

ILLINOIS POLLUTION CONTROL BOARD

April 16, 1998

IN THE MATTER OF:)
)
REVIEW OF REMEDIATION COSTS FOR) R98-27
ENVIRONMENTAL REMEDIATION TAX) (Rulemaking - Land)
CREDIT (AMENDMENTS TO 35 ILL.)
ADM. CODE 740))

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by K.M. Hennessey, C.A. Manning, and M. McFawn):

In 1997, the Illinois General Assembly adopted legislation creating the environmental remediation tax credit (tax credit). The tax credit allows taxpayers to credit against their Illinois income tax liability a portion of the costs that the taxpayer has spent to clean up certain contaminated properties (or “brownfields”). The tax credit is intended to give taxpayers an incentive to clean up and redevelop brownfields.

A taxpayer who wishes to claim the tax credit must first submit to the Illinois Environmental Protection Agency (Agency) an application for review of its cleanup (or “remediation”) costs. The proposal that the Board adopts today for first notice establishes the procedures and standards under which the Agency will consider these applications.

PROCEDURAL MATTERS

Effective July 21, 1997, the Illinois General Assembly adopted P.A. 90-123, a bill that created an environmental remediation tax credit (tax credit). See P.A. 90-123 (1997), eff. July 21, 1997. This bill amended two statutes: the Illinois Income Tax Act (the Income Tax Act), 35 ILCS 5/101 *et seq.* (1996) which the bill amended by adding the tax credit at Section 201(1); and the Illinois Environmental Protection Act (the Environmental Protection Act), 415 ILCS 5/1 *et seq.* (1996), which the bill amended by adding a provision regarding the Agency’s review of the remediation costs at Section 58.14.

Section 58.14 of the Environmental Protection Act required the Agency to propose rules for its review of environmental remediation costs within six months after the effective date of P.A. 90-123. Section 58.14 requires the Board to adopt those rules for second notice within six months after the Board receives the Agency’s proposed rules.

On January 21, 1998, the Agency filed a proposal, along with a motion for acceptance, a Statement of Reasons (Statement), and an Agency Analysis of Economic and Budgetary Effects of Proposed Rulemaking. On January 22, 1998, the Board accepted this matter for hearing.

The Board held three public hearings in this matter: the first, in Chicago, on February 24, 1998; the second, in Springfield, on February 27, 1998; and the third, also in Springfield, on March 17, 1998. At the February 24 hearing, several witnesses testified: Mr. Gary King, manager of the Division of Remediation Management in the Agency's Bureau of Land of the Agency; Mr. Lawrence Eastep, manager of the Remedial Project Management Section of the Agency's Bureau of Land; Mr. Douglas Oakley, an Agency employee who manages and reviews claims for Underground Storage Tank remedial costs; and Dr. Shirley Baer, an Agency employee who works in the Agency's Voluntary Site Remediation Unit. Dr. Baer also coordinated the Agency's efforts on this proposal with the Department of Revenue (Revenue) and the Department of Commerce and Community Affairs (DCCA). Tr.1 at 9-11.¹

At the February 27, 1998, hearing, all of these Agency witnesses again testified, along with Ms. Melissa Pantier of DCCA. In addition, Ms. Kelsey Lundy, Director of Community Affairs of the St. Louis Regional Commerce and Growth Association (RGCA) testified about the proposal. Mr. Eric Voyles, a member of the RCGA, also testified, as did Mr. Eugene Schmittgens, attorney for the RCGA.

The March 17, 1998, hearing was held to receive public comment on DCCA's decision, under P.A. 90-489, eff. Jan. 1, 1998, not to perform an economic impact study on the Agency's proposed rules. No one submitted any comments at that hearing.

At the first and second hearings, the hearing officer accepted into the record the following exhibits:

Exhibit 1: Testimony of Gary King (Exh. 1);

Exhibit 2: Illinois Environmental Protection Agency Draft of Revisions to Part 740 in Response to Questions from the Pollution Control Board Hearing of 2/24/98 (Exh. 2);

Exhibit 3: Draft of Department of Commerce and Community Affairs Notice of Proposed Rules amending 14 Ill. Adm. Code 520 (Exh. 3);

Exhibit 4: Bureau of Land Inventory Data Input Form (Exh. 4); and

Exhibit 5: Testimony of Kelsey Lundy on behalf of the RGCA.

Following the hearings, the hearing officer established a deadline for interested persons to file public comments. The Board received the following public comments:

Public Comment #1 (PC 1): Proposed Testimony of Kelsey Lundy on behalf of the RCGA.

¹ The transcript of the February 24, 1998 hearing is cited as "Tr.1 at ___;" the transcript of the February 27, 1998 hearing is cited as "Tr.2 at ___."

Public Comment #2 (PC 2): Agency's Pre-first Notice Comments

Public Comment #3 (PC 3): Second Public Comment of Kelsey Lundy on behalf of the RGCA.

In deciding to adopt this proposal for first notice, the Board considered all matters of record, including the proposal, testimony, exhibits, and public comments.

Following this order, the proposed rules will be published in the *Illinois Register*, upon which a 45-day public comment period will begin. In order to meet the statutory deadline imposed by Section 58.14 of the Environmental Protection Act, the Board must proceed to second notice at or before July 21, 1998. The last regularly scheduled Board meeting before that date is on July 9, 1998.

BACKGROUND AND OVERVIEW OF PROPOSAL

P.A. 90-123 established two programs to provide financial incentives for brownfields remediation. The first program, directed at the public sector, is the Brownfields Redevelopment Program. Under that program, the Agency will issue grants to municipalities to investigate and assess brownfields sites. That program will be the subject of regulations that the Agency plans to adopt this spring. Tr.1 at 13.

The second program, directed at the private sector, is the tax credit that is the subject of this rulemaking. Generally, that program provides taxpayers who remediate brownfields a tax credit that is equal to 25 % of the taxpayer's remediation costs over \$100,000 per site. Tr.1 at 13-14. The \$100,000 limit is waived in certain areas that meet certain criteria, including that the site is entirely within an enterprise zone. See P.A. 90-123, eff. July 21, 1997 (amending 35 ILCS 5/101 *et seq.* (1996)). The total credit allowed will not exceed \$40,000 per year, with a maximum total of \$150,000 per site. *Id.* Unused credits may be carried forward for five taxable years. *Id.*

The tax credit is not available "if the taxpayer or any related party caused or contributed to, in any material respect, a release of regulated substances on, in, or under" the site. Furthermore, the tax credit is available only to taxpayers who remediate sites under the Site Remediation Program (SRP). The SRP is a voluntary program under which participants may clean up sites where contaminants are present. It allows participants to use risk-based cleanup objectives that take into account current and anticipated uses of sites. The SRP also establishes procedures for the Agency's review and approval of site cleanup activities. Readers interested in a more thorough discussion of the SRP should consult the Board's order in In the Matter of Site Remediation Program and Groundwater Quality (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620) (June 5, 1997), R97-11.

Three agencies have roles to play regarding the tax credit. First, DCCA identifies those areas that are not subject to the \$100,000 remediation cost threshold. See P.A. 90-123, eff. July 21, 1997 (amending 35 ILCS 5/101 *et seq.* (1996)); see also Tr.1 at 14. Second, the Agency must determine what costs are considered "remediation costs" and therefore eligible to be applied

to the tax credit. See P.A. 90-123, eff. July 21, 1997 (amending 415 ILCS 5/1 *et seq.* (1996)). Finally, the Department of Revenue will take the information that it receives from DCCA and the Agency and implement the tax credit. See Tr.1 at 14-15; P.A. 90-123, eff. July 21, 1997 (amending 35 ILCS 5/101 *et seq.* (1996)).

To implement its role regarding the tax credit, the Agency proposes that the Board add to Part 740 a new Subpart G entitled “Review of Remediation Costs for Environmental Remediation Tax Credit.” The proposed Subpart G contains seven sections. Section 740.700 generally describes the contents of Subpart G. Section 740.705 (Preliminary Review of Estimated Remediation Costs) establishes a procedure for obtaining a preliminary review of estimated remediation costs. The advantage of this procedure, which is optional, is that if actual remediation costs are less than those the Agency approved under the preliminary review procedure, the Agency is not required to further review those costs and may approve the costs as submitted. This procedure also will give remediation applicants an indication of the magnitude of the tax credit they may receive in connection with a remedial action.

To be eligible for the tax credit, a remediation applicant must submit an application for final review of remediation costs to the Agency and have the Agency approve the application. Section 740.710 (Application for Final Review of Remediation Costs) sets forth the information required in the application. Section 740.715 (Agency Review of Application for Final Review of Remediation Costs) standards and procedures for the Agency’s review of the application. Section 740.720 (Fees and Manner of Payment) addresses the fees that a remediation applicant must submit with its application for final review.

Section 740.725 (Remediation Costs) provides a non-exhaustive list of examples of costs that the Agency may approve as remediation costs. It also provides that additional costs not listed may be considered remediation costs in certain circumstances. Section 740.730 (Ineligible Costs) provides a non-exhaustive list of examples of costs that are ineligible for approval as remediation costs.

In addition to the new Subpart G, the Agency proposes minor changes to several existing sections of Part 740: Section 740.100 (Purpose), Section 740.120 (Definitions), and Section 740.505 (Reviews of Plans and Reports. As explained below, these changes are necessary to accommodate Subpart G.

DISCUSSION

Section 740.100: Purpose

The Agency proposes to amend this section to note that one of the purposes of Part 740 is to establish procedures to obtain Agency review and approval of remediation costs before the person conducting the cleanup (also known as a remediation applicant²), may apply to

² More specifically, a “remediation applicant” is “any person seeking to perform or performing investigative or remedial activities under Title XVII of the Act including the owner or operator of the site or persons authorized by law or consent to act on behalf of the owner or operator of the site.” 415 ILCS 5/58.2 (1996).

receive the tax credit. No one suggested any changes to the Agency's proposal. The Board accepts, with minor changes, the language that the Agency has proposed.

Section 740.120: Definitions

The Agency proposes to add a definition of "remediation costs" to Part 740. The Agency's proposed definition is based on the statutory definition of remediation costs set forth at 415 ILCS 5/58.2, and the Board includes it in its first notice order.

In its public comment, the Agency proposes to revise the definition of "indirect costs." As initially proposed, the definition applied only to the Agency's indirect costs. The Agency's proposed revision deletes that language, making it clear that others besides the Agency may incur "indirect costs." PC 2, Attachment 1 at 5; Tr.2 at 32-33. The Board includes the proposed revision in the attached order.

The Board asked the Agency to consider whether to add a definition of "enterprise zone" to this section, or add a cross-reference to DCCA's definition of that term. Tr.1 at 40. At the second hearing, the Agency suggested that the Board add the words "as defined in the Illinois Enterprise Zone Act" after the term "enterprise zone" in 740.720(c)(1). The Board accepts this suggestion, noting that DCCA has not yet adopted regulations implementing its responsibilities regarding the tax credit.

Originally, the Agency also had proposed to add a definition of "act of God," a term the Agency used later in its originally proposed Section 740.730(p). However, as explained below at page 19-20, the Agency now proposes to delete that subsection. The Board has agreed to that deletion, and accordingly deletes "act of God" as well.

Section 740.505: Reviews of Plans and Reports

The Agency proposes to amend this section, which sets forth procedures for the Agency's review of plans and reports under the SRP, by adding a reference to Section 740.705(c). Basically, the addition of this reference will expand the Agency's time to review certain SRP documents when the remediation applicant also seeks a preliminary review of estimated remediation costs under Section 740.505. No one suggested any changes to this section, and it is set forth as proposed in the first notice order.

