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Governor Jim Edgar has signed into law one of the most sweeping changes to Illinois environmental statutes in many years. P.A. 89-0443[1] amends the Illinois Environmental Protection Act[2] by adding Title XVII[3] which sets out in detail the Illinois Brownfields program. This legislation, signed by the Governor on December 21, 1995, will encourage the cleanup and redevelopment of contaminated properties by:

- focusing remedial efforts on actual risks;
- setting out a process for gaining Illinois Environmental Protection Agency approval of cleanups;
- giving legal basis and legal protections to that approval; and
- changing the current joint and several liability scheme to one which limits liability to those that caused a contamination problem.

I. THE BROWNFIELDS PROBLEM

The term "Brownfields" refers to environmental concerns which inhibit the development of urban industrial property. These include the fears that the property will be contaminated with hazardous materials and that the next owner of the property will be required to remediate that contamination. These fears were partly encouraged by the zealous enforcement of the

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1. H.R. 901, 89th Leg., Fall Sess. (Ill. 1995). The bill was jointly sponsored by Rep. Persico of Glen Ellyn and Sen. Mahar of Orland Park. Furthermore, H.R. 544, 89th Leg., Spring Sess. (Ill. 1995) also amended the Illinois Environmental Protection Act under the moniker of the Brownfields Act.

2. 415 ILL. COMP. STAT. ANN. 5/1 (West 1993 & Supp. 1995).

3. 415 ILL. COMP. STAT. ANN. 5/58.1-58.11 (West 1993 & Supp. 1995).

Comprehensive Environmental Response Compensation and Liability Act[4] (CERCLA or Superfund) by the United States Environmental Protection Agency ("USEPA") which successfully imposed the cost of addressing remediation on thousands of businesses which had no part in creating the problem.

In Illinois, this problem was exacerbated by the draconian cleanup objectives announced by the Illinois Environmental Protection Agency ("IEPA") in the implementation of its Underground Storage Tank program.[5] These objectives appeared to require all soils and groundwater in the state to be cleaned to drinking water standards, even in situations where human contact with the contamination was impossible. Despite the lack of any scientific or regulatory basis, these objectives were accepted by the commercial community with regard to all cleanups. Although the impact of these objectives in the Underground Storage Tank ("UST") program was somewhat ameliorated by the availability of state funding for UST remediations (in fact, the objectives bankrupted the state fund twice), they proved a powerful disincentive in considering urban sites for development.

The other disincentive was the lack of protections for persons seeking to remediate contaminated properties. Although the IEPA had a voluntary cleanup or Prenotice program,[6] it had little statutory basis and no regulatory support. Further, the applicant was stuck with whatever Agency decision on cleanup objectives it could negotiate and had no means of challenging that decision. Although the Agency had an internal process for reconsidering application of its unreasonable objectives,[7] there were no standards for the operation of this process and applicants had no right to even discuss their case with the decision-makers. The IEPA letter that would be issued at the end of the process had some statutory basis but provided no real protection to the site owner.

Thus, not only did a person considering the development of industrial property face the uncertainty of not knowing the presence or extent of contamination, but that person also would not know how the IEPA would respond to such contamination. The developer would know that the Agency would initially seek to implement the most drastic cleanup objectives possible and that there was no leverage to obtain a more reasonable decision. Small wonder that most developers avoided urban properties, seeking instead the relative certainty of previously undeveloped properties.

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4. 42 U.S.C. §§ 9601-9675 (1994).
5. ILL. ADMIN. CODE tit. 35, §§731-732 (1992).
6. ILL. ADMIN. CODE tit. 35, §859.103 (1992).
7. *See* ILL. COMP. STAT. ANN. tit. 35, §859.201-205 (1992).

II. THE LEGISLATIVE NEGOTIATIONS

In March 1995, Representative Persico and Senator Mahar sponsored identical Brownfields bills which addressed the problem by privatizing the process of approving remediations.[8] Although similar to legislation in other states, this galvanized the IEPA, which lobbied strongly against it. When it became clear that the privatization issue could not be easily surmounted, the regulated community, the Agency and the Governor's Office entered into intense negotiations which produced the current Act but left the controversial issue of liability unresolved.

