

Recent Changes to Illinois' LUST Rules and Regulations

Introduction

On March 1, 2006, new Leaking Underground Storage Tank (LUST) regulations (35 IAC Part 734) and amendments to prior LUST regulations (35 IAC Part 732) became effective. The LUST Section within the Illinois Environmental Protection Agency (IEPA) oversees the remedial activities after a release from a petroleum UST has been reported to the Illinois Emergency Management Agency (IEMA). Previously, on June 24, 2002, a new law (Public Act 92-0554) amending aspects of 35 IAC Part 732, was put into effect as the first step in implementing the new regulations. These new regulations amend sections of the Environmental Protection Act governing the remediation of reported releases from regulated petroleum UST systems and the process for owners/operators of USTs to obtain payment from the LUST Fund for eligible response costs.

Applicability

For an owner/operator that reported a LUST release to the IEMA on or after March 1, 2006, the new 35 IAC Part 734 regulations apply. The new 35 IAC Part 734 regulations also apply if the owner/operator reported a release between June 24, 2002 and March 1, 2006 and elected to proceed in accordance with the Public Act 92-0554 prior to March 1, 2006. However, in this instance, being that those owner/operators are now responsible to meet the requirements of the new regulations without purposely electing to do so, the IEPA has retained the authority to determine on a case-by-case basis whether key requirements of the new regulations have been satisfied. For example, costs incurred as part of a budget plan approved by the IEPA prior to March 1, 2006, will be reimbursed with the amounts approved in that budget plan and will not be subject to the new regulations, such as maximum payment amounts.

For an owner/operator that reported a LUST release to the IEMA on or after September 23, 1994, but prior to June 24, 2002, the amended 35 IAC Part 732 regulations apply unless the owner/operator elects to proceed under the new 35 IAC Part 734.

Notable Changes to the LUST Regulations

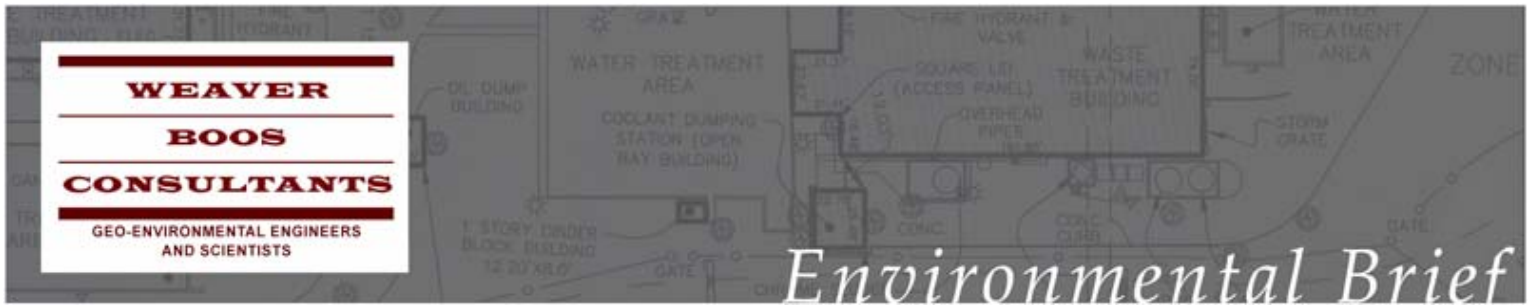
Technical Changes

- The exclusion of exposure routes as a strategy to seek closure for a release under amended Part 732 are allowed only if the owner/operator elects to proceed under Part 734.
- Free product is considered to be one-eighth of an inch in depth as measured in a groundwater monitoring well, or a sheen on groundwater in a UST excavation or on surface water.

- A free product removal plan (and budget, if applicable) is required for the removal of free product conducted more than 45 days after confirming its presence.
- In addition to a Licensed Professional Engineer, a Licensed Professional Geologist can now certify the required plans, budgets, and reports excluding the Corrective Action Completion Report under both amended Part 732 and Part 734.
- Site investigations conducted under Part 734, require a new three-stage investigation process. However, if the impacts present at the site are adequately delineated, the remaining stages can be skipped and a Site Investigation Report may be prepared for IEPA approval.
- The completion of a potable water supply well search is required as part of site investigation activities in amended Part 732 and Part 734.