Section 740.700: General

This section describes the content of the Agency's newly proposed Subpart G, Review of Remediation Costs for Environmental Remediation Tax Credit. No one suggested any changes to this section. The Board has included it, with a minor modification, in the first notice order.

Section 740.705: Preliminary Review of Estimated Remediation Costs

This section establishes a procedure for obtaining a preliminary review of estimated remediation costs. It implements Section 58.14(d) of the Environmental Protection Act, which

provides in part: “A Remediation Applicant may obtain a preliminary review of estimated remediation costs for the development and implementation of the Remedial Action Plan by submitting a budget plan along with the remedial action plan.” P.A. 90-123, eff. July 21, 1997 (amending 415 ILCS 5/1 *et seq.* (1996)). A “remedial action plan” is a plan for achieving cleanup objectives at a site, and is described in Section 740.450 of the SRP.

The advantage of the preliminary review procedure is that if actual remediation costs are less than those the Agency approved in the preliminary review, the Agency is not required to further review those costs and may approve the costs as submitted.” P.A. 90-123, eff. July 21, 1997 (amending 415 ILCS 5/1 *et seq.* (1996)). This procedure may be useful for remediation applicants who wish to know the tax consequences of performing remedial action before undertaking the remedial action. Statement at 6.

Subsection (a) sets forth procedures for obtaining a preliminary review of estimated remediation costs. It provides that a remediation applicant may obtain the review by submitting a budget plan along with the Remedial Action Plan. The Agency will not accept a budget plan unless a Remedial Action Plan is submitted with, or before the submittal of, the budget plan.

Subsection (a) also specifies the information that the remediation applicant must submit with the budget plan. This information includes basic information about the applicant, the site to be remediated, as well as line item estimates of the costs that the remediation applicant expects to incur to develop and implement the Remedial Action Plan. These estimates should address costs of various site investigation activities, sampling and analysis activities, remedial activities, report preparation costs, and other activities. The budget plan also must include a certification, signed by the remediation applicant or its agent, that neither the remediation applicant nor certain other related parties has “caused or contributed in any material respect to the release or substantial threat of release of regulated substance(s) or pesticide(s)³ that are identified and addressed in the Remedial Action Plan” 35 Ill. Adm. Code 740.705(a)(3).

Subsection (b) requires the remediation applicant to pay a fee for review under Section 740.720 and addresses other administrative matters. The Agency’s originally proposed subsection (c) requires the Agency to review the budget plan along with the Remedial Action Plan to determine whether the estimated costs are remediation costs. The Agency must make this determination in accordance with Sections 740.725 and 740.730. The Board has retained the language in the Agency’s originally proposed subsection (c), but finds that it more logically follows the Agency’s original subsection (d) and has moved it accordingly.

The Agency’s original subsection (d) addresses the impact of a remediation applicant’s submission of a budget plan on the Agency’s time to review the Remedial Action Plan under

³ The Agency’s original proposal only referred to “regulated substances.” At the Board’s suggestion, the Agency proposes to add “or pesticides” here, as well as to Sections 740.710(a)(4), 740.725(a)(7), 740.725(a)(8), and 740.730(f). The Board has incorporated these changes into the order.

Section 740.505(d). The Agency has revised its original proposal to address some questions on the mechanics of this provision that the Board asked during the hearings. The Agency's revised proposal is as follows:

(d) If a budget plan is submitted along with a Remedial Action Plan, the submittal of the budget plan shall be deemed an automatic 60-day waiver of the applicable review period for Remedial Action Plans set forth in Section 740.505(d) of this Part. If the budget plan is not submitted along with the initial Remedial Action Plan, the budget plan must be submitted after the final determination on the initial Remedial Action Plan, and the Agency may take 60 days of review of the budget plan. If an amended Remedial Action Plan or amended budget plan is submitted prior to an Agency determination on the initial Remedial Action Plan and budget plan, the 120-day time for combined review of both documents is restarted. If an amended budget plan is submitted without an amended Remedial Action Plan and after the Agency's final determination on the initial Remedial Action Plan, the Agency may take 60 days for the review of the amended budget plan. The Agency's record of the date of receipt of the budget plan shall be deemed conclusive unless a contrary date is proven by a dated, signed receipt from registered or certified mail. The RA may waive the time for review at the Agency's request or at the RA's discretion.

The Board finds that the Agency's proposed revisions clarify this subsection and incorporates the proposed changes into the order, with three modifications. First, the third sentence of the Agency's proposed changes to subsection (d) provided that when a budget plan is not submitted with the initial RAP, a budget plan "*must* be submitted after the final determination on the initial Remedial Action Plan" The Board is concerned that this language might be interpreted to mean that a budget plan is mandatory in this situation, when in fact a budget plan is always optional. The Board has therefore modified the language to provide that a budget plan "may not be submitted until after the Agency has made a final determination on the initial Remedial Action Plan" The Board believes this language is more consistent with the Agency's intent. Second, the Board has broken the Agency's proposed revision into subsections, and made certain other minor revisions, for clarity. Finally, the Board has renumbered this subsection (c).

The Agency's original subsection (d) also addresses the procedures for the Agency's approval, disapproval, or modification of the estimated remediation costs in the budget plan. The Agency must inform the remediation applicant of its decision in writing. If the Agency disapproves the budget plan, or approves it with modifications, the Agency's written notice must provide the reasons for the Agency's disapproval or modification, identify any information or documentation that the remediation applicant did not provide, and identify the regulations or statutes upon which the Agency has based its decision. The Agency may combine this notice with its notice of decision on the remediation applicant's Remedial Action Plan. The Board has retained these provisions as drafted.

Subsection (e)(1) provides that if the Agency approves a Remedial Action Plan with conditions, the Agency may return the corresponding budget plan to the remediation applicant without review. If the remediation applicant amends the Remedial Action Plan because of the Agency's action, the remedial applicant may submit a revised budget plan for review. Similarly, under subsection (e)(2), if the remediation applicant revises the Remedial Action Plan of its own accord, the applicant must revise and re-submit the budget plan. In both situations, the remediation applicant need not pay any additional fee. The Agency originally proposed, in both subsections (e)(1) and (e)(2), that a remediation applicant's submittal of an amended budget plan restarts the time for review. The Board has stricken this language because these situations are now addressed in the revised subsection (c).

Subsection (f) provides that a remediation applicant may appeal the Agency's disapproval or modification of a budget plan to the Board. A remediation applicant also may appeal the Agency's failure to issue a determination within the applicable review period, which in effect is deemed a disapproval. The remediation applicant must file the appeal within 35 days after its receipt of the determination or expiration of a deadline.

At the public hearings, Chairman Claire Manning asked if the Agency's characterization of a preliminary budget determination as "non-binding" is consistent with the remediation applicant's right to appeal the Agency's disapproval or modification of a budget plan. Tr.1 at 24-25. In response, the Agency stated that while it was "awkward" to have an appeal of a non-binding decision, the appeal was statutorily required. Tr.2 at 14-15.

Other participants at the hearing also questioned to what extent the Agency could revisit decisions reflected in an approved preliminary budget determination. The Agency generally responded that while the Agency does not intend to determine that activities approved in a Remedial Action Plan (and accompanying preliminary budget determination) are ineligible costs, the Agency must have the ability to ensure that the costs incurred were actually incurred and were at a reasonable rate. Tr.1 at 20-24.

The Board concludes that the preliminary budget determination (and its review of that determination) is "non-binding" only to the extent that a remediation applicant who has received this determination must still show, after the remediation is completed, that the costs were actually incurred and were reasonable. As the Agency has agreed, the preliminary budget determination (and a Board order reviewing that determination) is binding to the extent that the Agency or the Board has determined that a particular technology is appropriate at a particular site. Tr.1 at 20-24.

Section 740.710: Application for Final Review of Remediation Costs

To be eligible for the tax credit, a remediation applicant must submit an application for final review of remediation costs (application) to the Agency and have the Agency approve the application. Tr.1 at 54-55. This section sets forth the information required in the application and procedures for the Agency's review of the application.

Subsection (a)

Subsection (a) provides that an application may not be submitted until a “No Further Remediation” (NFR) letter has been issued and recorded in the chain of title in accordance with Title XVII of the Environmental Protection Act and Subpart F of Part 740. The NFR letter is issued to a remediation applicant once that applicant has demonstrated that it has achieved remediation objectives for the site. The NFR letter is *prima facie* evidence that the site does not constitute a threat to human health or the environment. See 415 ILCS 5/58.10(a) (1996). The NFR letter further “signifies a release from further responsibilities under [the Environmental Protection] Act in performing remedial action.” *Id.*

Subsection (a) also specifies the information that an application for final review must include, including identification of the remedial applicant and the site; copy of the NFR letter; itemization and documentation of remediation activities and costs; a certification regarding the remediation, the site, and the costs; and the signature of the remedial applicant or its authorized agent. At the Board’s suggestion, the Agency proposes that the Board modify subsection (a) to make clear that the remedial applicant’s affidavit that an NFR letter has issued by operation of law, as well as an NFR letter issued by the Agency, will satisfy the requirements of this subsection. PC 2 at 8.

This subsection also requires that the NFR Letter, or affidavit that an NFR letter has issued by operation of law, be “certified by the appropriate County Recorder or Registrar of Titles.” The Agency confirmed that this requires “a certified copy or a copy . . . in which the recorder or the registrar is attesting to the fact that this is actually a recorded document.” Tr. 1 at 56.

At both hearings, participants and the Board also discussed two aspects of the certification requirement in subsection (a)(4), as discussed below.

Certification on Causing or Contributing to a Release. The certification provides in part as follows:

Neither _____ [I if the RA is certifying or name of RA if authorized agent is certifying], nor any related party as described in Section 201(l) of the Illinois Income Tax Act, nor any person whose tax attributes _____ [I if the RA is certifying or name of RA if authorized agent is certifying] have [has] succeeded to under Section 381 of the Internal Revenue Code caused or contributed in any material respect to the release or substantial threat of release of a regulated substance(s) or pesticide(s) for which the attached No Further Remediation Letter was issued. 35 Ill. Adm. Code 740.710(a)(4) .

The Agency addressed whether this certification was consistent with Section 58.14(b)(3) of the Environmental Protection Act, which provides an application for final review to include:

[A] demonstration that the release of the regulated substances of concern for which the No Further Remediation Letter was issued were not caused or

contributed to in any material respect by the Remediation Applicant. 415 ILCS 5/58.14(b)(3) (1996).

The Agency explained:

[I]t is inappropriate for the Agency to make a determination of liability in the context of the SRP. While it is widely agreed that parties should not receive a tax credit for remediating releases for which they are responsible, acceptance into the SRP is not based on liability for the release, and the Agency has neither the tools nor the time to conduct the type of investigation that would be required to determine liability for a release To prevent the Agency's acceptance of tax credit certifications from being used as a defense in subsequent enforcement and cost recovery actions, the Agency has proposed subsection 740.710(c).
Exh. 1 at 9-10.

Section 740.710(c) provides that the Agency's acceptance of this certification "shall not be used as a defense with regard to any enforcement or cost recovery actions that may be initiated by the State or any other party."

The Agency also testified that this procedure was consistent with the second sentence of Section 58.14(b)(3), which provides: "After the Pollution Control Board rules are adopted pursuant to the Illinois Administrative Procedure Act for the administration and enforcement of Section 58.9 of the Environmental Protection Act, determinations as to credit availability shall be made consistent with those rules" P.A. 90-123, eff. July 21, 1997 (amending 415 ILCS 5/1 *et seq.* (1996)). Proposed rules to implement Section 58.9, which provides for proportionate share liability, are now pending before the Board. The Agency believes, however, that the certification "will work regardless of what the Board ends up adopting as far as the [proportionate share liability] rules." Tr.1 at 59.

