a very successful program to date. Each year the program has shown a steady increase in the number of NFR Letters issued. The Agency expects that the program will continue its steady growth in the coming years. The limited changes proposed by the Agency primarily are intended to update and fine-tune the existing procedures and to eliminate minor sticking points. The exceptions are the requirement for using accredited laboratories for analyses of soil and groundwater samples and the authority to create SMZs. Even if it does not quite accommodate every conceivable redevelopment plan, the SMZ concept proposed by the Agency promises to expand substantially the options for site redevelopment while reducing remediation costs and time. The Agency urges the Board to adopt for First Notice the Agency's proposal as modified by its Motion to Amend and by the Department of Defense amendments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Mark Wight
Mark Wight
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Date: May 2, 2001

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PROOF OF SERVICE

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and mailing them from Springfield, Illinois on 5-2-01, with sufficient postage affixed as indicated above.

Christine L. Roberts

SUBSCRIBED AND SWORN TO BEFORE ME
this 2nd day of May, 2001.

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

SERVICE LIST: R 01-27

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

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