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Luncheon Address

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I. IMPROVEMENTS: DEVELOPING PARTNERSHIPS

Some of the legislation that was passed last year is going to fundamentally change the way that Brownfields are cleaned up and developed. Similarly, there are a lot of improvements that the Agency has been involved with, is involved with, and will be involved with. We have done an amazing amount of new and, I think, rather creative things. We participated in a Club Winn program that I am sure you were aware of up in the Rockford area and that was the first program in the country that addressed how to deal with small businesses and they really show a concern and an intent to deal with the problems of small businesses. We did that last spring essentially and Governor Edgar was very pleased with that effort, and we have expanded that to include basically two industrial groups for the small businesses right now throughout the state so that program has certainly showed improvement in the area of how a regulatory agency deals with part of its constituency.

We have also gotten away from the command and control basis of environmental protection. I have been a part of it for a long time and not to say that it is not appropriate in its time, but I think its time has come and gone, command and control served the country very well. There was a lot to do and there was an urgency to get it done. But I think we have gone about as far as we can with that kind of a program and that kind of a mentality, and we are going to have to recognize that we're in need of really developing partnerships, and developing partnerships at all levels. For instance, the IEPA was the very first state agency in the country to reach a partnership agreement with its local U.S. EPA office (in Illinois, it is Region 5). We have a performance-partnership agreement which he did sign in the

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fall, which is again a fundamental change in the way that the federal government has done business with a state agency.

We have gained a great deal of flexibility now in the way we run programs. We are going to be looking for taking advantage of that flexibility in doing some very interesting things. Our site remediation program is not really new; we have had it for a long time. It essentially addresses sites of a nonfederal interest (state sites), and it also is involved with the federal cleanup program through site assessments that involve national priority sites, Superfund sites, and Department of Defense sites.

Our state program is further divided into voluntary and nonvoluntary sites. Nonvoluntary sites are those sites where the environmental risks are sufficient to justify the use of state funds from the hazardous waste fund. These are used to perform cleanup work or to eventually remediate the problems. We also use enforcement actions, if necessary, against potentially responsible parties to have them pick up the costs of these cleanups. The other portion of our state program is the voluntary cleanup program, or prenotice program, and it is a key adjunct to the Brownfields efforts in the state of Illinois. We have operated the prenotice program for many years in Illinois and it has been very successful. I think an indication of the success that it has had is that in April 1995, the IEPA and Region 5 of the USEPA amended our Superfund Memorandum of Agreement to include an addendum that provided that a site receiving IEPA cleanup approval in the form of a cleanup letter under the voluntary cleanup program could expect that no federal activity would commence. So it was an indication that the federal government had a lot of confidence that the prenotice or voluntary program was in fact effective and did work. This agreement between Region 5 and the State of Illinois was in fact the first such agreement in the country. There are currently 460 voluntary cleanup sites in the state and all of them have service agreements with the Agency which are essentially contracts that ensure that we are going to get paid for our oversight and our review services.

Looking back, Brownfields really developed as a topic or as a described field of concern in about 1992 or 1993 as best as I can determine. Brownfields is contrasted with Greenfields, which obviously means open virgin type of land development with which you don't really experience the same type of problems at all. But over the last several years, Brownfields has emerged and it has presented very significant issues and very significant opportunities for the agency. We have been one of the national leaders in this area, and we intend to continue to be one of the national leaders in this area. We are looking to any way possible that we can accelerate the redevelopment of contaminated sites, and I think a major part of that effort will include House Bill 901 which adds Title 17 to our Environmental Protection Act.

Another vital issue in this area is how our cleanup standards developed, and this has been a rather thorny issue for a long, long time. We were looking at this in the late '70s through the '80s, and now midway through the '90s, hopefully we have come up with the solution: the three-tiered system for the evaluation of sites and determination of what are appropriate background levels to meet as well as cleanup objectives. We are essentially finalizing our three-tiered system through rulemaking with the Pollution Control Board. The advance word on that is the Agency has developed and created this tiered approach to cleanup objectives, which I have been told by people in the Bureau that this is a hot seller right now. The tiered procedure can be used to develop risk-based soil and ground water cleanup objectives under programs administered by us. This tiered procedure allows a person remediating a site to take into account such factors as property use, site specific soil and ground water characteristics, institutional controls, and engineering barriers to develop cleanup objectives. It basically describes how background levels can be used as cleanup objectives. There has already been a seminar in Springfield generally sponsored by the Illinois Chamber of Commerce, Environmental Regulatory Group, and the IEPA to go through the details of this. I think this is going to be the basis for the Agency's rulemaking before the Board and it is going to be quite important that people become familiar with it as soon as possible.