The Board also asked the Agency what would happen if a remediation applicant filed a false certification. The Agency testified that it would let Department of Revenue know and that the Agency believes that Department of Revenue has authority to reopen a tax return if a certification is false. Tr.1 at 59-64.

In light of the above testimony, the Board agrees that the Agency's proposed certification is a practical and efficient means of ensuring that a remedial applicant seeking a tax credit has not caused or contributed to a release that is being remediated.

Certification Regarding Reimbursed Costs. The parties also discussed the following portion of the certification: "None of the costs included in this application have been or will

be reimbursed from any federal or state grant, the Underground Storage Tank Fund, or any policy of insurance.”⁴

The Agency stated that this list, which includes some costs the Agency deems ineligible, was not exhaustive. Instead, these are the costs the Agency thought would come up most frequently. Tr.1 at 64-65. The Board questioned why it was necessary to refer to the Underground Storage Tank Fund, because sites remediated under that program may not participate in the SRP. Tr.2 at 48-49. The Agency agreed, but thought that including it was a way of putting people on notice. *Id.*

In addition, the participants and the Board discussed whether costs reimbursed through insurance or other sources should be considered eligible. The RCGA strongly believes that they should be, both for statutory and policy reasons.

First, the RCGA relies on the following language of the tax credit statute:

For purposes of this Section, “unreimbursed eligible remediation costs” means costs approved by the Illinois Environmental Protection Agency (“Agency”) under Section 58.14 of the Environmental Protection Act that were paid in performing environmental remediation at a site for which a No Further Remediation Letter was issued by the Agency and recorded under Section 58.10 of the Environmental Protection Act, and does not mean approved eligible remediation costs that are at any time deducted under the provisions of the Internal Revenue Code In no event shall unreimbursed eligible remediation costs include any costs taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code. 35 ILCS 5/201(l) (1996).

Based on this provision, the RCGA concludes that “unreimbursed eligible remediation costs” excludes “only [remediation] costs for which a federal tax deduction or credit is to be taken.” Exh. 5 at 8-9.

The RCGA also opposes this portion of the certification for the following policy reasons:

[T]he requirement of the proposed regulation seriously inhibits an applicant’s ability to finance a deal by requiring the applicant to offset other sources of financing against the tax credits. In the case of a Brownfields redevelopment project, the applicant is undertaking a remediation effort, which it would not ordinarily be required to [under]take. In fact, the [Income Tax] Act prohibits the awarding of a tax credit to an individual who cannot demonstrate “that the release of the regulated substances of concern for which the No Further

⁴ The Board notes that such costs are also deemed ineligible under the Agency’s originally proposed Section 740.730(e), which excludes “costs reimbursed pursuant to an insurance policy, federal or state grants, or the Leaking Underground Storage Tank Fund.”

Remediation Letter was issued were not caused or contributed to in any material respect by the Remediation Applicant.”

Brownfields projects are inherently riskier, may give rise to future liability and are difficult to finance. These credits are but one tool to create a cleaner environment in the State of Illinois. In and of themselves, they are insufficient to finance the entire project. Therefore, they should not be required to be offset by other sources of funding, particularly when there is no statutory authority to do so. Exh. 5 at 9.

The RCGA presented witnesses at the second hearing that confirmed these assertions. See Tr.2 at 74-78, 88-99.

The Agency disagrees with the RCGA’s reading of the statute and policy justifications. It argues:

The consequence of [RCGA’s] narrow interpretation is that the statute then would allow for a tax credit even if 100 percent of the otherwise eligible remediation costs were reimbursed through another mechanism The Agency believes that the phrase also includes other forms of reimbursement. The tax credit is intended to allow the offset of a portion of the RA’s out-of-pocket costs of remediation against the RA’s income and not to provide a windfall bonus payment to an RA based on costs of remediation the RA did not pay. PC 2 at 5-6.

The Agency further notes that “[b]ecause the exclusion for reimbursed costs is contained in the Illinois Income Tax Act rather than the Environmental Protection Act, the Agency’s interpretation is that [Department of Revenue] will have the last word on what are ‘unreimbursed eligible remediation costs,’ and the Agency has reason to believe that [Department of Revenue] shares that interpretation. Nevertheless, Section 58.14(b) of the [Environmental Protection] Act authorizes the Agency to perform this initial screening on behalf of [Department of Revenue] and to include the requirement in the proposal.” PC 2 at 6.⁵

The Board finds that the language of the Income Tax Act suggests that “unreimbursed eligible remediation costs” means all “eligible remediation costs” other than those costs (1) “deducted at any time” under the Internal Revenue Code, or (2) “taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code.” P.A. 90-123, amending 35 ILCS 5/101 *et seq.*

⁵ The Agency notes that a bill has been introduced into the Illinois Senate, SB 1291, that would eliminate references to the Internal Revenue Code, but still provide that the only “unreimbursed costs” are eligible for the tax credit. Tr.2 at 103-104. The Agency concludes that “unreimbursed costs” therefore must mean something in addition to remediation costs for which the taxpayer has received a federal tax credit. *Id.* The Board does not believe it may consider this pending legislation as proper evidence of the legislature’s intent.

(1996). The statute does not suggest that any other eligible remediation costs should be considered “reimbursed.”

In establishing the Underground Storage Tank Fund (Fund), by contrast, the legislature expressly stated that the Fund could not be used to reimburse costs “already paid to the owner or operator under a private insurance policy, other written agreement, or court order.” 415 ILCS 5/57.9(a)(6) (1996). See also 415 ILCS 5/57.8(e) (1996) (containing a similar exclusion). The absence of such language in Section 201(l) of the Income Tax Act or in Section 58.14 of the Environmental Protection Act confirms that these costs may be considered “unreimbursed” for the purposes of the tax credit. The Board further notes that the tax credit, unlike the Underground Storage Tank Fund, is not available to those who have caused or contributed to the contamination of the property.

The Board further finds this reading of the statute consistent with the statute’s purpose, which, as noted above, is to encourage taxpayers to clean up and redevelop brownfields. Therefore, the Board has revised this portion of the certification so that it requires a remediation applicant to certify that “[n]one of the costs included in this application have been or will be deducted at any time under the Internal Revenue Code or taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code.”

Subsection (b)

Subsection (b) addresses how the application is to be submitted to the Agency and specifies that it must be accompanied by the applicable fee for review under Section 740.720. No changes were suggested for or made to this subsection.

Subsection (c)

Subsection (c), as discussed above, provides that the Agency’s acceptance of this certification “shall not be used as a defense with regard to any enforcement or cost recovery actions that may be initiated by the State or any other party.” The Board has slightly modified the language of this subsection so it mirrors the language of the certification provided for in Section 740.710(a)(4).

Section 740.715: Agency Review of Application for Final Review of Remediation Costs

Subsection (a) provides that the Agency shall review applications to determine, in accordance with Section 740.725 and 740.730, if the costs incurred are remediation costs. Subsection (b) provides that the Agency will have 60 days after it receives the application for final review to make its determination. If the remediation applicant submits an amended application, the Agency’s time for review is restarted. The remediation applicant may waive the time for review at the Agency’s request or on its own accord. 35 Ill. Adm. Code 740.710(b).

Subsection (c)(1) sets forth a certification that remediation applicants who have an approved budget plan may submit with the final application. The certification provides that

the actual remediation costs are equal to or less than the line item costs approved in the budget plan decision. If the remediation applicant submits a budget plan decision and certification with its application, the Agency may, but is not required to, further review of the costs. 35 Ill. Adm. Code 740.710(c)(2).

At the first hearing, the Board questioned whether the remedial applicant must certify that actual remediation costs are equal to or less than every line item in the approved budget plan. For example, if actual remediation costs were less than every line item in the approved budget plan but one, could a remedial applicant still certify with that exception? Tr.1 at 71-76. At the second hearing, the Agency agreed that was a sensible approach, and modified its proposal to allow a remedial applicant to certify with exceptions. Tr.2 at 22. The Agency also confirmed that its review of excepted line items would not involve a reconsideration of the appropriateness of the remediation technology involved, but primarily a review of the reasons for the cost overrun on a particular line item. Tr.2 at 46-47.

Subsection (d) provides that the Agency must notify the remediation applicant in writing of the Agency's decision to approve, disapprove, or modify the remediation costs as set forth in the application. If the Agency disapproves the application, or approves it with modifications, the Agency's written notification must state the reasons for the disapproval or modification; identify the documents, if any, that the Agency deems that the remediation applicant did not provide; and identify the statutes or regulations upon which the Agency has based its decision. Although this subsection originally referred to the "estimated" remediation costs, the Agency deleted "estimated" because by the time a remediation applicant submits an application, the costs are no longer estimated. Tr.1 at 76-77; Tr.2 at 22-23.

Subsection (e) describes how the Agency should deliver the notification to the remediation applicant. Subsection (f) provides the remediation applicant with the right to appeal the Agency's disapproval, modification, or failure to act on an application within the applicable review period. No changes were suggested for or made to these subsections.

Section 740.720: Fees and Manner of Payment

This section sets forth the fees that a remediation applicant must submit with its application for final review. Generally, the fee is \$500 for a preliminary review of estimated remediation costs and \$1,000 for the final review. In cases in which the total remediation costs for the site are less than \$100,000, and the site meets several other criteria (including that it is entirely within an enterprise zone), the review fees may be reduced or waived. These review fees are in addition to any other fees, payments, or assessments due under Part 740 or under Title XVII of the Environmental Protection Act. At the second hearing, the Agency added a reference to clarify that the definition of "enterprise zone" in the Illinois Enterprise Zone Act, 20 ILCS 655 *et seq.* (1996), will apply.

To obtain a reduced fee for a preliminary budget review, or a waived fee for a final review of remediation costs, the total remediation costs must be \$100,000 or less, and the remediation applicant must submit written certification that the remediation site is entirely within an enterprise zone and meets certain other criteria. The Agency confirmed that it

expects DCCA to provide this written certification according to procedures that DCCA will adopt. Tr.2 at 26-27.

No other changes were suggested for or made to this section.

Section 740.725: Remediation Costs

This section provides a non-exhaustive list of examples of costs that the Agency may approve as remediation costs (also referred to as “eligible costs”). Subsection (a) lists the examples. Subsection (b) provides that additional costs not identified in subsection (a) may be considered remediation costs if the remediation applicant “submits detailed information demonstrating that those items are essential for compliance with this Part 740, 35 Ill. Adm. Code 742, and the approved Remedial Action Plan.”

During the hearings, several issues were raised regarding subsection (a), some of which also involved Section 740.730, the section that provides an inexhaustive list of ineligible costs. In addition, the RCGA asked the Board to add a new subsection (c). These issues are addressed below.

Section 740.725(a)(1)

The Agency proposed to strike its originally proposed Section 740.725(a)(1), which provided that costs of preparing bid documents and contracts for certain services and supplies were eligible costs. The Agency also thought that this section could be read to allow recovery for attorney fees, which the Agency decided were not authorized by the statute. Tr.2 at 32.

RCGA opposes this change. The RCGA states that the original language “will encourage the developer to seek the least expensive contractor for the work,” and will encourage cost effective remediation. PC 3 at 10.

The Board finds that this section should remain as proposed. The Board notes, however, that this subsection should not be read to include attorney fees, which are excluded under 740.730(m).

Sections 740.725(a)(7) and (a)(8)

As discussed on page 6, the Board has added “or pesticides” to these two provisions.

