

HIGHWAY AUTHORITY AGREEMENT

This Agreement is entered into this ____ day of _____, 2014 pursuant to 35 Ill. Adm. Code 742.1020 by and between the _____ "Owner/Operator" and Illinois Department of Transportation "Highway Authority," collectively known as the "Parties."

WHEREAS, _____ is the owner or operator of one or more leaking underground storage tanks presently or formerly located at _____, Illinois ("the Site");

WHEREAS, as a result of one or more releases of contaminants from the above referenced underground storage tanks "the Release(s)", soil and/or groundwater contamination at the Site exceeds the Tier 1 residential remediation objectives of 35 Ill. Adm. Code 742;

WHEREAS, the soil and/or groundwater contamination exceeding Tier 1 residential remediation objectives extends or may extend into the Highway Authority's right-of-way;

WHEREAS, the Owner/Operator is conducting corrective action in response to the Release(s);

WHEREAS, the Parties desire to prevent groundwater beneath the Highway Authority's right-of-way that exceeds Tier 1 remediation objectives from use as a supply of potable or domestic water and to limit access to soil within the right-of-way that exceeds Tier 1 residential remediation objectives so that human health and the environment are protected during and after any access;

NOW, THEREFORE, the Parties agree as follows:

1. The recitals set forth above are incorporated by reference as if fully set forth herein.
2. The Illinois Emergency Management Agency has assigned incident number(s) _____ to the Release(s).
3. Attached as Exhibit A is a scaled map(s) prepared by the Owner/Operator that shows the Site and surrounding area and delineates the current and estimated future extent of soil and groundwater contamination above the applicable Tier 1 residential remediation objectives as a result of the Release(s).
4. Attached as Exhibit B is a table(s) prepared by the Owner/Operator that lists each contaminant of concern that exceeds its Tier 1 residential remediation objective, its Tier 1 residential remediation objective and its concentrations within the zone where Tier 1 residential remediation objectives are exceeded. The locations of the concentrations listed in Exhibit B are identified on the map(s) in Exhibit A.
5. Attached as Exhibit C is a scaled map prepared by the Owner/Operator showing the area of the Highway Authority's right-of-way that is governed by this agreement ("Right-of-Way"). Because Exhibit C is not a surveyed plat, the Right-of-Way boundary may be an approximation of the actual Right-of-Way lines.
6. The Highway Authority stipulates it has jurisdiction over the Right-of-Way that gives it sole control over the use of the groundwater and access to the soil located within or beneath the Right-of-Way.
7. The Highway Authority agrees to prohibit within the Right-of-Way all potable and domestic uses of groundwater exceeding Tier 1 residential remediation objectives.

8. The Highway Authority further agrees to limit access by itself and others to soil within the Right-of-Way exceeding Tier 1 residential remediation objectives. Access shall be allowed only if human health (including worker safety) and the environment are protected during and after any access. The Highway Authority may construct, reconstruct, improve, repair, maintain and operate a highway upon the Right-of-Way, or allow others to do the same by permit. In addition, the Highway Authority and others using or working in the Right-of-Way under permit have the right to remove soil or groundwater from the Right-of-Way and dispose of the same in accordance with applicable environmental laws and regulations. The Highway Authority agrees to issue all permits for work in the Right-of-Way, and make all existing permits for work in the Right-of-Way, subject to the following or a substantially similar condition:

As a condition of this permit the permittee shall request the office issuing this permit to identify sites in the Right-of-Way where a Highway Authority Agreement governs access to soil that exceeds the Tier 1 residential remediation objectives of 35 Ill. Adm. Code 742. The permittee shall take all measures necessary to protect human health (including worker safety) and the environment during and after any access to such soil.