We are also looking at ways of refining our enforcement mechanisms. We are looking along with the Attorney General's office at streamlining our consent decrees that we use to basically settle enforcement actions that involve cleanups and I think that will speed up the process as well. In most cases, that enforcement has been determined to be needed.

II. THE ILLINOIS PERSPECTIVE

Before I get into a discussion of Title 17, let me go through some of the lessons that the Agency has learned along the way. We admit that we do not know everything there is to know about cleanups; however, we are learning, we have learned, and I think we will continue to learn. We had to begin by understanding what the goals of cleanups really are. Why do we want to redevelop property and at what levels is cleanup necessary? We have to then look at what role a state program would serve in this area. We then look at standardizing the necessary corrective action process. A lot of that has been done for us by the legislature, but as many of you know we did participate in that development of House Bill 901. Finally, as I mentioned earlier, we had to learn about developing strong federal, state and

local governmental relationships. This is in a lot of ways a team approach. It can't be done by one agency and often if only one agency tries, there isn't a lot of smooth sailing. We also had to learn about the private sector. We had to determine what private sector linkages are really important and what we need to be concerned about in that area. Redevelopment and cleanup of contaminated property conjugates to complex systems of public and private land transactions. The goal of traditional land development is to build structures of value and use for people. The goal of site remediation is to cleanup sites so that people and the environment are protected. The differences in the goals are apparent, yet the goals are not incompatible. Without successful integration of these systems, public health will be unnecessarily threatened and land developing unnecessarily impaired. We had to look and try to find why contaminated property is not developed so we went out to stakeholders and got reactions and responses. Some of those reactions were that (1) the cleanup objectives were too stringent, that may be true; (2) our cleanup requirements are too vague, that may be true; (3) the agency can't make decisions in a timely manner; and (4) that the cleanup costs exceed the value of the property, probably true. Another reaction that we heard was that urban redevelopment is too difficult. That there is not an appreciation for environmental justice issues, that the bottom line is not helped by redeveloping urban property. A common reaction is that bankers do not want to be involved in these type of projects. Finally, we heard that the developer must have protection against all potential liability issues. You're going to see that a lot of these issues are being addressed, and the time has come to get over these hurdles.

III. THE ROLE OF THE STATE VOLUNTARY CLEANUP PROGRAM

The State Program is still involved. We conduct reviews, we provide approvals or provide denials. We will continue to provide oversight of the corrective action activities, investigations, remedial action plans and closure reports. Probably one of the more important aspects of it is to provide to the developer a reasonable level of federal assurance. By that I mean that there will not be a federal Superfund case filed if in fact there is compliance with the state cleanup objectives with approval from the state. The role also has to include performing our activities in a manner that fits within a time period that is specific and also acceptable to industry. We in Illinois have been unique for some time. But we have deadlines by which we have to issue permits in most areas and, think about it, the draftsman of our environmental protection act back in 1970 had a very good concept there

because that does force a governmental agency like us to do something. Usually, it's ninety days in some cases. Now it's been expanded to 120 days but generally that has been a very worthwhile provision of our act, and we need to consider that and make these type of time commitments as well in the Brownfields cleanup areas.

Finally, which I think everybody really wants at the end is that we will provide a no further action letter. That is sort of the seal of approval that is the document that I think efforts are aimed at.

IV. STANDARDIZING THE COURSE OF ACTION PROCESS

I think we had to look at how the management of land contamination is done and how we were doing it and how it should be done. Soil cleanup for the sake of soil cleanup is an inappropriate goal. We should be having as a primary goal though remediation that manages contamination to protect the pathway by which harm to the public health and environment can occur. Liability concerns should not based on the mere presence of contamination but whether contamination is being properly managed. The primary direction is being provided now through House Bill 901 which has just added Title 17 to the Environmental Protection Act. This program is basically a cooperative effort between the IEPA, the Illinois Chamber of Commerce and the Illinois Manufacturers Association. It was designed to, and I think to a great degree does, reduce the uncertainties and fears and defines the risk associated with cleanup projects. It also provides incentives for private party cleanups and it, as one of its main provisions, establishes a liability scheme that eliminates the joint and several liability and replaces that liability scheme with a causation standard approaching a liability scheme. We also need to adopt risk-based methodologies and I think we are doing that with the three-tiered system and the guidance document will explain that in far better detail than I can, but essentially the first tier is a base-line numerical type of standard where there will be numbers and if you meet those numbers it is a clean site. The second tier is an equation-based standard where you cite available data to plug into the equation and find out if the standards are in fact met. The final tier and probably the most expensive will be the formal risk assessment that is undertaken. We will consider and utilize, where appropriate: conditional approvals of cleanups for a variety of reasons; the nature of the use of the property, whether it's industrial, commercial, or residential; what engineering controls have been used to clean up the site; whether the site has been capped; and whether the building is a parking lot or whatever structure may be on the property.