Section 740.725(a)(11)

This subsection, as originally proposed, provided that the costs of preparing an application for the tax credit are eligible costs. At the second hearing, the Agency proposed to revise this section to provide that eligible costs would include: “Engineering costs associated with preparation of a budget plan in accordance with Section 740.705 of this Part or an Application for Final Review of Remediation Costs in accordance with Section 740.710 of this part if prepared prior to the issuance of the NFR Letter.” The Agency explained that under

Section 58.14 of the Environmental Protection Act, costs incurred after the NFR Letter cannot be considered eligible.⁶ See Tr.2 at 27-28; P.A. 90-123, eff. July 21, 1997. The RCGA, however, believes that such costs should be reimbursed. Exh. 5 at 11.

While the Board is sympathetic to RCGA's concerns, the Board agrees with the Agency's reading of Section 58.14 and therefore incorporates the Agency's suggested change, with minor modifications.

Section 740.725(a)(12)

At the first hearing, a question arose on whether Section 740.725(a)(12) is consistent with Section 740.730(k). Section 740.725(a)(12) provides that eligible costs include:

Removal or replacement of concrete, asphalt, or paving necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.750 of this Part.

Section 740.730(k) provides that ineligible costs include:

Costs associated with replacement of above-grade structures destroyed or damaged during remediation activities.

At the second hearing, the Agency stated that the provisions were correctly drafted and explained:

[T]o give you an example, if you had contamination under an existing parking lot . . . and the conclusion relative to the Remedial Action Plan was that that contamination needed to be removed, breaking up and removing the concrete, and then removing the contamination underneath, that would be all part of remedial action and that would be an eligible item as would backfilling. . . . However, the paving would only become eligible if it was necessary as an engineered barrier. If it was not needed as an engineered barrier then the replacement of the paving would not be an eligible item. . . . [Under 730(k)], if you are building a building above that pavement grade, that barrier grade, we want to make it clear that you cannot build a building and take that as a tax credit Tr.2 at 29-30; see also Tr.2 at 51.

The Board accepts the Agency's explanation and includes these sections as proposed.

Section 740.725(a)(15)

At the second hearing, the Agency proposed to modify its original proposal as follows:

~~Destruction, or dismantling, and reassembly or relocation of permanent~~ above-grade structures that are necessary to achieve remediation objectives under

⁶ These costs also are excluded under Section 740.730(d).

~~serviceable for, and desirable to, the planned post-remediation use of the site pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part. Exh. 2 at 5; see also Tr.2 at 53.~~

The Agency testified that these changes made this subsection consistent with subsection (a)(12) through (a)(14) as well as the Underground Storage Tank regulations. Tr.2 at 30. The Agency confirmed that the costs of disposing of a destroyed, demolished, or dismantled structure are eligible costs. Tr.2 at 53-54. The Agency also noted that “if you conclude that it is to achieve the remediation objectives we have to dismantle something, it would be okay to reassemble it.” Tr.2 at 53. The Agency confirmed that simply moving a structure to obtain access to a contaminated area, and then moving it back again, is “close to dismantling and reassembling in that kind of scenario.” Tr.2 at 55-56. The Agency stated, however, that it generally would not allow such costs to be eligible in the context of a site investigation, because in a site investigation, “you can put wells in all sorts of different places.” Tr.2 at 55-56. The Agency emphasized that under subsection 740.725(b), an applicant could make a site specific demonstration under which such costs could be deemed eligible. Tr.2 at 57.

The Board accepts the revisions that the Agency has suggested.

The Agency’s Newly Proposed Section 740.725(a)(16)

The Agency originally proposed that all costs associated with obtaining a special waste generator identification number be ineligible under Section 740.730(l). The RCGA objected to this provision, and in response, the Agency proposed to add a new subsection 740.725(a)(16), which provides that eligible costs include “Costs associated with obtaining a special waste generator identification number not to exceed \$25.00.” Exh. 2 at 5, 6.

The Agency explained that obtaining a special waste generator identification number involves filling out a simple one-page form. Tr.2 at 34-36; see Exh. 4. The Agency believes that in the Underground Storage Tank program, some applicants have claimed excessive costs for filling out this form. Tr.1 at 33-34, 98-99; Tr.2 at 36-37. The Agency believes that the cost should be allowed, but should be capped at \$25.00. *Id.*

The RCGA believes the allowed eligible costs should be higher. PC 3 at 11. The RCGA originally had suggested a modification to Section 740.730(l) that would have allowed costs of obtaining a special waste generator identification number of up to \$250 be allowed. Exh. 5 at 6; Tr.2 at 71. The Board agrees, and has adopted the RCGA’s original proposal in lieu of the Agency’s proposed subsection 740.725(a)(16), with modifications for clarity.

The Agency’s Newly Proposed Subsection 740.725(a)(17)

At the second hearing, the Agency also proposed to add subsection (a)(17), which would provide that eligible costs include:

Costs incurred as a result of a release of regulated substances of pesticides because of vandalism, theft, negligence or fraudulent activity by a party other than an RA or an agent of an RA. Exh. 2 at 5.

The Agency explained that this provision is the reverse of subsection 740.730(h), which it modified at second hearing to provide that ineligible costs include:

Costs associated as a result of vandalism, theft, negligence or fraudulent activity, including the creation of spills, leaks or releases, by the RA or an agent of the RA. Exh. 2 at 6.

As the Agency explained, “We have tried to cover it from both ends. So if you had a vandalism activity that was the result of actions by someone who was not the RA or an agent of the RA, those would be eligible. But if there was an action by the RA or an agent of the RA, then that would be an ineligible item.” Tr.2 at 31.

The RCGA proposed slightly different language that mirrors the language in the Underground Storage Tank regulations at Section 732.606(c). See Exh. 2 at 6; Tr.2 at 70. The Board believes that the RCGA’s proposal is substantively equivalent to the Agency’s proposal. See Tr.2 at 90-91. In the interest of preserving as much consistency as possible between these regulations and the Underground Storage Tank regulations, the Board modifies Section 740.730(h) to conform to Section 732.606(c), and declines to adopt the Agency’s new proposed Section 740.725(a)(17).

The RCGA’s Newly Proposed Section 740.725(c)

The RCGA proposes that the Board add a new subsection (c) that would provide as follows:

- (1) If the Agency has approved a Remedial Action Plan in accordance with Section 740.750, then the costs associated with the activities of the approved Remedial Action Plan shall be considered eligible remediation costs. Only costs associated with activities contained in an approved RAP will be eligible costs for purposes of receiving a remediation tax credit.
- (2) If the Agency has approved a preliminary budget in accordance with Section 740.705, then upon the submission of a certification that the actual remediation costs incurred for the development and implementation of the Remedial Action Plan are equal to or less than the costs approved in the Agency’s final determination on the budget plan, then the Agency shall, absent fraud or further review pursuant to Section 740.710(c) approve the eligibility of costs. Exh. 5 at 4.

The RCGA states that this subsection “will address the concerns of developers that the RAP will not be modified so as to exclude costs which were associated with activities approved by the Agency.” *Id.*

The Agency stated that while the Agency does not intend to determine that activities approved in a Remedial Action Plan are ineligible costs, the Agency must have the ability to insure that the costs incurred were actually incurred and were at a reasonable rate. Tr.1 at 20-24. The Agency also noted that Remedial Action Plans have “very comprehensive levels of

information,” including information about the planned development of the site. Tr.2 at 101. The Agency believes this information is useful, but would not want the consequence of its approval of such a plan to mean that non-remedial activities are eligible for the tax credit. The Board agrees and therefore declines to adopt the RCGA’s suggested language.

Section 740.730: Ineligible Costs

This section provides a non-exhaustive list of examples of costs that are ineligible for approval as remediation costs. Participants in the hearings raised issues regarding several of the items on this list. Each is addressed below.

Section 740.730(e)

This provision, as originally proposed, would exclude “costs reimbursed pursuant to an insurance policy, federal or state grants, or the Leaking Underground Storage Tank Fund.” Consistent with the Board’s conclusion on the certification regarding such costs (see pages 12-13 above), the Board has stricken this provision. In its place, the Board has substituted a provision excluding “[c]osts that have been or will be deducted at any time under the Internal Revenue Code or taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code.”

Section 740.730(f)

As discussed at page 6, the Agency added the word “pesticides” to this provision, and the Board has incorporated it into the order.

Sections 740.730 (j)and (s)

Section 740.730(j) excludes costs “incurred as a result of negligence or unprofessional conduct by any contractor, subcontractor, or other person providing remediation services at the site.” Section 740.730(s) excludes “stand-by or demurrage costs.” The Board questioned whether these provisions were consistent with a section originally numbered Section 740.730(p), and which provided:

Costs incurred through delays in the timely performance of remediation activities except where the delay was caused solely by an act of God, an act of war, or an act or omission of a third party other than an employee or agent of the RA, either directly or indirectly.

At the second hearing, the Agency proposed to delete this subsection. The Agency did so because “it was causing some inconsistency and we could not think of a reasonable situation where that would become applicable.” Tr.2 at 32. The Board agrees and has deleted the originally proposed subsection.

Section 740.730(m)

The Agency's original proposal would have disallowed attorney fees as eligible costs except for attorney fees for SRP-related appeals to the Board in which the Board does not order the respondent to pay the petitioner's legal fees. The Agency would have allowed attorney fees in only this limited instance because it believes that "the relationship between the activities traditionally performed by the legal profession and those necessary to design and implement an environmental response action is too tenuous to consider the legal work a remediation cost." PC 2 at 7; see also Tr.2 at 32.

In its public comment, however, the Agency proposed to make all attorney fees ineligible, whether incurred in connection with an SRP appeal or a site remediation. The Agency noted that it originally would have allowed attorney fees in certain SRP appeals to maintain consistency with the LUST program, which allows attorney fees in similar instances. The Agency noted, however, that the statute provided a basis for the recovery of attorney fees in the LUST program. There is no similar basis in the tax credit statute. Therefore, the Agency believes this exception should be stricken and all attorney fees excluded. Tr.2 at 32.

The RCGA argued that excluding attorney fees would give remedial applicants an incentive to use technical personnel to perform tasks – such as the preparation of contracts and other legal documents – that are in fact the practice of law. As a result, the RCGA argued, this exclusion would encourage the unauthorized practice of law. Tr.2 at 72.

The Agency rejects this argument, arguing that non-lawyers would not be enticed into practicing law simply because a remedial applicant cannot get a tax credit for attorney services. PC 2 at 2-3. The Agency also stated that the exclusion of attorney fees could not possibly serve as a defense to a charge of unauthorized practice of law. PC 2 at 3.

In its second public comment, the RCGA reiterated its belief that attorneys provide very necessary services in brownfields redevelopment, and that attorney fees therefore should be eligible costs. PC 3 at 11. The RCGA also argued that ESG Watts, Inc. v. Pollution Control Board, 286 Ill. App. 3d 325 (3d Dist. 1997), which overturned the Board's award of attorney fees in that case, is distinguishable. In Watts, the Board awarded attorney fees as a sanction. The appellate court found that the Board could not do so without specific statutory authority.