Throughout the negotiations, the regulated community insisted on following the example of the Illinois Civil Justice Reform Amendments of 1995[9] by abolishing joint and several liability for environmental contamination. The proposal provided for "proportionate share liability" or liability for cost of remediating contamination only against persons who actually caused the contamination and only to the extent of those persons' proportionate share of the remedial costs. Although the Governor's Office did not disagree with this in principle, it insisted that it needed funding so that the state could pay for "orphan shares" or that part of a remediation for which no responsible persons could be held liable under the proportionate share proposal. The regulated community did not disagree with this demand in principle either, but insisted on reasonable estimates of costs to determine the amount of funding needed.

At the end of the spring session, House Bill 544 and Senate Bill 46 were passed with proportionate share liability included.[10] Governor Edgar issued an amendatory veto of the sections of the legislation containing the proportionate share liability, noting in his veto message the ongoing debate regarding orphan shares. By the time of the Veto Session in November 1995, an agreement was reached on additional funding whereby other waste funds were moved to the Agency's Hazardous Waste Fund and a small fee was established for obtaining no further action letters under the Brownfields Bill. These changes were included in House Bill 901 which was adopted by the General Assembly. At the same time, the amendatory vetoes of House Bill 544 and Senate Bill 46 were approved. With the Governor's signature of House Bill 901 and certification of the approval of House Bill

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8. *See supra* note 1.

9. Civil Justice Reform Amendments of 1995, P.A. 89-7, 1995 Ill. Legis Serv. 224 (West) (also known as the Tort Reform Act).

10. *See supra* note 1.

544 and Senate Bill 46 as amended by him, the Brownfields legislation became law.

III. ANALYSIS OF THE LEGISLATION

A. APPLICATION

Title XVII applies directly to sites which are not regulated by other specific programs such as the UST program, the Resource Conservation and Recovery Act ("RCRA") program, or the National Priority List.[11] Sites in such programs can still use the standards for developing cleanup objectives to the extent those objectives would be allowed under the other programs. Sites already in the Pre-Notice Program can switch to Title XVII unless they have already received their No Further Remediation letter.[12]

The process is directed to voluntary remediations, but could also apply to IEPA actions to require remediation outside of the above programs. As with the Pre-Notice Program, a deposit is required to pay the Agency's costs in reviewing plans and reports and a fee is paid to obtain a No Further Remediation letter at the end of the process.[13] This fee is equal to the amount of the Agency's costs, but can be no more than $2,500.[14]

B. REMEDIAL OBJECTIVES

Title XVII next describes the process of developing risk based remediation objectives.[15] This is intended to codify the ASTM approach of using a tiered process to develop remedial objectives based on actual site risk with the ability to develop more accurate values based on more detailed site information.[16] The first tier of objectives (Tier I) is a "look up table"

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11. *See* 415 ILL. COMP. STAT. ANN. 5/58.1(a)(2) (West Supp. 1996): "Any person, including persons required to perform investigations and remediations under this Act, may elect to proceed under this Title unless (i) the site is on the National Priorities List (Appendix B of 40 C.F.R. 300), (ii) the site is a treatment, storage, or disposal site for which a permit has been issued or that is subject to closure requirements under federal or State solid waste or hazardous waste laws, (iii) the site is subject to federal or State underground storage tank laws." The statute cites to the Underground Storage Act, 430 ILL. COMP. STAT. ANN. 15/1 (1993 & Supp. 1996), Solid Waste Disposal Act, 42 U.S.C. §§6901-6992(k) (1994), and CERCLA, 42 U.S.C. §9605 (1994).

12. 415 ILL. COMP. STAT. ANN. 5/58.8 (1996).

13. 415 ILL. COMP. STAT. ANN. 5/58.7 (West Supp. 1996).

14. *Id.*

15. 415 ILL. COMP. STAT. ANN. 5/58.5(a) (West Supp. 1996).

