

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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APR 17 2003

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
BROWNFIELD SITE RESTORATION)
PROGRAM)
)
(AMENDMENTS TO 35 ILL.ADM.) R03-20
CODE 740) (Rulemaking)

N O T I C E

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Pollution Control Board
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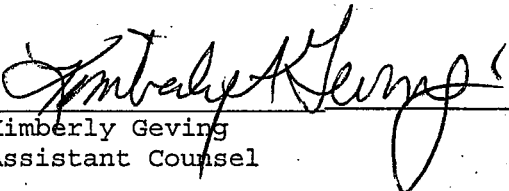
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Chicago, Illinois 60601

See Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of
the Clerk of the Pollution Control Board the Testimony of Gary P. King
of the Illinois Environmental Protection Agency, a copy of which is
herewith served upon you.

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

By:



Kimberly Geving
Assistant Counsel

DATE: April 16, 2003
Agency File #:
Illinois Environmental
Protection Agency

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R03-20

Rulemaking-Land

TESTIMONY OF GARY P. KING

My name is Gary King. I am the manager of the Division of Remediation Management within the Bureau of Land of the Illinois Environmental Protection Agency ("Agency"). I have been in my current title since May 1990. Prior to assuming my current position I was the senior counsel for the Bureau of Land within the Agency's Division of Legal Counsel. I have been employed at the Agency since 1977. I received a B.S. in Civil Engineering in 1974 from Valparaiso University and a J.D. in 1977 from the same university.

I have testified before the Board in numerous rulemaking proceedings.

A. LEGISLATION

Section 58.15 of the Environmental Protection Act ("Act") was amended by P.A. 92-715, effective July 23, 2002 to add Subsection (B), the Brownfields Site Restoration Program ("BSRP"). Proponents of the BSRP legislation hoped it would provide an effective financial incentive for the cleanup and reuse of Brownfield sites, in lieu of the Environmental Remediation Tax Credit ("ERTC") that sunset December 31, 2001. Section 58.15(B)(m) directs the Agency to submit to the Board proposed regulations prescribing procedures and standards for the

administration of the BSRP.

Section 58.15(B) prescribes in substantial detail the procedures for obtaining reimbursement under the BSRP.

B. REGULATORY DEVELOPMENT

Because the statutory language of P.A. 92-715 is very explicit on many issues relative to the administration of this program, development of this rulemaking proposal has been straightforward. Because much of the language of the Section 58.15(B) BSRP finds parallel language in the Section 58.14 ERTC, the Agency has drawn much of the language for this rulemaking from 35 Ill. Adm. Code 740 Subpart G.

The Agency sought input on this rulemaking from the Regional Commerce and Growth Association of Greater St. Louis ("RCGA"). The Agency sought input from RCGA because of their keen interests in the BSRP and their efforts to see it enacted by the General Assembly. The Agency transmitted a copy to a representative of RCGA by email on December 11, 2002. The Agency received comments from RCGA on February 14, 2003. Those comments and the RCGA's questions are discussed later in this testimony. The Agency had already sent its proposal to the Board on February 14 and thus was unable to make any changes based on the comments of RCGA.

C. DISCUSSION OF PROPOSED REGULATIONS

Because the procedures of the Brownfields Site Restoration Program are based on performance of remediation under the Site Remediation Program, the Agency believes that the appropriate placement of the review procedures is in the Site Remediation Program regulations at

35 Ill. Adm. Code 740 ("Part 740"). Therefore, the proposal is presented as amendments to Part 740 including a new Subpart H and miscellaneous conforming amendments to the existing Part 740. The Agency's Statement of Reasons adequately outlines the procedures in the rules without further repetition here.

Following in this testimony are the comments and questions of RCGA as to the proposed BSRP rules as sent to the Agency on February 14, 2003.

RCGA: *I think overall the IEPA was trying to be pretty fair with these regulations. The process for applying for this grant money is pretty cumbersome, but most of this is defined by the legislation so I don't think there's much we can do.*

IEPA: I concur

RCGA: *1. In 740.805(a), ask IEPA to clarify what "satisfying the requirements of Section 740.450" means. At this point, the applicant does not have to have an IEPA-approved RAP - does this language give the IEPA the ability to reject a budget plan based on a pre-review or completeness review of the RAP?*

IEPA: If a RAP submitted under Section 740.450 is incomplete, then Section 740.805(a) authorizes the Agency to reject the budget plan. This language was drawn from Section 740.705(a). The same concept applies to the BSRP as the ERTC. The Agency should not be making decisions about whether costs in a budget are appropriate unless the Agency can determine that the remediation, as reflected in the RAP, will be appropriate.

