

ORIGINAL

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JAN 28 2002

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)

AMENDMENTS TO 35 ILL. ADM. CODE 732;) R01-26
REGULATION OF PETROLEUM LEAKING) (Rulemaking - Land)
UNDERGROUND STORAGE TANKS)

NOTICE OF FILING

P.C. #14

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

Joel J. Sternstein
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the **MOTION FOR LEAVE TO FILE INSTANTER** and **PUBLIC COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, copies of which are herewith served upon you.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: *Karen L. Bernoteit*
One of Its Attorneys

Dated: January 24, 2002

Karen L. Bernoteit
Illinois Environmental
Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217) 522-5512

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STATE OF ILLINOIS
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MOTION FOR LEAVE TO FILE INSTANTER

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (IERG), by one of its attorneys, Karen L. Bernoteit, and respectfully seeks leave from the Illinois Pollution Control Board (Board) to file INSTANTER the attached Comments of the Illinois Environmental Regulatory Group (IERG) in the above-referenced proceedings. In support of its request, IERG states as follows:


Due to the departure of IERG's former Executive Director, DK Hirner, on December 31, 2001, and other pressing matters, IERG was unable to file its Comments on the Board's Proposed Regulation and First Notice Opinion and Order in R01-26, issued on November 1, 2001. IERG, the Illinois State Chamber of Commerce and the Illinois Environmental Protection Agency (Agency) cosponsored a training seminar covering the Title V Air Permitting Program on January 15 and 17th, 2002 and IERG held its Quarterly Meeting on January 16, 2002. Because of the personnel changes at the Executive Director level, IERG Staff had to direct its efforts on preparing for the above events and was unable to finalize its Comments in R01-26 by the due date. The inclusion of IERG's Comments in the record of the above proceeding will present a more complete record for the Board's consideration.

WHEREFORE, IERG respectfully requests that the Board grant IERG's Motion in this matter.

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ILLINOIS ENVIRONMENTAL
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Dated: January 24, 2002

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
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IN THE MATTER OF:)
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AMENDMENTS TO 35 ILL. ADM. CODE 732;) R01-26
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COMMENTS OF THE ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Karen L. Bernoteit, and submits for its Comments on the Illinois Pollution Control Board's Proposed Rule and First Notice Opinion and Order, dated November 1, 2001, in the above-titled matter, the following:

I. **BACKGROUND**

By way of background, IERG met with representatives of the Illinois Environmental Protection Agency (Agency) and members of the Site Remediation Advisory Committee (SRAC) prior to the Agency's filing of the proposal with the Illinois Pollution Control Board (Board). One of the main concerns on the part of the regulated community was the Agency's proposed Section 732.411, which, among other things, sets forth the factors the Agency must consider when determining whether a site owner/operator has made best efforts to obtain access to off-site property that contains contamination.

In its First Notice Opinion and Order, the Board proposed Section 732.411, relating to Off-Site Access, that contains the following subsections:

- The first provision contained in 35 Ill. Admin. Code 732.411(a) states that an owner/operator that seeks to demonstrate compliance with the proposed

35 Ill. Admin. Code 732.404(c), (which states that an owner/operator is not required to perform corrective action on off-site property if it is unable to gain off-site access despite the use of best efforts in accordance with Section 732.411), must demonstrate compliance with the requirements in Section 732.411.

- The second provision, Subsection 732.411(b), delineates the elements that must be included in a certified letter to the owner of off-site property in order to conduct best efforts to obtain off-site access.
- The third provision, Subsection 732.411(c), purportedly contains the documentation that the owner/operator must submit as part of a Corrective Action Completion Report in order to demonstrate compliance with Section 732.411.

The preamble to Subsection 732.311(d) purports to be a method for the Agency to determine whether a site owner/operator has complied with the best efforts provisions in Subsection 732.411(b), that consist of sending a certified letter that contains required elements. However, there is no nexus between the best efforts provisions that contain requirements for a certified letter in the proposed Subsection 732.411(b) and the factors listed in the proposed Subsection 732.411(d), which are clearly general site conditions based on possible exposure scenarios, and not access issues.