Reimbursement Changes

- The per occurrence reimbursement limit has been increased from \$1,000,000 to \$1,500,000 for eligible charges.
- Costs associated with on-site corrective action to achieve remediation objectives that are more stringent than site-specific (TACO Tier 2) remediation objectives are considered ineligible within amended Part 732 and Part 734. This does not apply if geology prevents the development of site-specific remediation objectives.
- Costs associated with groundwater remediation, if a groundwater ordinance is already approved by the Agency for use as an institutional control, are considered ineligible within amended Part 732 and Part 734.
- Amended Part 732 and Part 734 have incorporated the use of maximum amounts payable for select activities throughout the closure process, including:
 - Removal and abandonment of USTs;
 - Free product removal;
 - Drilling, well installation, well abandonment;
 - Soil removal, transportation, and disposal;
 - Handling and laboratory analysis of samples;
 - Dismantling and replacement of concrete, asphalt, paving; and
 - Handling charges.
- A bidding process is available as an alternative to the maximum amounts payable listed within amended Part 732 and Part 734 for the items above.
- Professional services will be reimbursed on a time and materials basis; however, they will be constrained to the hourly rates as listed within amended Part 732 and Part 734.



- Owners/operators that submit a report, plan, budget or application for payment must maintain all books, records, and documents directly related to the above-mentioned items, including the financial information and data used in preparation or support of applications for payment.

Potential Positive and Negative Impacts

An important change of the new regulations is the increase in the per occurrence reimbursement limit to \$1,500,000. This will be especially important with releases that require more intensive corrective actions.

The new and amended regulations also may expedite the preparation and review of budget plans and reimbursement claims by establishing hourly rates for professional services and maximum payable amounts for several early action, site investigation and remedial action activities. This may result in more consistent budgets and eligible reimbursement amounts from site to site and may allow consultants the ability to provide a cost estimate to owner/operators that is more likely to be fully reimbursable.

The new and amended regulations may also have some negative impacts associated with the established maximum amounts payable. Although certain inflationary adjustments will occur every year, the amounts assigned to several of the activities appear to be low compared to current market averages. This may have negative economic impacts to the various companies that provide these services in addition to the added challenge for a consultant to find companies willing to provide quality services at these lower rates specified in the regulations. Furthermore, the maximum amounts payable are the same throughout the state, therefore consultants and contractors in urban areas, where the market prices are generally higher, have increased difficulty meeting the low rates.

Finally, restricting reimbursement to only the activities that will remediate a property to site-specific remediation objectives instead of the most stringent remediation objectives may adversely impact the value of a property. Similarly, not allowing the reimbursement of costs associated with groundwater remediation if an ordinance is in place, in essence, encourages the owner/operator to leave impacts in place on their property. Consequently, the owner/operator may face complications should they want to sell their property in the future.

Weaver Boos Qualifications

The IEPA will not authorize reimbursement of ineligible or unreasonable costs, costs from work that deviates from IEPA approved plans, or costs that exceed the minimum requirements stated in the new regulations. Poor judgment and inexperience during this important process may result in significant costs being ineligible for reimbursement. Weaver Boos can provide the following services to assist owners/operators in developing effective approaches to seek closure for a release in accordance with the new regulations:

- Assist with UST removals, including the excavation, transportation and disposal of impacted soil and groundwater and the removal of free product in a cost effective manner;
- Conduct site investigation activities to evaluate if remediation activities are necessary;
- Coordinate remediation activities including the necessary equipment and personnel in an efficient manner, to mitigate disruption of business operations;
- Evaluate cost and liability factors resulting from interim measures, as well as from final disposal or treatment options, for contaminated soil and groundwater;
- Prepare reports and provide certifications by Licensed Professional Engineers or Licensed Professional Geologists as required by environmental laws and regulations; and
- Prepare budgets and submit claims that maximize reimbursement costs for the owner/operator and provide the required Licensed Professional Engineer or Licensed Professional Geologist certification prior to review by the IEPA.

Weaver Boos currently employs qualified Environmental Professionals with the background and experience to assist you with your environmental assessment and remediation needs. For additional information, please contact Carolyn Feltz at 312-922-1030 or Keith Fetzner at 630-717-4848.

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