RCGA: *2. Something that's not addressed in the legislation or regulations pertains to the earlier reports required by the SRP. It appears that the presumption is that the applicant will have submitted and obtained approval for these reports already, but what if they haven't or what if they have submitted some of the prior reports but not received IEPA approval yet? (The SRP allows a RA to submit all the reports at one time, if it chooses, and in some cases, not all reports must be submitted.)*

IEPA: Section 740.805(a) provides for the Agency to reject a budget plan unless a RAP has been presented to the Agency that meets Section 740.450.

RCGA: 3. 740.805(g)(3) states that submittal of an amended plan restarts the time for review. Does this include the 60-day waiver? Are they referring to just the budget plan, or does any amendment to the RAP (including one that does not affect the budget) restart the clock?

IEPA: The reference to "amended plan" in 740.805(g)(3) refers to "amended budget plans", as provided for in the introductory language of 740.805(g).

RCGA: 4. Section 740.805(i)(4) allows the IEPA to return the budget plan un-reviewed if it disapproves a RAP or approves a RAP with conditions. In some cases it does not make sense for the IEPA to review a budget for a RAP that requires significant revisions, but where the IEPA approves a RAP with conditions, it seems IEPA could provide comments on the budget as well. The LUST program requires owner/operators to submit cleanup plans and budgets together and the IEPA issues comments to both, even if it does not approve the cleanup plan - perhaps our program should work the same way. The RA is paying for this initial review (\$500).

IEPA: The language of 740.805(j)(4) for the BSRP parallels the language adopted by the Board in 740.705(e)(1) for the ERTC. The Agency's authority to return the budget plan unreviewed is discretionary on the part of the Agency; it is not mandatory.

RCGA: 5. Under 740.810(d) (and similar provisions in 740.811), can the IEPA reject a RA's certification?

IEPA: Yes. See Section 740.830(a)(2).

RCGA: 6. Is there a fee payment provision missing from 740.811?

IEPA: Yes

RCGA: 7. What happens if the IEPA does not complete its review of an application for payment within the timeframes in 740.815(b)? Is it automatically approved or automatically denied?

IEPA: The applicant can wait for the Agency to complete its review or the applicant can file a request for review with the Board as if the Agency had denied the request.

RCGA: 8. It appears the reference to "budget plan" in 740.815(c) should be changed to "application."

IEPA: Section 740.815(c) uses the word "application".

RCGA: 9. *The regulations are not clear on when an amended application must be submitted under 740.815. The statute allows IEPA to approve an application with modifications - the regulations should clarify that this type of approval does not require submittal of an amended application, only if the IEPA disapproves the application. Also the regulations should probably specify that a RA could submit an amended application in the event the IEPA disapproves an application.*

IEPA: It is not clear from the question as to whether the concern relates to submitting an amended application before, or after, the Agency decision. Where an application is approved with modifications the modified approval stands as the determination controlling future actions, unless an appeal is filed with the Board. An applicant who receives an IEPA disapproval can file an appeal with the Board or submit a new application meeting the points of the disapproval.

RCGA: 10. *Under 740.830, can the IEPA provide specific examples of subparagraphs (c), (g), (h) and (j)*

IEPA: Example of (C): construction of a building. Example of (g): contractor backs over and destroys monitoring well. Example of (h): construction of a building. Example of (j): purchase of x-ray fluorescence monitoring equipment.

RCGA: 11. *Also under 740.830, subparagraph (n), as currently drafted, gives the IEPA too much discretion. Regarding subparagraph (w), will the IEPA publish a list of reasonable rates so RA's know what is unreasonable? Will the reasonable and customary rate sheet for the LUST program that IEPA is working on now with the Consulting Engineers Counsel also apply to our program?*

IEPA: As to 740.830(n), the Board used the same language in 740.730(p) for the ERTC. As to 740.830(w), this question is premature since the Agency has not proposed to the Board a change to the Board regulations on the LUST reimbursement program under Part 732.