16. *See* 415 ILL. COMP. STAT ANN. 5/58.5 (c)(1) & (2):

or chart of numeric objectives.[17] Different values would be provided for residential and industrial property and for different "pathways" or means by which the contamination could come in contact with a "receptor" and cause harm.[18] The pathways include ingestion, inhalation and migration to groundwater.[19] The person seeking to remediate the site (Remedial Applicant or "RA") would simply compare the concentration of contaminants on the site with the look up table.[20] If the Tier I objectives are not exceeded, the person would be entitled to a No Further Action letter.[21]

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(1) The regulations shall provide for the adoption of a three-tiered process for a RA to establish remediation objectives protective of human health and the environment based on identified risks and specific site characteristics at and around the site.
(2) The regulations shall provide procedures for using alternative tiers in developing remediation objectives for multiple regulated substances.

17. *See* 415 ILL. COMP. STAT. ANN. 5/58.5 (d) & (d)(1):
(d) In developing remediation objectives under subsection (c) of this Section, the methodology proposed and adopted shall establish tiers addressing manmade and natural pathways of exposure, including but not limited to human ingestion, human inhalation, and groundwater protection. . .
1) Tier I remediation objectives expressed as a table of numeric values for soil and groundwater. Such objectives may be of different values dependent on potential pathways at the site and different land uses, including residential and nonresidential uses.

18. *See* ILL. COMP. STAT. ANN. 5/58.5(d)(2):
Tier II remediation objectives shall include the formulae and equations used to derive the Tier I objectives and input variables for use in the formulae. The RA may alter the input variables when it is demonstrated that the specific circumstances at and around the site including land uses warrant such alternate variables.

19. *Id.*

20. *See* 415 ILL. COMP. STAT. ANN. 5/58.4 (d)(4):
(4) For regulated substances that have a groundwater quality standard established pursuant to the Illinois Groundwater Protection Act [citation omitted] and rules promulgated thereunder, site-specific groundwater remediation objectives may be proposed under the methodology established in subdivision (d)(3) of this Section at values greater than the groundwater quality standards.

> (A) The RA proposing any site-specific groundwater remediation objective at a volume greater than the applicable groundwater quality standard shall demonstrate:
> (i) To the extent practical, the exceedance of the groundwater quality standard has been minimized and beneficial use appropriate to the groundwater that was impacted has been returned; and
> (ii) Any threat to human health or the environment has been minimized.

21. *See* 415 ILL. COMP. STAT. ANN. 5/58.7 (d)(4):
Upon approving, disapproving, or approving with conditions a plan or report, the Agency shall notify the RA in writing of its decision. In the case of approval or approval with conditions of a Remedial Action Completion Report, the Agency

Tier II consists of formulas used for developing the Tier I objectives.[22] To use Tier II, the RA gathers additional information about the site such as soil permeability, actual distance to receptors, and distance to drinking water sources.[23] This information is then applied to formulas to develop objectives which will probably be less conservative than Tier I but would be based to a greater extent on actual site conditions. Tier III is intended to provide for more elaborate risk assessments to develop objectives which are even more closely tied to actual site risks.[24] The Tier I objectives, Tier II formulas, and standards for Tier III objectives will all be included in the Pollution Control Board regulations.[25]

This process also provides for considering area background contamination in considering remedial objectives.[26] If the site is situated in a heavily industrialized area and is contaminated, not as a result of operations on that facility, but as a result of other industries in the area, the RA would not be

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shall prepare a No Further Remediation Letter that meets the requirements of Section 58.10 [415 ILL. COMP. STAT. ANN. 5/58.10] and send a copy of the letter to the RA.

22. *See supra* note 18 and accompanying text.

23. *Id.*

24. *See* 415 ILL. COMP. STAT. ANN. 5/58.5 (d)(3):

(3) Tier III remediation objectives shall include methodologies to allow for the development of site-specific risk-based remediation objectives for soil or groundwater, or both, for regulated substances. Such methodology shall allow for different remediation objectives for residential and various categories of non-residential land uses. The Board's future adoption of a methodology pursuant to this Section shall in no way preclude the use of a nationally recognized methodology to be used for the development of site-specific risk-based objectives for regulated substances under this Section. In determining Tier III remediation objectives under this subsection, all of the following factors shall be considered:

(A) The use of specific site characteristic data.