Here, the RCGA argues, the statute uses an undefined term, "eligible costs." The RCGA argues that "if an attorney performs a service which furthers the remediation of the site, then those costs should be eligible." PC 3 at 12. Not to allow such costs, the RCGA argues, would punish the developer for seeking advice from professionals about the best way to remediate the site and limit liability concerns. *Id.* The RCGA also believes that allowing attorney fees as eligible costs will spur the redevelopment of brownfields. *Id.* Finally, the RCGA argues that the logical conclusion of the Agency's position is that because no costs are defined, no costs are eligible. *Id.* The RCGA argues "this is not the intent of the Act and we believe the Agency's concerns regarding the courts' view of the eligibility of attorneys fees is somewhat overstated." *Id.* The RCGA asks that the Board modify the Agency's proposed Section 740.730(m) as follows:

Attorneys fees, except for those attorney services provided in appeals to the Illinois Pollution Control Board pursuant to this Part 740 where the Board rules in favor of the RA as petitioner and the Board has not authorized payment of the petitioner's legal fees, or incurred for the preparation of an application for an Environmental Remediation Tax Credit, or arising out of the RA's participation in the Site Remediation Program to the extent such services arise out of the preparation of legal documents or involve the practice of law. Exh. 5 at 7; see also PC 3 at 12.

The Board finds that while attorneys certainly may provide services in connection with remediation, attorney fees typically are only awarded when expressly provided for. For example, as the Agency notes, the statute establishing the Underground Storage Tank Fund provides:

Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees. 415 ILCS 5/57.9(l) (1996).

In the absence of a similar express legislative authorization, the Board is reluctant to consider attorney fees remediation costs. The Board therefore accepts the Agency's suggestion and revises this subsection to exclude all attorney fees.

Section 740.730(n)

As originally proposed, this provision would have excluded "purchase costs of non-consumable materials, supplies, equipment or tools." The RCGA noted that this provision was more limited than the LUST rules, which allow as eligible costs "a reasonable rate . . . for the usage of such materials, supplies, equipment or tools." Tr.2 at 73. The Agency has agreed to this change (Exh. 2 at 6, Tr.1 at 36), and the Board has included it in its order.

Section 740.730(r)

As proposed by the Agency, this section excludes:

Costs associated with unnecessary, irrelevant, or improperly conducted activities, including, but not limited to, data collection, testing, measurement, reporting, analyses, modeling, risk assessment, or sample collection, transportation, measurement, analyses, or testing.

The RCGA opposes this provision in part, arguing that "if a test is approved in a Remedial Action Plan, then that test is by definition necessary." Tr.2 at 73. The RCGA proposes that the Board insert this provision in its stead:

Costs not associated with the approved Remedial Action Plan, including improperly conducted activities, such as data collection, testing, measurement,

reporting, analyses, modeling, risk assessment, or sample collection, transportation, measurement, analyses, or testing. Exh. 5 at 7-8.

The Agency agrees that “if something . . . has been approved under the Site Investigation Plan or the Remedial [Action] Plan, as far as testing, that would be necessary.” Tr.1 at 37. However, the Agency does not believe that the language that it proposed requires otherwise. The Board agrees with the Agency, and further finds the Agency’s language more precise. The Board therefore has left this section as proposed.

Sections 740.730(t), (u), and (v)

These sections use the terms “indirect costs” and “direct costs” in describing certain ineligible costs. At the first hearing, the Board asked whether these terms should be defined. In response, the Agency proposed to modify the definition of “indirect costs,” as discussed at page 5. The Agency did not provide a definition of “direct costs,” but the Agency believes that the context of the term made its definition clear. Tr.1 at 33-34. The Board agrees and leaves these sections as proposed.

Sections 740.730(v), (w), (x), and (aa)

These sections exclude the following costs:

- (v) Indirect costs for personnel, labor, materials, services or equipment charged as direct costs;
- (w) Costs associated with landscaping, vegetative cover, trees, shrubs, and aesthetic considerations;
- (x) Costs associated with activities, materials, labor, equipment, structures or services not essential for compliance with this Part 740, 35 Ill. Adm. Code 742, and the approved Remedial Action Plan;

* * *

- (aa) Costs that are determined to be unreasonable.

RCGA argues that these costs should be considered eligible if the costs are contained in an approved Remedial Action Plan. Tr.2 at 73-74.

The Agency’s general response is that while the Agency does not intend to determine that activities approved in a Remedial Action Plan are ineligible costs, the Agency must have the ability to ensure that the costs incurred were actually incurred and at a reasonable rate. Tr.1 at 20-24. (See also page 8 above.) The Board accepts the Agency’s explanation and therefore leaves these sections as proposed.

CONCLUSION

The Board finds the Agency's proposal, with the Board's revisions, is economically reasonable and technically feasible. The Board therefore adopts the following proposal for first notice.

ORDER

The Board proposes for first notice the following amendments to 35 Ill. Adm. Code 740. The Clerk of the Board is directed to file these proposed rules with the Secretary of State.

TITLE 35: ENVIRONMENTAL PROTECTION SUBTITLE G: WASTE DISPOSAL CHAPTER I: POLLUTION CONTROL BOARD

PART 740 SITE REMEDIATION PROGRAM

SUBPART A: GENERAL

Section	
740.100	Purpose
740.105	Applicability
740.110	Permit Waiver
740.115	Agency Authority
740.120	Definitions
740.125	Incorporations by Reference
740.130	Severability

SUBPART B: APPLICATIONS AND AGREEMENTS FOR REVIEW AND EVALUATION SERVICES

Section	
740.200	General
740.205	Submittal of Application and Agreement
740.210	Contents of Application and Agreement
740.215	Approval or Denial of Application and Agreement
740.220	Acceptance and Modification of Application and Agreement
740.225	Termination of Agreement by the Remediation Applicant (RA)
740.230	Termination of Agreement by the Agency
740.235	Use of Review and Evaluation Licensed Professional Engineer (RELPE)

SUBPART C: RECORDKEEPING, BILLING AND PAYMENT

Section	
740.300	General
740.305	Recordkeeping for Agency Services
740.310	Request for Payment

- 740.315 Submittal of Payment
- 740.320 Manner of Payment

**SUBPART D: SITE INVESTIGATIONS, DETERMINATION OF REMEDIATION
OBJECTIVES, PREPARATION OF PLANS AND REPORTS**

- Section
- 740.400 General
- 740.405 Conduct of Site Activities and Preparation of Plans and Reports by Licensed Professional Engineer (LPE)
- 740.410 Form and Delivery of Plans and Reports, Signatories and Certifications
- 740.415 Site Investigation -- General
- 740.420 Comprehensive Site Investigation
- 740.425 Site Investigation Report -- Comprehensive Site Investigation
- 740.430 Focused Site Investigation
- 740.435 Site Investigation Report -- Focused Site Investigation
- 740.440 Determination of Remediation Objectives
- 740.445 Remediation Objectives Report
- 740.450 Remedial Action Plan
- 740.455 Remedial Action Completion Report

SUBPART E: SUBMITTAL AND REVIEW OF PLANS AND REPORTS

- Section
- 740.500 General
- 740.505 Reviews of Plans and Reports
- 740.510 Standards for Review of Site Investigation Reports and Related Activities
- 740.515 Standards for Review of Remediation Objectives Reports
- 740.520 Standards for Review of Remedial Action Plans and Related Activities
- 740.525 Standards for Review of Remedial Action Completion Reports and Related Activities
- 740.530 Establishment of Groundwater Management Zones

**SUBPART F: NO FURTHER REMEDIATION LETTERS AND
RECORDING REQUIREMENTS**

- Section
- 740.600 General
- 740.605 Issuance of No Further Remediation Letter
- 740.610 Contents of No Further Remediation Letter
- 740.615 Payment of Fees
- 740.620 Duty to Record No Further Remediation Letter
- 740.625 Voidance of No Further Remediation Letter

SUBPART G: REVIEW OF REMEDIATION COSTS FOR ENVIRONMENTAL

REMEDIATION TAX CREDIT

<u>740.700</u>	<u>General</u>
<u>740.705</u>	<u>Preliminary Review of Estimated Remediation Costs</u>
<u>740.710</u>	<u>Application for Final Review of Remediation Costs</u>
<u>740.715</u>	<u>Agency Review of Application for Final Review of Remediation Costs</u>
<u>740.720</u>	<u>Fees and Manner of Payment</u>
<u>740.725</u>	<u>Remediation Costs</u>
<u>740.730</u>	<u>Ineligible Costs</u>

Appendix A	Target Compound List
Table A	Volatile Organics Analytical Parameters and Required Quantitation Limits
Table B	Semivolatile Organic Analytical Parameters and Required Quantitation Limits
Table C	Pesticide and Aroclors Organic Analytical Parameters and Required Quantitation Limits
Table D	Inorganic Analytical Parameters and Required Quantitation Limits
Appendix B	Review and Evaluation Licensed Professional Engineer Information

AUTHORITY: Implementing Sections 58 through ~~58.12~~ 58.14 and authorized by Sections 58.5, 58.6, 58.7, ~~and 58.11~~ and 58.14 of the Environmental Protection Act [415 ILCS 5/58 through ~~58.12~~ 58.14].

SOURCE: Adopted in R97-11 at 21 Ill. Reg. 7889, effective July 1, 1997; amended in _____ at ____ Ill. Reg. _____, effective _____.

NOTE: Capitalization denotes statutory language. In this Part, the abbreviation µg is used to indicate micrograms.

SUBPART A: GENERAL

Section 740.100 Purpose

The purpose of this Part is to ESTABLISH PROCEDURES FOR INVESTIGATION AND REMEDIATION AT SITES WHERE THERE IS A RELEASE, THREATENED RELEASE, OR SUSPECTED RELEASE OF HAZARDOUS SUBSTANCES, PESTICIDES, OR PETROLEUM AND FOR THE REVIEW AND APPROVAL OF THOSE ACTIVITIES. (Section 58.1(a)(1) of the Act) The purpose of this Part is also to establish procedures to be followed to obtain Illinois Environmental Protection Agency review and approval of remediation costs before applying for the environmental remediation tax credit under Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)].

(Source: Amended at ____ Ill. Reg. _____, effective _____)

Section 740.120 Definitions

Except as stated in this Section, or unless a different meaning of a word or term is clear from the context, the definition of words or terms in this Part shall be the same as that applied to the same words or terms in the Environmental Protection Act.

"Act" means the Environmental Protection Act [415 ILCS 5].

"AGENCY" MEANS THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY. (Section 3.01 of the Act)

"Agency travel costs" means costs incurred and documented for travel in accordance with 80 Ill. Adm. Code 2800 and 3000 by individuals employed by the Agency. Such costs include costs for lodging, meals, travel, automobile mileage, vehicle leasing, tolls, taxi fares, parking and miscellaneous items.

"AGRICHEMICAL FACILITY" MEANS A SITE ON WHICH AGRICULTURAL PESTICIDES ARE STORED OR HANDLED, OR BOTH, IN PREPARATION FOR END USE, OR DISTRIBUTED. THE TERM DOES NOT INCLUDE BASIC MANUFACTURING FACILITY SITES. (Section 58.2 of the Act)

"ASTM" MEANS THE AMERICAN SOCIETY FOR TESTING AND MATERIALS. (Section 58.2 of the Act)

"Authorized agent" means a person who is authorized by written consent or by law to act on behalf of an owner, operator, or Remediation Applicant.

"Board" means the Pollution Control Board.

"Contaminant of concern" or "REGULATED SUBSTANCE OF CONCERN" MEANS ANY CONTAMINANT THAT IS EXPECTED TO BE PRESENT AT THE SITE BASED UPON PAST AND CURRENT LAND USES AND ASSOCIATED RELEASES THAT ARE KNOWN TO THE REMEDIATION APPLICANT BASED UPON REASONABLE INQUIRY. (Section 58.2 of the Act)

"Costs" means all costs incurred by the Agency in providing services pursuant to a Review and Evaluation Services Agreement.

"Groundwater management zone" or "GMZ" means a three dimensional region containing groundwater being managed to mitigate impairment caused by the release of contaminants of concern at a remediation site.