There is going to be chain of title notification provided to subsequent purchasers of the property so that there won't be any surprises down the road.

V. COMMUNICATION

We need to continue to make sure that working together, the partnership agreements, the arrangements by which government entities talk to each other or let one another know are in place and are working properly. This has been one of the major failings of the previous system. You can't have an agency, like the EPA, try to dictate what is in the best interest of a community where maybe the local governing body knows better than we do. We need to also integrate what happens with Brownfields cleanups and what is happening with enterprise zones, TIFs, or maybe locally governmental sponsored Brownfield cleanups. So we need to maintain direct lines of intergovernmental communications, we have to facilitate a constant dialogue, and we have to be cognizant at an agency level of breaking down our own internal barriers. We have a lot of provincialism within the agency and we have a lot of programs that people don't like to share or get involved with other programs even though it may be the best type of arrangement we can have. So we are going to be looking at breaking down these institutional barriers, and I'll admit there are barriers, between the LUST program at the agency, the RCRA program at the agency, and between our fiscal and administration people. We're aware about that and we'll work on it, but it's not easy.

The private sector can't be excluded. We have to understand that there are different roles, there are different responsibilities and requirements by all the private sector entities. The developers have different issues, different agendas at times than the lenders, the manufacturers, or the consultants. Everybody I think in their own way has certain things that they need attention on and basically are concerned about, and we need to be aware of those and try to address those as we can. The final point about what we've learned is that we just have to be very, very concerned about communicating. We have to communicate with the private sector and also with the public. We have to explain why it is that what we're doing makes sense, why it is the reasonable alternative to a complete remediation to the public and again House Bill 901 does address that by requiring the agency to develop guidance that can be used by cleanup developers to interact better with the public. This is critical because I think the public often times is ignored, and I think if you do involve the public and go out of your way to explain what's going on, the public is very receptive to that type of attention

and more times than not they are receptive to what you're trying to do and accomplish.

VI. TITLE 17

Title 17 originally started a year ago as House Bill 544. Governor Edgar vetoed that piece of legislation because the liability scheme that was presented and the fact that there was an issue with shares or sites that was not going to be addressed if we eliminated the joint civil liability scheme that then existed. The legislature addressed that. There is now a new assessment fee on no further action letters, and there is a transfer of two million dollars per year from the solid waste fund to the hazardous waste fund to address shares. Finally, on December 21, 1995, the Governor signed HB 901 and the National Law Journal in February 1996 quoted businesses saying that Illinois law is prototyped, and it is. We seem to be on the cutting edge of a lot of things. The voluntary program under 22.2(M) of the act has essentially been eliminated and incorporated into Title 17 or section 58. Until the rules are adopted, though, the voluntary program will essentially continue. The three-tiered approach is very important in a conceptual sense to get on a legislative footing, if you will, because it does establish carcinogen exposure levels which never were addressed by the legislature before and the cancer risk exposures are between one in ten thousand as the bottom line and one in one million as the other limit. This really is a significant part of legislation that really defines what in Illinois is acceptable risk.

There are still opportunities for the Agency to ensure that the cleanups are done adequately and properly and there are a series of reports within this legislation that will provide information to the Agency. An interesting aspect of this legislation is that the reports don't have to be filed sequentially. They can be whatever the developer or consultant feels they should be submitted so they can be done sequentially; they can be done all at once at the end of the project. It seems like a new type of approach. I think there is going to be some interest in getting some approval on the way by the agency rather than holding out to the end and maybe expecting some kind of a surprise.

So the final remedial action completion report is basically done after the completion of the remedial action plan is designed to demonstrate whether remedial action was completed in accordance with the approved remedial action plan. If a no further action letter is issued, that is a prima facie defense for any future allegations or charges of not having a clean site.

VII. WHERE WE ARE NOW

Basically, the legislation provided a ten-member advisory committee. The Committee met a week ago and had its first meeting, and I think that was more or less an organizational meeting that got the group together and started discussing what the advisory committee would be doing. There are going to be more committee meetings from now through June 1996. The Agency will be presenting a draft of its proposed rules to this committee for its oversight or review of the rules and the committee has the obligation to comment on those rules before they are presented to the Pollution Control Board. At this time, the Agency intends to get the first draft of its rules on the program basically to the committee sometime in April 1996. Hopefully, the committee agrees with the revisions to those draft rules and something will be presented to the Pollution Control Board by September. This is a rather quick schedule for rulemaking in Illinois, but I think we are on target and things are looking pretty good that it is going to get to the Board.