9. This agreement shall be referenced in the Agency's no further remediation determination issued for the Release(s).
10. The Agency shall be notified of any transfer of jurisdiction over the Right-of-Way at least 30 days prior to the date the transfer takes effect. This agreement shall be null and void upon the transfer unless the transferee agrees to be bound by this agreement as if the transferee were an original party to this agreement. The transferee's agreement to be bound by the terms of this agreement shall be memorialized at the time of transfer in a writing ("Rider") that references this Highway Authority Agreement and is signed by the Highway Authority, or subsequent transferor, and the transferee.
11. This agreement shall become effective as a Highway Authority Agreement on the date the Agency issues a no further remediation determination for the Release(s). It shall remain effective as a Highway Authority Agreement until the Right-of-Way is demonstrated to be suitable for unrestricted use and the Agency issues a new no further remediation determination to reflect there is no longer a need for this agreement, or until the agreement is otherwise terminated or voided.
12. In addition to any other remedies that may be available, the Agency may bring suit to enforce the terms of this agreement or may, in its sole discretion, declare this agreement null and void if any of the Parties or any transferee violates any term of this agreement. The Parties or transferee shall be notified in writing of any such declaration.
13. This agreement shall be null and void as a Highway Authority Agreement if a court of competent jurisdiction strikes down any part or provision of the agreement.
14. This agreement supersedes any prior written or oral agreements or understandings between the Parties on the subject matter addressed herein. It may be altered, modified or amended only upon the written consent and agreement of the Parties.
15. Any notices or other correspondence regarding this agreement shall be sent to the Parties at following addresses:

Manager, Division of Remediation Management
Bureau of Land
Illinois Environmental Protection Agency
P.O. Box 19276
Springfield, IL 62974-9276

If to Owner/Operator:

If to Department:

Illinois Department of Transportation
 Region One Engineer
 Attn: District One Environmental Studies Unit
 201 West Center Court
 Schaumburg, Illinois 60196

And to:

And to:

Illinois Department of Transportation
 Attn: Assistant Chief Counsel
 2300 S. Dirksen Parkway, Room 313
 Springfield, Illinois 62764

16. This Agreement is not binding upon the Department until it is executed by the undersigned representative of the Department. Prior to execution by the undersigned representative of the Department this Agreement constitutes an offer by Owner/Operator. The duly authorized representatives of Owner/Operator have signed this Agreement and this Agreement is binding upon them, their successors and assigns.
17. The IEPA and Illinois Attorney General "AG" must review and approve this Agreement, and this Agreement shall be referenced in the IEPA's "No Further Remediation" determination in the chain of title for the Site in the county where the Site is located. This Agreement shall be null and void as a Highway Authority Agreement should the IEPA or AG not approve it or should it not be referenced in the "No Further Remediation" determination, provided, however, that this Agreement shall be effective between the Owner/Operator and the Department immediately upon signature by their representatives.
18. The Owner/Operator agrees to defend, indemnify and hold harmless the Department, and other highway authorities, if any, maintaining the highway Right-of-Way by an agreement with the Department, and the Department's agents, contractors or employees for all obligations asserted against or costs incurred by them, including reasonable attorney's fees and court costs, associated with the release of Contaminants from the Site, regardless whether said obligations or costs were caused by the negligence, but not the gross negligence, of them.
19. As an additional consideration, Owner/Operator agrees to reimburse the Department for reasonable costs to protect human health and the environment, including, but not limited to, identifying, investigating, handling, storing and disposing of contaminated soil and/or groundwater in the Right-of-Way as a result of the release of contaminants at this Site. It has been determined that the Department has not incurred any reimbursable costs at the time this Agreement is executed by the undersigned representative of the Department. If future costs are incurred, a cashier's check made payable to "Treasurer, State of Illinois" shall be tendered to the Department of Transportation upon demand by the Department.
20. Violation of the terms of this Agreement by Owner/Operator, or their successors in interest, may be grounds for voidance of this Agreement as a Highway Authority Agreement. Violation of the terms of this Agreement by the Department will not void this Agreement, unless the IEPA has determined that the violation is grounds for voiding this Agreement as a Highway Authority Agreement and the Department has not cured the violation within such time as IEPA has granted to cure the violation.
21. This Agreement is in settlement of claims the Department may have arising from the release of Contaminants into the Right-of-Way associated with IEMA incident numbers .