"Indirect costs" means those costs that ~~incurred by the Agency which~~ cannot be attributed directly to a specific site but are necessary to support the site-specific

activities, including, but not limited to, such expenses as managerial and administrative services, building rent and maintenance, utilities, telephone and office supplies.

"Laboratory costs" means costs for services and materials associated with identifying, analyzing, and quantifying chemical compounds in samples at a laboratory.

"LICENSED PROFESSIONAL ENGINEER" OR "LPE" MEANS A PERSON, CORPORATION OR PARTNERSHIP LICENSED UNDER THE LAWS OF THIS STATE TO PRACTICE PROFESSIONAL ENGINEERING. (Section 58.2 of the Act)

"Other contractual costs" means costs for contractual services not otherwise specifically identified, including, but not limited to, printing, blueprints, photography, film processing, computer services and overnight mail.

"PERSON" MEANS INDIVIDUAL, TRUST, FIRM, JOINT STOCK COMPANY, JOINT VENTURE, CONSORTIUM, COMMERCIAL ENTITY, CORPORATION (INCLUDING A GOVERNMENT CORPORATION), PARTNERSHIP, ASSOCIATION, STATE, MUNICIPALITY, COMMISSION, POLITICAL SUBDIVISION OF A STATE, OR ANY INTERSTATE BODY, INCLUDING THE UNITED STATES GOVERNMENT AND EACH DEPARTMENT, AGENCY, AND INSTRUMENTALITY OF THE UNITED STATES. (Section 58.2 of the Act)

"Personal services costs" means costs relative to the employment of individuals by the Agency. Such costs include, but are not limited to, hourly wages and fringe benefits.

"PESTICIDE" MEANS ANY SUBSTANCE OR MIXTURE OF SUBSTANCES INTENDED FOR PREVENTING, DESTROYING, REPELLING, OR MITIGATING ANY PEST OR ANY SUBSTANCE OR MIXTURE OF SUBSTANCES INTENDED FOR USE AS A PLANT REGULATOR, DEFOLIANT OR DESSICANT. (Illinois Pesticide Act [415 ILCS 60/4])

"Practical quantitation limit" or "PQL" or "Estimated quantitation limit" means the lowest concentration that can be reliably measured within specified limits of precision and accuracy for a specific laboratory analytical method during routine laboratory operating conditions in accordance with "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods," EPA Publication No. SW-846, incorporated by reference at Section 740.125 of this Part. For filtered water samples, PQL also means the Method Detection Limit or Estimated Detection Limit in accordance with the applicable method revision in: "Methods for the Determination of Metals in Environmental Samples," EPA Publication No.

EPA/600/4-91/010; "Methods for the Determination of Organic Compounds in Drinking Water," EPA Publication No. EPA/600/4-88/039; "Methods for the Determination of Organic Compounds in Drinking Water, Supplement II," EPA Publication No. EPA/600/R-92/129; or "Methods for the Determination of Organic Compounds in Drinking Water, Supplement III," EPA Publication No. EPA/600/R-95/131, all of which are incorporated by reference at Section 740.125 of this Part.

"Reasonably obtainable" means that a copy or reasonable facsimile of the record must be obtainable from a private entity or government agency by request and upon payment of a processing fee, if any.

"Recognized environmental condition" means the presence or likely presence of any regulated substance or pesticide under conditions that indicate a release, threatened release or suspected release of any regulated substance or pesticide at, on, to or from a remediation site into structures, surface water, sediments, groundwater, soil, fill or geologic materials. The term shall not include de minimis conditions that do not present a threat to human health or the environment.

"REGULATED SUBSTANCE" MEANS ANY HAZARDOUS SUBSTANCE AS DEFINED UNDER SECTION 101(14) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (P.L. 96-510) AND PETROLEUM PRODUCTS INCLUDING CRUDE OIL OR ANY FRACTION THEREOF, NATURAL GAS, NATURAL GAS LIQUIDS, LIQUEFIED NATURAL GAS, OR SYNTHETIC GAS USABLE FOR FUEL (OR MIXTURES OF NATURAL GAS AND SUCH SYNTHETIC GAS). (Section 58.2 of the Act)

"REGULATED SUBSTANCE OF CONCERN" or "contaminant of concern" MEANS ANY CONTAMINANT THAT IS EXPECTED TO BE PRESENT AT THE SITE BASED UPON PAST AND CURRENT LAND USES AND ASSOCIATED RELEASES THAT ARE KNOWN TO THE REMEDIATION APPLICANT BASED UPON REASONABLE INQUIRY. (Section 58.2 of the Act)

"RELEASE" MEANS ANY SPILLING, LEAKING, PUMPING, POURING, EMITTING, EMPTYING, DISCHARGING, INJECTING, ESCAPING, LEACHING, DUMPING, OR DISPOSING INTO THE ENVIRONMENT, BUT EXCLUDES ANY RELEASE WHICH RESULTS IN EXPOSURE TO PERSONS SOLELY WITHIN A WORKPLACE, WITH RESPECT TO A CLAIM WHICH SUCH PERSONS MAY ASSERT AGAINST THE EMPLOYER OR SUCH PERSONS; EMISSIONS FROM THE ENGINE EXHAUST OF A MOTOR VEHICLE, ROLLING STOCK, AIRCRAFT, VESSEL, OR PIPELINE PUMPING STATION ENGINE; RELEASE OF SOURCE, BYPRODUCT, OR SPECIAL NUCLEAR MATERIAL FROM A

NUCLEAR INCIDENT, AS THOSE TERMS ARE DEFINED IN THE FEDERAL ATOMIC ENERGY ACT OF 1954, IF SUCH RELEASE IS SUBJECT TO REQUIREMENTS WITH RESPECT TO FINANCIAL PROTECTION ESTABLISHED BY THE NUCLEAR REGULATORY COMMISSION UNDER SECTION 170 OF SUCH ACT; AND THE NORMAL APPLICATION OF FERTILIZER. (Section 3.33 of the Act)

"REMEDIAL ACTION" MEANS ACTIVITIES ASSOCIATED WITH COMPLIANCE WITH THE PROVISIONS OF SECTIONS 58.6 AND 58.7 of the Act, including, but not limited to, the conduct of site investigations, preparation of work plans and reports, removal or treatment of contaminants, construction and maintenance of engineered barriers, and/or implementation of institutional controls. (Section 58.2 of the Act)

"REMEDICATION APPLICANT" OR "RA" MEANS ANY PERSON SEEKING TO PERFORM OR PERFORMING INVESTIGATIVE OR REMEDIAL ACTIVITIES UNDER TITLE XVII OF THE ACT INCLUDING THE OWNER OR OPERATOR OF THE SITE OR PERSONS AUTHORIZED BY LAW OR CONSENT TO ACT ON BEHALF OF THE OWNER OR OPERATOR OF THE SITE. (Section 58.2 of the Act)

"REMEDICATION COSTS" MEANS REASONABLE COSTS PAID FOR INVESTIGATING AND REMEDIATING REGULATED SUBSTANCES OF CONCERN CONSISTENT WITH THE REMEDY SELECTED FOR THE SITE. FOR PURPOSES OF Subpart G of this Part, "REMEDICATION COSTS" SHALL NOT INCLUDE COSTS INCURRED PRIOR TO JANUARY 1, 1998, COSTS INCURRED AFTER THE ISSUANCE OF A NO FURTHER REMEDIATION LETTER UNDER Subpart F of this Part, OR COSTS INCURRED MORE THAN 12 MONTHS PRIOR TO ACCEPTANCE INTO THE SITE REMEDIATION PROGRAM under this Part. (Section 58.2 of the Act)

"Remediation objective" means a goal to be achieved in performing remedial action, including but not limited to the concentration of a contaminant, an engineered barrier or engineered control, or an institutional control established under Section 58.5 of the Act or Section 740.Subpart D of this Part.

"Remediation site" means the single location, place, tract of land, or parcel or portion of any parcel of property, including contiguous property separated by a public right-of-way, for which review, evaluation, and approval of any plan or report has been requested by the Remediation Applicant in its application for review and evaluation services. This term also includes, but is not limited to, all buildings and improvements present at that location, place, or tract of land.

“RESIDENTIAL PROPERTY” MEANS ANY REAL PROPERTY THAT IS USED FOR HABITATION BY INDIVIDUALS, OR where children have the opportunity for exposure to contaminants through soil ingestion or inhalation at educational facilities, health care facilities, child care facilities, or outdoor recreational areas. (Section 58.2 of the Act)

"Review and Evaluation Licensed Professional Engineer" or "RELPE" means the licensed professional engineer with whom a Remediation Applicant (RA) has contracted to perform review and evaluation services under the direction of the Agency.

"SITE" MEANS ANY SINGLE LOCATION, PLACE, TRACT OF LAND OR PARCEL OF PROPERTY OR PORTION THEREOF, INCLUDING CONTIGUOUS PROPERTY SEPARATED BY A PUBLIC RIGHT-OF-WAY. (Section 58.2 of the Act) This term also includes, but is not limited to, all buildings and improvements present at that location, place or tract of land.

(Source: Amended at ___ Ill. Reg. ____, effective _____)

SUBPART E: SUBMITTAL AND REVIEW OF PLANS AND REPORTS

Section 740.505 Reviews of Plans and Reports

- a) ALL REVIEWS CARRIED OUT UNDER THIS Part SHALL BE CARRIED OUT BY THE AGENCY OR A RELPE (Review and Evaluation Licensed Professional Engineer), BOTH UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER. (Section 58.7(d) of the Act)
- b) PLANS, REPORTS AND RELATED ACTIVITIES WHICH THE AGENCY OR A RELPE MAY REVIEW INCLUDE, but are not limited to:
 - 1) SITE INVESTIGATION REPORTS AND RELATED ACTIVITIES;
 - 2) REMEDIATION OBJECTIVES REPORTS;
 - 3) REMEDIAL ACTION PLANS AND RELATED ACTIVITIES; AND
 - 4) REMEDIAL ACTION COMPLETION REPORTS AND RELATED ACTIVITIES. (Section 58.7(d)(2) of the Act)
- c) ONLY THE AGENCY SHALL HAVE THE AUTHORITY TO APPROVE, DISAPPROVE, OR APPROVE WITH CONDITIONS A PLAN OR REPORT AS A RESULT OF THE REVIEW PROCESS, INCLUDING THOSE PLANS OR REPORTS REVIEWED BY A RELPE. (Section 58.7(d)(3) of the Act)

- d) Except as provided in subsection (d)(5) below and Section 740.705(c) of this Part, the Agency shall have 60 days from the receipt of any plan or report to conduct a review and make a final determination to approve or disapprove the plan or report, or approve the plan or report with conditions. All reviews shall be based on the standards set forth in this Subpart E.
- 1) The Agency's record of the date of receipt of a plan or report shall be deemed conclusive unless a contrary date is proven by a dated, signed receipt from the Agency or certified or registered mail.
 - 2) Submittal of an amended plan or report restarts the time for review.
 - 3) The RA may waive the time line for review upon a request from the Agency or at the RA's discretion.
 - 4) The Agency shall not be required to review any plan or report submitted out of the sequence for plans and reports set forth in this Part.
 - 5) If any plans or reports are submitted concurrently, the Agency's timeline for review shall increase to a total of 90 days for all plans or reports so submitted.
- e) Upon completion of the review, the Agency shall notify the RA in writing of its final determination on the plan or report. The Agency's notification shall be made in accordance with Section 740.215(b) of this Part. If the Agency disapproves a plan or report or approves a plan or report with conditions, the written notification shall contain the following information, as applicable:
- 1) An explanation of the specific type of information or documentation, if any, that the Agency deems the RA did not provide;
 - 2) A listing of the Sections of Title XVII of the Act or this Part that may be violated if the plan or report is approved as submitted;
 - 3) A statement of the specific reasons why Title XVII of the Act or this Part may be violated if the plan or report is approved as submitted;
 - 4) A statement of the reasons for conditions if conditions are required.
- f) The Agency may, to the extent consistent with review deadlines, provide the RA with a reasonable opportunity to correct deficiencies prior to sending a disapproval. However, the correction of such deficiencies by the submittal of additional information may, in the sole discretion of the Agency, restart the time for review.