RCGA: 12. *According to the rules, no costs incurred prior to DCCA approval (step 4) are reimbursable. It is key that the IEPA will accept for step 1, a general or rough budget for the site. Otherwise, the potential developer will have to spend a fair amount of money, which is not reimbursable, and they may find out that the money does not exist or the site doesn't meet DCCA's approval.*

IEPA: I concur.

RCGA: 13. *Step 6 is an option for the RA. However, if this step is not done, the developer risks the IEPA disapproval of costs during final approval*

(step 9). This will be after they are incurred, so the RA is wise to pursue pre-approval. The Rules state in 740.805.a that this budget can't be submitted until the RAP is submitted. The costs to complete a RAP can be considerable (hundreds of thousands of dollars) and the RA runs the risk that the IEPA will not approve these costs.

IEPA: I concur, although the costs can be quite variable from site to site.

RCGA: *14. The additional time associated with going through this program is going to be cumbersome. There is no indication of how quickly IEPA will complete Step 2 or of how quickly DCCA will complete their approval. Normally IEPA has 60 or 90 days to approve reports. The way I read Section 740.805 e and g 2, the IEPA gives itself an additional 60 days to approve the projected budget. IE, for this step alone, the IEPA will have between 120 and 150 days.*

IEPA: The interpretation of the proposed rules is correct. The procedures for reimbursement could well prove to be cumbersome, but this is the framework set forth in the legislation. An applicant is required to follow these procedures only if and when the applicant chooses to seek reimbursement.

RCGA: *15. Assuming that EPA initial approval (Step 2) and DCCA approval (Step 4) take 30 days each and IEPA pre approval (Step 6) takes 120 days, the developer will have an additional 180 days before they can begin site remediation. This is on top of the time it will take for their consultant to submit all of the budgets conduct the site investigation and generate the RAP.*

IEPA: An applicant who wants to take advantage of reimbursement under the BSRP must be very careful in planning ahead on site activities to account for Agency and DCCA review times.

RCGA: *16. I.E. at a minimum the "additional 60 days" needs to be eliminated and if possible, the time for initial IEPA and DCCA approval needs to be defined, hopefully as a limited period. Also, the IEPA will hopefully understand that the initial budget that will be submitted will not be very detailed.*

IEPA: I disagree that the "additional 60 days" needs to be eliminated. If it is eliminated then the Agency will have to review the RAP and the budget plan within the same 60 days. This would mean that the Agency would be given no time to review, by regulation, the budget plan.

D. TECHNICAL FEASIBILITY

No new technical requirements are created by the proposed Subpart H. All that will be required of RAs and their consultants will be to maintain records of site activities and expenses and assemble them for purposes of the applications for review. These activities are similar to those long required of LUST owner/operators seeking payment from the UST Fund. Therefore, the Agency concludes that no issues of technical feasibility are raised in this proposal.

E. ECONOMIC REASONABLENESS

As described previously, Section 58.15(B) of the Act prescribes in substantial detail how the BSRP is to function. As a result, there is little discretion as to the form and content of the procedures, and any economic issues are diminished for the purposes of this rulemaking. Moreover, no new regulatory burdens are imposed as a result of this proposal. Application for the BSRP reimbursement is elective, and potential applicants may decide for themselves if the benefits outweigh the costs.

THIS FILING IS 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 Testimony of Gary P. King on behalf of the Illinois Environmental Protection Agency upon the person to whom it is directed, by placing a copy in an envelope addressed to:

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See Attached Service List
(1st Class)

and mailing it from Springfield, Illinois on April 16th 2003

Antuly A. Lemay

SUBSCRIBED AND SWORN TO BEFORE ME

this 16th day of April, 2003
Brenda Boehner
Notary Public



THIS FILING IS SUBMITTED ON RECYCLED PAPER

R 03-20 SERVICE LIST*
 IN THE MATTER OF: BROWNFIELDS SITE RESTORATION PROGRAM; AMENDMENTS TO 35 ILL. ADM. CODE 740
 Updated April 11, 2003

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 10:00am
 Apr-14-03

R 03-20 SERVICE LIST*

IN THE MATTER OF: BROWNFIELDS SITE RESTORATION PROGRAM; AMENDMENTS TO 35 ILL ADM. CODE 740

Updated April 11, 2003

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*Subject to change without notification. Please contact the Clerks Office at 312-814-3461 to obtain the current list.

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