(B) The use of appropriate exposure factors for the current and currently planned future land use of the site and adjacent property and the effectiveness of engineering, institutional, or legal controls placed on the current or future use of the site.

(C) The use of appropriate statistical methodologies to establish statistically valid remediation objectives.

(D) The actual and potential impact of regulated substances to receptors.

25. *See* 415 ILL. COMP. STAT. ANN. 5/58.4 (f):

"Until such time as the Board adopts remediation objectives under this Section, the remediation objectives adopted by the Board under Title XVI of this Act [citation omitted] shall apply to all environmental assessments and soil or groundwater remedial action conducted under this Title."

26. 415 ILL. COMP. STAT. ANN. 5/58.4 (c)(3) (West Supp. 1996).

obligated to remediate that contamination so long as it does not provide an acute risk to workers on the site.

Although the remedial objective process applies to both soil and groundwater objectives, the IEPA believed that the development of groundwater objectives is limited by the Illinois Groundwater Protection Act[27] and the Pollution Control Board's Groundwater Quality Standards.[28] Yet Title XVII allows some flexibility in seeking alternate groundwater objectives in situations where potable water supplies would not be affected.[29]

A key element of the tiered objective process is that it considers actual land use so that industrial properties are not subject to the same standards as residential properties.[30] It also allows for barriers to be used to eliminate the risk rather than requiring removal of contamination.[31] Use of these land use considerations or barriers carries with it a price: the land owner must agree to added restrictions to assure that the land use or barriers will remain in place.[32]

C. AGENCY APPROVAL

The process for seeking IEPA approval remediations is similar to the current process and requires the submission of similar reports:

- a Site Investigation Report, to describe the site and the contamination;[33]

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27. *See* 415 ILL. COMP. STAT. ANN. 5/58.4 (d)(4) and 415 ILL. COMP. STAT. ANN. 55/1.

28. *See* 415 ILL. COMP. STAT. ANN. 5/58.3 (West Supp. 1996): "The General Assembly hereby establishes by this Article a Site Investigation and Remedial Activities Program for sites subject to this Title. This program shall be administered by the Illinois Environmental Protection Agency under this Title XVII and rules adopted by the Illinois Pollution Control Board." *Id.*

29. 415 ILL. COMP. STAT. ANN. 5/58.5 (d)(4) (West Supp. 1996).

30. *See supra* note 17 and note 24.

31. See 415 ILL. COMP. STAT. ANN. 5/58.4 (d)(4)(A)(i) & (ii). For text *see supra*, note 20.

32. *See* 415 ILL. COMP. STAT. ANN. 5/58.4 (e): "The rules proposed by the Agency and adopted by the Board under this Section shall include conditions for the establishment and duration of groundwater management zones by rule, as appropriate, at sites undergoing remedial action under this Title."

33. 415 ILCS 5/58.6(b)(1) & (2):

(b)(1) Site investigation and Site Investigation Report. The RA shall conduct a site investigation to determine the significant physical features of the site and vicinity that may affect contaminant transport and risk to human health, safety, and the environment and to determine the nature, concentration, direction and rate of movement, and extent of the contamination at the site.

- a Remedial Objectives Report, to select the remedial objective;[34]
- a Remedial Action Plan to describe what steps will be taken to achieve the objectives; and
- a Remedial Action Completion Report to describe that the objectives have been achieved.

These must be certified by an Illinois Licensed Professional Engineer ("LPE"). Title XVII specifically provides that all of these can be included in one document and that IEPA approval is not a prerequisite for moving from step to step; obviously Agency disapproval should be considered since the ultimate goal is for the Agency to issue a No Further Remediation letter.

Seeking Agency approval under Title XVII has significant advantages over the Pre-Notice process. The Agency has sixty days to act on each report. If the Agency does not act after sixty days, the RA can continue to negotiate or appeal the Agency's inaction to

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(2) The RA shall compile the results of the investigations into a Site Investigation Report. At a minimum, the reports shall include the following, as applicable:

(A) Executive summary;
(B) Site history;
(C) Site-specific sampling methods and results;
(D) Documentation of field activities, including quality assurance project plan;
(E) Interpretation of results; and
(F) Conclusions.