- g) If the RA has entered into a contract with a RELPE under Subpart B of this Part, the Agency shall assign plans and reports submitted by the RA to the RELPE for initial review.
- 1) The RELPE's review shall be conducted in accordance with this Subpart E.
 - 2) Upon completion of the review, the RELPE shall recommend to the Agency approval or disapproval of the plan or report or approval of the plan or report with conditions.
 - 3) Unless otherwise approved by the Agency in writing, the RELPE shall have 30 days to complete the review of a plan or report and forward the recommendation to the Agency. If any plans or reports have been submitted concurrently to the Agency, the RELPE shall have a total of 45 days to complete the review of all plans or reports so submitted, unless otherwise approved by the Agency in writing.
 - 4) The recommendation of the RELPE shall be in writing, shall include reasons supporting the RELPE's recommendation, and shall be accompanied by all documents submitted by the RA and any other information relied upon by the RELPE in reaching a decision.
- h) IF THE AGENCY DISAPPROVES OR APPROVES WITH CONDITIONS A PLAN OR REPORT OR FAILS TO ISSUE A FINAL DETERMINATION WITHIN THE applicable review PERIOD AND THE RA HAS NOT AGREED TO A WAIVER OF THE DEADLINE, THE RA MAY, WITHIN 35 DAYS after receipt of the final determination or expiration of the deadline, FILE AN APPEAL TO THE BOARD. APPEALS TO THE BOARD SHALL BE IN THE MANNER PROVIDED FOR THE REVIEW OF PERMIT DECISIONS IN SECTION 40 OF THE ACT. (Section 58.7(d)(5) of the Act)

(Source: Amended at ___ Ill. Reg. _____, effective _____)

SUBPART G: REVIEW OF REMEDIATION COSTS FOR
ENVIRONMENTAL REMEDIATION TAX CREDIT

Section 740.700 General

This Subpart sets forth the procedures to be followed by an RA to obtain Agency review and approval of remediation costs before applying for the environmental remediation tax credit under Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]. It contains procedures for preliminary reviews of estimated remediation costs and final reviews of remediation costs actually incurred, establishes fees for the Agency's reviews, provides for appeals of Agency decisions, and includes examples of remediation costs and ineligible costs.

(Source: Added at ___ Ill. Reg. ____, effective _____)

Section 740.705 Preliminary Review of Estimated Remediation Costs

a) The RA for any remediation site enrolled in the Site Remediation Program may request a preliminary review of estimated remediation costs by submitting a budget plan along with the Remedial Action Plan required under Section 740.450 of this Part. No budget plan shall be accepted for review by the Agency unless a Remedial Action Plan satisfying the requirements of Section 740.450 of this Part also has been submitted. The budget plan shall be submitted on forms prescribed and provided by the Agency and shall include, but not be limited to, the following information:

1) Identification of applicant and remediation site:

A) The full legal name, address and telephone number of the RA, any authorized agents acting on behalf of the RA, and any contact persons to whom inquiries and correspondence must be addressed;

B) The address, site name, tax parcel identification number(s) and Illinois inventory identification number for the remediation site for which the tax credit is being sought and the date of acceptance of the site into the Site Remediation Program;

C) The Federal Employer Identification Number (FEIN) or Social Security Number (SSN) of the RA.

2) Line item estimates of the costs that the RA anticipates will be incurred for the development and implementation of the Remedial Action Plan, including but not limited to:

A) Site investigation activities:

i) Drilling costs;

ii) Physical soil analysis;

iii) Monitoring well installation;

iv) Disposal costs.

B) Sampling and analysis activities:

i) Soil analysis costs;

ii) Groundwater analysis costs;

iii) Well purging costs;

iv) Water disposal costs.

C) Remedial activities:

i) Groundwater remediation costs;

ii) Excavation and disposal costs;

iii) Land farming costs;

iv) Above-ground bio-remediation costs;

v) Land application costs;

vi) Low thermal treatment costs;

vii) Backfill costs;

viii) In-situ soil remediation costs;

ix) Other treatment costs.

D) Report preparation costs.

E) Other costs not included above.

3) A certification, signed by the RA or authorized agent and notarized, as follows:

I, _____ [name of RA, if individual, or authorized agent of RA], hereby certify that neither _____ [“I” if RA is certifying or name of RA if authorized agent is certifying], nor any related party (as described in Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]), nor any person whose tax attributes _____ [“I” if RA is certifying or name of RA if authorized agent is certifying] have [has] succeeded to under Section 381 of the Internal Revenue Code caused or contributed in any material respect to the release or substantial threat of a release of regulated substance(s) or pesticides that are identified and addressed in the Remedial Action Plan submitted for the site identified above.

- 4) The original signature of the RA or authorized agent acting on behalf of the RA.
- b) The budget plan shall be accompanied by the applicable fee for review as provided in Section 740.720 of this Subpart. Budget plans shall be mailed or delivered to the address designated by the Agency on the forms. Requests that are hand-delivered shall be delivered during the Agency's normal business hours.
- c) The time for the Agency to review the budget plan begins on the date that the Agency receives the budget plan. The Agency's record of the date of receipt of the budget plan shall be deemed conclusive unless a contrary date is proven by a dated, signed receipt from registered or certified mail. The RA may waive the time for review. The time frames for the Agency review are:
 - 1) If the budget plan is submitted with the Remedial Action Plan, the submission of the budget plan shall be deemed an automatic 60-day waiver of the applicable review period for the Remedial Action Plan, as set forth in Section 740.505(d) of this Part. In this instance, the Agency shall have 120 days from its receipt of the two documents to make its final determination on the two documents.
 - 2) If the budget plan is not submitted with the Remedial Action Plan, the budget plan may not be submitted until after the Agency has made a final determination on the Remedial Action Plan. If the budget plan is submitted after the Agency has approved the Remedial Action Plan, the Agency shall have 60 days from its receipt of the budget plan to make a final determination on the budget plan.
 - 3) If an amended Remedial Action Plan or amended budget plan is submitted before an Agency final determination on the Remedial Action Plan and budget plan, the Agency shall have 120 days from its receipt of the amended document to make a final determination on the two documents.
 - 4) If an amended budget plan is submitted without an amended Remedial Action Plan and after the Agency's final determination on the Remedial Action Plan, the Agency shall have 60 days from its receipt of the amended budget plan to make a final determination on the amended budget plan.
- d) The Agency shall review the budget plan and the Remedial Action Plan to determine, in accordance with Sections 740.725 and 740.730 of this Part, whether the estimated costs are remediation costs. Upon completion of the preliminary review, the Agency shall notify the RA in writing of its decision to approve, disapprove or modify the estimated remediation costs submitted in the budget plan.

- 1) If a budget plan is disapproved or approved with modification of estimated remediation costs, the written notification shall contain the following information as applicable:
 - A) An explanation of the specific type of information or documentation, if any, that the Agency deems the RA did not provide;
 - B) The reasons for the disapproval or modification of estimated remediation costs;
 - C) Citations to statutory or regulatory provisions upon which the decision is based.
 - 2) The Agency may combine the notification of its decision on a budget plan with the notification of its decision on the corresponding Remedial Action Plan.
 - 3) The Agency's notification of decision shall be by certified or registered mail postmarked with a date stamp and with return receipt requested. The Agency's decision shall be deemed to have taken place on the postmarked date that the notice is mailed.
- e) 1) If the Agency disapproves a Remedial Action Plan or approves a Remedial Action Plan with conditions in accordance with Subpart E of this Part, the Agency may return the corresponding budget plan to the RA without review. If the Remedial Action Plan is amended as a result of the Agency action, the RA may submit a revised budget plan for review. No additional fee shall be required for this review.
- 2) If the Remedial Action Plan is amended by the RA and the RA intends to submit the Agency's decision on the budget plan in accordance with Section 740.715(c) of this Subpart, the budget plan shall be revised accordingly and resubmitted for Agency review. No additional fee shall be required for this review.
- f) If the Agency disapproves or modifies the budget plan or fails to issue a final determination within the applicable review period, the RA may, within 35 days after its receipt of the determination or expiration of the deadline, file an appeal to the Board. Appeals to the Board shall be in the manner provided for the review of permit decisions in Section 40 of the Act.

(Source: Added at ___ Ill. Reg. ____, effective _____)

Section 740.710 Application for Final Review of Remediation Costs

a) The RA for any remediation site enrolled in the Site Remediation Program may submit an application for final review of remediation costs. No application shall be submitted until a No Further Remediation Letter has been issued and the No Further Remediation Letter (or an affidavit under Section 740.620(a)(2) of this Part stating that the No Further Remediation Letter has issued by operation of law) has been recorded in the chain of title for the site, all in accordance with Title XVII of the Act and Subpart F of this Part. The application shall be submitted on forms prescribed and provided by the Agency and shall include, but not be limited to, the following information:

1) Identification of applicant and remediation site:

A) The full legal name, address and telephone number of the RA, any authorized agents acting on behalf of the RA, and any contact persons to whom inquiries and correspondence must be addressed;

B) The address, site name, tax parcel identification number(s), and Illinois inventory identification number for the remediation site for which the tax credit is being sought and the date of acceptance of the site into the Site Remediation Program;

C) The Federal Employer Identification Number (FEIN) or Social Security Number (SSN) of the RA.

2) A true and correct copy of the No Further Remediation Letter(s) (or affidavit(s) under Section 740.620(a)(2) of this Part stating that the No Further Remediation Letter(s) has issued by operation of law) for the remediation site as recorded in the chain of title for the site and certified by the appropriate County Recorder or Registrar of Titles;

3) Itemization and documentation of remediation activities at the remediation site for which the environmental remediation tax credit is sought and for the costs of remediation incurred by the RA at the site, including invoices, billings and dated, legible receipts along with canceled checks or other Agency-approved methods of proof of payment;

4) A certification, signed by the RA or authorized agent and notarized, as follows:

I, _____ [name of RA, if individual, or authorized agent of RA], hereby certify that:

The site for which this application for an environmental remediation tax credit is submitted is the same site as the site for which the attached No Further Remediation Letter was issued;

All the costs included in this application were incurred at the site and for the regulated substance(s) or pesticide(s) for which the No Further Remediation Letter was issued;

The costs submitted were paid by _____ [“me” if RA is certifying or name of RA if authorized agent is certifying] and are accurate to the best of my knowledge and belief;

None of the costs included in this application were incurred before January 1, 1998, or more than 12 months before the enrollment of the site in the Site Remediation Program, or after the date of issuance of the No Further Remediation Letter;

None of the costs included in this application have been or will be deducted at any time under the Internal Revenue Code or taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code;

Neither _____ [“I” if RA is certifying or name of RA if authorized agent is certifying], nor any related party (as described in Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]), nor any person whose tax attributes _____ [“I” if RA is certifying or name of RA if authorized agent is certifying] have [has] succeeded to under Section 381 of the Internal Revenue Code caused or contributed in any material respect to the release or substantial threat of a release of regulated substance(s) or pesticide(s) for which the No Further Remediation Letter was issued.