22. Prior to accessing or granting access to the soil as provided in Paragraph 8 herein, the Department will first give Owner/Operator written notice, unless there is an immediate threat to the health or safety to any individual or to the public, that it intends to perform a site investigation in the Right-of-Way and remove or dispose of contaminated soil or groundwater to the extent necessary for its work. Failure to give notice is not a violation of this Agreement. The removal or disposal shall be based upon the site investigation (which may be modified by field conditions during excavation). A copy of the site investigation report will be provided to Owner/Operator. If practicable, as reasonably determined by the Department, the Department may provide Owner/Operator with an opportunity to perform the Site investigation and to remove and dispose of the contaminated soil and/or groundwater necessary for the Department's work in advance of that work.

The Owner/Operator shall reimburse the reasonable costs incurred by the Department to perform the site investigation and to dispose of any contaminated soil or groundwater, provided, however, that if notice to Owner/Operator has not been given and there was no immediate threat to health or safety, reimbursement for those costs shall be limited to \$10,000.00. There is a rebuttable presumption that the Contaminants found in the highway Right-of-Way arose from the release of Contaminants from the Site. Should Owner/Operator not reimburse the reasonable costs under the conditions set forth herein, this Agreement shall be null and void, at the Department's option, upon written notice to Owner/Operator by the Department that those costs have not been reimbursed. Owner/Operator may cure that problem within twenty working days by making payment, or may seek to enjoin that result.

23. The Department's sole responsibility under this Agreement with respect to others using the highway Right-of-Way under permit from the Department is to include the following, or similar language, in the future standard permit provisions and to make an effort to notify its current permit holders of the following:

As a condition of this permit the permittee shall request the office issuing this permit to identify sites in the Right-of-Way where a Highway Authority Agreement governs access to soil that exceeds the Tier 1 residential remediation objectives of 35 Ill. Adm. Code 742. The permittee shall take all measures necessary to protect human health (including worker safety) and the environment during and after any access to such soil.

Owner/Operator hereby releases the Department from liability for breach of this Agreement by others under permit and agrees to defend and indemnify the Department against claims that may arise from others under permit causing a breach of this Agreement. Owner/ Operator agrees that its personnel, if any, at the Site who are aware of this Agreement will notify anyone they know is excavating in the Right-of-Way about this Agreement.

24. Should the Department breach this Agreement, Owner/Operator's sole remedy is for an action for damages in the Illinois Court of Claims. Any and all claims for damages against the Department, its agents, contractors, employees or its successors in interest arising at any time for a breach of paragraphs 7 and 8 of this Agreement are limited to an aggregate maximum of \$20,000.00. No other breach by the Department, its agents, contractors, employees and its successors in interest of a provision of this Agreement is actionable in either law or equity by Owner/Operator against the Department or them and Owner/Operator hereby releases the Department, its agents, contractors, employees and its successors in interest for any cause of action it may have against them, other than as allowed in this paragraph, arising under this Agreement or environmental laws, regulations or common law governing the contaminated soil or groundwater in the highway Right-of-Way. Should the Department convey, vacate or transfer jurisdiction of that highway Right-of-Way, Owner/Operator may pursue an action under this Agreement against the successors in interest, other than a State agency, in a court of law.

25. This Agreement is entered into by the Department in recognition of laws passed by the General Assembly and regulations adopted by the Pollution Control Board which encourage a tiered-approach to remediating environmental contamination. This Agreement is entered into by the Department in the spirit of those laws and under its right and obligations as a highway authority.

Should any provisions of this Agreement be struck down as beyond the authority of the Department, however, this Agreement shall be null and void.

IN WITNESS WHEREOF, Owner/Operator, _____, has caused this Agreement to be signed by its duly authorized representative.

BY: _____ DATE: _____
Title

IN WITNESS WHEREOF, the Department has caused this Agreement to be signed by its Secretary.

Illinois Department of Transportation

BY: _____ DATE: _____
Erica J. Borggren
Acting Secretary

This Agreement is approved on behalf of the Office of the Illinois Attorney General.

BY: _____ DATE: _____
Matthew J. Dunn
Assistant Attorney General
Chief, Division of Environmental/Asbestos Litigation