34. 415 ILL. COMP. STAT. ANN. 5/58.6 (c):

(c) Remediation Objectives Report.

(1) If a RA elects to determine remediation objectives appropriate for the site using the Tier II or Tier III procedures under subsection (d) of Section 58.5 [415 ILL. COMP. STAT. ANN. 5/58.5], the RA shall develop such remediation objectives based on site-specific information. In support of such remediation objectives, the RA shall prepare a Remediation Objectives Report demonstrating how the site-specific objectives were calculated or otherwise determined.

(2) If a RA elects to determine remediation objectives appropriate for the site using the area background procedures under subsection (b) of Section 58.5 [415 ILL. COMP. STAT. ANN. 5/58.5], the RA shall develop such remediation objectives based on site-specific literature review, sampling protocol, or appropriate statistical methods in accordance with Board rules. In support of such remediation objectives, the RA shall prepare a Remediation Objectives Report demonstrating how the area background remediation objectives were determined. *Id.*

the Pollution Control Board. Title XVII provides specific standards for Agency review and allows any Agency denial or conditional approval to be appealed to the Board. This gives the RA far more leverage in the process than before and should provide for more reasonable Agency decisionmaking.

A unique feature of Title XVII is that the RA can hire a LPE to perform the Agency's review and evaluation of the reports. This is called a Review and Evaluation LPE or "RELPE". This codifies the practice of one Illinois company with numerous complex sites before the Agency, which, with the Agency's consent, hired another consultant to perform the Agency's review of site documentation. Although the Agency retained final authority of approval of plans or reports, the reviewing consultant performed all of the review work and drafted recommendations for Agency action. In certain situations, this provides an opportunity to speed and improve Agency reviews.

D. NO FURTHER REMEDIATION LETTER

The No Further Remediation letter now carries far more statutory weight: it represents a final Agency determination that no further remediation is necessary for the selected land use and that there is no threat to human health and the environments. The letter is prima facie evidence that there is not a threat to human health and the environment and that no further remediation is warranted, and the letter runs with the land and applies to any future owner or lender. It must be filed with the county Recorder of Deeds. It can be revoked if it was based on false information, if the land use or barrier which supported the determination is not maintained, or if further contamination is found. The Agency bears the burden of seeking to revoke the letter and proving that it should be revoked. The Agency's decision is not final until the RA or landowner has an opportunity to appeal the decision to the Board. The letter can also be structured as broadly or narrowly as is appropriate. The RA can seek approval that a spill has been remediated or that an entire site is clean.

E. PROPORTIONATE SHARE LIABILITY

The proportionate share liability section now included in Title XVII limits the IEPA or other persons from seeking to recover costs of remediating properties to recovery only from persons who

actually caused the contamination and only to the extent of costs caused by that person's contamination. It also specifically precludes actions against persons who did not cause contamination at the site, landlords who did not know or could not reasonably have known of the actions of their tenants, and financial institutions holding or foreclosing on mortgages who do not actually take control of the site and cause a release.

IV. FUTURE IMPLEMENTATION

Title XVII provides for the IEPA and an Advisory Board to propose regulations implementing the program to the Pollution Control Board by September 1996.[35] The Agency has already begun the process of developing regulations in issuing its Tiered Assessment of Cleanup Objectives Guidance. While it does not meet the statutory goal of providing for risk based corrective action, it is a vast improvement over prior cleanup objectives issued by the Agency and will represent a starting point for future discussions.

In the meantime, Title XVII is available for persons seeking to remediate sites. There will plainly be a period of experimentation as both the Agency and the regulated community explore the possibilities in the Act. The regulated community is advised to examine Title XVII carefully, as it provides numerous advantages and opportunities not offered by the Agency under prior programs.

35. The IEPA and the Advisory Board are still working on these regulations as of the publication date of this article.