- 5) The original signature of the RA or of the authorized agent acting on behalf of the RA.
- b) The application for final review shall be accompanied by the applicable fee for review as provided in Section 740.720 of this Subpart. Applications shall be mailed or delivered to the address designated by the Agency on the forms. Requests that are hand-delivered shall be delivered during the Agency’s normal business hours.
- c) The Agency’s acceptance of a certification that neither the RA, nor any related party (as described in Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)]), nor any person whose tax attributes the RA has succeeded to under Section 381 of the Internal Revenue Code caused or contributed in any material

respect to the release or substantial threat of a release for which the environmental remediation tax credit is requested shall not bind the Agency or the State and shall not be used as a defense with regard to any enforcement or cost recovery actions that may be initiated by the State or any other party.

(Source: Added at ___ Ill. Reg. ____, effective _____)

Section 740.715 Agency Review of Application for Final Review of Remediation Costs

- a) The Agency shall review the application for final review of remediation costs to determine, in accordance with Sections 740.725 and 740.730 of this Part, whether the costs incurred are remediation costs.
- b) The Agency shall have 60 days after the receipt of an application for final review to make its final determination on the application. The Agency's record of the date of receipt of the application shall be deemed conclusive unless a contrary date is proven by a dated, signed receipt from registered or certified mail. The RA may waive the time for review. Submittal of an amended application restarts the time for review.
- c) 1) If a preliminary review of a budget plan has been obtained under Section 740.705 of this Subpart, the RA may submit, along with the application, supporting documentation, and fee under Section 740.720 of this Subpart, a copy of the Agency's budget plan decision accompanied by a certification, signed by the RA or authorized agent and notarized, as follows:
- I, _____ [name of RA, if individual, or name of authorized agent of RA], hereby certify that the actual remediation costs incurred at the site for line items _____ [list line items to which certification applies] and identified in the Application for Final Review of Remediation Costs are equal to or less than the costs approved for the corresponding line items in the attached budget plan decision.
- 2) If the budget plan decision and certification are submitted, the Agency may, but is not required to, conduct further review of the costs incurred for development and implementation of the Remedial Action Plan and may approve costs as submitted. If the certification in subsection (c)(1) of this Section does not apply to all line items as approved in the budget plan, the Agency shall conduct its review of the costs for the uncertified line items as if no budget plan had been approved.
- d) Upon completion of the final review, the Agency shall notify the RA in writing of its decision to approve, disapprove or modify the remediation costs submitted in the application. If an application is disapproved or approved with modification of

remediation costs, the written notification shall contain the following information as applicable:

- 1) An explanation of the specific type of information or documentation, if any, that the Agency deems the RA did not provide;
 - 2) The reasons for the disapproval or modification of remediation costs;
 - 3) Citations to statutory or regulatory provisions upon which the decision is based.
- e) The Agency's notification of final determination shall be by certified or registered mail postmarked with a date stamp and with return receipt requested. The Agency's determination shall be deemed to have taken place on the postmarked date that the notice is mailed.
- f) If the Agency disapproves or modifies the application for final review or fails to issue a final determination within the applicable review period, the RA may, within 35 days after receipt of the final determination or expiration of the deadline, file an appeal to the Board. Appeals to the Board shall be in the manner provided for the review of permit decisions in Section 40 of the Act.

(Source: Added at ___ Ill. Reg. ____, effective _____)

Section 740.720 Fees and Manner of Payment

- a) The fee for the preliminary review of estimated remediation costs conducted under Section 740.705 of this Subpart shall be as follows:
- 1) Except as provided in subsection (a)(2) of this Section, the fee for the preliminary review shall be \$500 for each remediation site reviewed.
 - 2) There shall be no fee for a preliminary review if the requirements of subsection (c) of this Section are satisfied.
- b) The fee for the final review of remediation costs under Section 740.715 of this Subpart shall be as follows:
- 1) Except as provided in subsection (b)(2) of this Section, the fee for the final review shall be \$1000 for each remediation site reviewed.
 - 2) The fee for the final review shall be \$250 if the requirements of subsection (c) of this Section are satisfied.

- c) To obtain the fee waiver under subsection (a)(2) of this Section or the reduced fee under subsection (b)(2) of this Section:
- 1) The total remediation costs for the site must be \$100,000 or less; and
 - 2) The RA must submit written certification in accordance with regulations of the Department of Commerce and Community Affairs (DCCA) that the remediation site is located entirely within an enterprise zone as defined in the Illinois Enterprise Zone Act [20 ILCS 655] and entirely within one or more census tracts that have been determined by DCCA to contain a majority of households consisting of low and moderate income persons. The certification shall be submitted with the budget plan or application for final review and shall clearly identify the remediation site by name, address, tax parcel identification number(s) and Illinois inventory identification number.
- d) The fee for a review under this Subpart G shall be in addition to any other fees, payments or assessments under Title XVII of the Act and this Part. The fee shall be paid by check or money order made payable to “Treasurer - State of Illinois, for Deposit in the Hazardous Waste Fund.” The check or money order shall include the Illinois inventory identification number and the Federal Employer Identification Number (FEIN) or Social Security Number (SSN) of the RA.

(Source: Added at ___ Ill. Reg. ____, effective _____)

Section 740.725 Remediation Costs

- a) Activities, materials, labor, equipment, structure and service costs that may be approved by the Agency as remediation costs for the environmental remediation tax credit under Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)] include, but are not limited to, the following:
- 1) Preparation of bid documents and contracts for procurement of contractors, subcontractors, analytical and testing laboratories, labor, services and suppliers of equipment and materials;
 - 2) Engineering services performed in accordance with Section 58.6 of the Act and implementing regulations at Sections 740.235 and 740.405 of this Part;
 - 3) Site assessment and remedial investigation activities conducted in accordance with Sections 740.410, 740.415, 740.420 and 740.430 of this Part;
 - 4) Report or plan preparation conducted in accordance with Sections 740.425, 740.435, 740.445, 740.450 and 740.455 of this Part;

- 5) Collection, analyses or measurement of site samples in accordance with Section 740.415(d) of this Part;
- 6) Groundwater monitoring well installation, operation, maintenance and construction materials;
- 7) Removal, excavation, consolidation, preparation, containerization, packaging, transportation, treatment or off-site disposal of wastes, environmental media (e.g., soils, sediments, groundwater, surface water, debris), containers or equipment contaminated with regulated substances or pesticides at concentrations exceeding remediation objectives pursuant to an approved Remediation Objectives Report in accordance with Section 740.445 of this Part. Activities must be in compliance with all applicable state or federal statutes and regulations;
- 8) Clean backfill materials in quantities minimally necessary to replace soils excavated and disposed off-site that were contaminated with regulated substances or pesticides at levels exceeding remediation objectives pursuant to an approved Remediation Objectives Report in accordance with Section 740.445 of this Part;
- 9) Transportation, preparation and placement of clean backfill materials pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;
- 10) Design, testing, permitting, construction, monitoring and maintenance of on-site treatment systems pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;
- 11) Engineering costs associated with preparation of a budget plan in accordance with Section 740.705 of this Subpart or an Application for Final Review of Remediation Costs in accordance with Section 740.710 of this Subpart if prepared before the issuance of the NFR letter (by the Agency or by operation of law);
- 12) Removal or replacement of concrete, asphalt or paving necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;
- 13) Clay, soil or other appropriate geologic materials as a cap, barrier or cover necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;

- 14) Placement of clay, soil or other appropriate geologic materials as a cap, barrier or cover necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part;
 - 15) Destruction or dismantling and reassembly of above-grade structures that are necessary to achieve remediation objectives pursuant to an approved Remedial Action Plan in accordance with Section 740.450 of this Part.
- b) An RA may submit a request for review of remediation costs that includes an itemized accounting and documentation of costs associated with activities, materials, labor, equipment, structures or services not identified in subsection (a) of this Section if the RA submits detailed information demonstrating that those items are essential for compliance with this Part 740, 35 Ill. Adm. Code 742 and the approved Remedial Action Plan.

(Source: Added at ___ Ill. Reg. ____, effective _____)

Section 740.730 Ineligible Costs

Costs ineligible for the environmental remediation tax credit under Section 201(l) of the Illinois Income Tax Act [35 ILCS 5/201(l)] include, but are not limited to, the following:

- a) Costs not incurred by the RA;
- b) Costs incurred for activities, materials, labor or services relative to remediation at a site other than the site for which the No Further Remediation Letter was issued;
- c) Costs for remediating a release or substantial threat of a release of regulated substances or pesticides that was caused or contributed to in any material respect by the RA, any related party as described in Section 201(l) of the Illinois Income Tax Act [35 ILCS 201(l)] or any person who tax attributes the RA has succeeded to under Section 381 of the Internal Revenue Code;
- d) Costs incurred before January 1, 1998, or more than 12 months before enrollment of the site in the Site Remediation Program, or after the date of issuance of a No Further Remediation Letter issued pursuant to Section 58.10 of the Act and Subpart F of this Part;
- e) Costs that have been or will be deducted at any time under the Internal Revenue Code or taken into account in calculating an environmental remediation credit granted against a tax imposed under the provisions of the Internal Revenue Code;

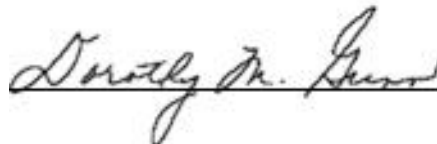
- f) Costs associated with material improvements that serve incidentally as engineered barriers and that are not primarily designed or intended to eliminate or mitigate exposures to, or migration of, regulated substances or pesticides;
- g) Costs or losses resulting from business interruption;
- h) Costs incurred as a result of vandalism, theft, negligence or fraudulent activity by the RA or the agent of the RA;
- i) Costs incurred as a result of negligence or unprofessional conduct as defined in Section 25 of the Professional Engineering Practice Act of 1989 [235 ILCS 325/25];
- j) Costs incurred as a result of negligence or unprofessional conduct by any contractor, subcontractor, or other person providing remediation services at the site;
- k) Costs associated with replacement of above-grade structures destroyed or damaged during remediation activities;
- l) Costs associated with obtaining a special waste generator identification number in excess of the lesser of \$250 or the actual time spent in obtaining a special waste generator identification number;
- m) Attorney fees;
- n) Purchase costs of non-consumable materials, supplies, equipment or tools, except that a reasonable rate may be charged for the usage of such materials, supplies, equipment or tools;
- o) Costs for repairs or replacement of equipment or tools due to neglect, improper or inadequate maintenance, improper use, loss or theft;
- p) Costs associated with activities that violate any provision of the Act or Board, Agency or Illinois Department of Transportation regulations;
- q) Costs associated with improperly installed or maintained groundwater monitoring wells;
- r) Costs associated with unnecessary, irrelevant or improperly conducted activities, including, but not limited to, data collection, testing, measurement, reporting, analyses, modeling, risk assessment or sample collection, transportation, measurement, analyses or testing;
- s) Stand-by or demurrage costs;

- t) Interest or finance costs charged as direct costs;
- u) Insurance costs charged as direct costs;
- v) Indirect costs for personnel, labor, materials, services or equipment charged as direct costs;
- w) Costs associated with landscaping, vegetative cover, trees, shrubs and aesthetic considerations;
- x) Costs associated with activities, materials, labor, equipment, structures or services not essential for compliance with this Part 740, 35 Ill. Adm. Code 742 and the approved Remedial Action Plan;
- y) Costs determined to be incorrect as a result of a mathematical, billing or accounting error;
- z) Costs that are not adequately documented;
- aa) Costs that are determined to be unreasonable.

(Source: Added at ___ Ill. Reg. ____, effective _____)

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of April 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board