II. THE STANDARD FOR ISSUANCE OF AN NFR LETTER TO OWNERS/OPERATORS THAT HAVE BEEN DENIED ACCESS TO ADDRESS OFF-SITE CONTAMINATION

The Board's proposal does not include a clearly defined standard for the issuance of No Further Remediation (NFR) letters to site owners that have been denied access to

off-site property that contains contamination. Because of the obvious inconsistency between what the preamble of the proposed Subsection 732.411(d) states it will contain, and what it in fact contains, the proposal fails to delineate a standard for Agency decision making concerning to issuance of a NFR letter in this situation. It may well be that the best efforts provisions contained in Subsection 732.411(b) are self evident and that there is no need for a separate subsection to guide how the Agency will judge compliance with Subsection 732.411(b). IERG would agree to the elimination of Subsection (d) in its entirety if a standard that ensured that any environmental risk posed by the off-site contamination is considered in the decision of whether to issue an NFR letter to an owner/operator that has been denied access to clean up off site contamination.

III. THE NEED TO ASSESS OFF SITE CONTAMINATION AS A PRECONDITION TO GRANTING AN NFR LETTER

It appears that the proposed factors set forth in Subsections 732.411(d)(1-9) are aimed at assuring that no major environmental problem is presented by off site contamination. IERG agrees, as did the Illinois Petroleum Council (IPC), as evidenced in its proposed regulatory revisions filed with the Board on March 29, 2001, that the appropriate standard to be aware of is whether the contamination remaining on the off-site property poses an imminent threat of harm to human health or the environment. IERG also believes that the owner/operator bears some responsibility to investigate – to the extent they can – if off site contamination which poses an imminent threat will exist. IERG recommends that the preamble to the proposed Subsection 732.411(d)(1-9) be revised to state that the subsection contains the factors the Agency should consider when determining whether the off-site contamination poses an imminent threat to human health or the environment. IERG supports the factors proposed by the IPC in its proposed

Subsection 732.411(e), filed March 29, 2001, and would be open to considering additional factors beyond those in the IPC proposal. IERG respectfully wishes to remind the Board that the very reason that Section 732.411 is proposed is because off site contamination *will in fact remain off site*. To adopt open-ended language such as that contained in the proposed Subsection 732.411(d), which allows the Agency to pick and choose when and if a NFR letter can be granted based on an undefined level of off site contamination, defeats the very purpose of the regulation.

IV. THE EFFECT OF AN NFR LETTER

The result of complying with the provisions of the proposed Section 732.411 is that the Agency will grant a NFR letter for that portion of the property that has been remediated. No release or NFR letter is granted for the off site property. To be successful, a remediation project must assure that contamination on the site will not continue to migrate off site. Thus, the issue is contamination off site which will not get any worse and which, despite the best efforts of the owner/operator, could not be remediated. Under the Agency's proposal, the remedy for such a situation might be to deny the owner/operator, who uses best efforts, an NFR letter for the property that it remediated. This proposal is devoid of logic and places the owner/operator in a circular regulatory situation which on the one hand offers a way to obtain an NFR if the owner/operator cannot obtain off site access despite the use of best efforts, and on the other hand requires activities to assess the potential for off-site contamination which the owner/operator is precluded from addressing.

Perhaps more important is the fact that denying an NFR letter to the owner/operator in no way resolves the environmental concerns that may exist off site.

Denying a NFR letter will not change the fact that the owner/operator was denied access to off site property. Thus the net result is that the owner/operator who uses best efforts is punished and the environmental concerns remain.

V. CONCLUSION

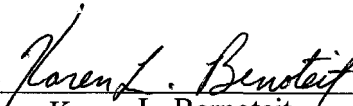
IERG believes it is questionable from a public policy standpoint, to adopt a regulation that on its face contains an obvious inconsistency that results in the absence of a clearly articulated standard for the issuance of NFR letters in certain circumstances. If the regulated community is expected to adhere to applicable regulatory requirements, the regulations should be as clear and concise as possible. The adoption of the proposed Subsection 732.411(d) might result in inconsistent interpretations among members of the regulated community. The regulation should read as clearly as possible so that a site/owner operator knows exactly what standard it must meet in order to obtain an NFR letter when off-site contamination has not been addressed due to the denial of access. There is no purpose served in penalizing site owners/operators, by denying NFR letters based on an unclear standard, for failing to address contamination on off-site property to which they were denied access.

IERG urges the Board to reconsider the Off-Site Access provisions of the proposed regulation and revise these provisions to ensure clarity by including a clearly articulated standard for issuing an NFR letter to an owner/operator that has not addressed off-site contamination because of the inability to gain off-site access. In addition, if the Board believes that an assessment of off site contamination is necessary, the listed factors should be revised consistent with those proposed by the IPC in its 35 Ill. Admin. Code 732.411(e)(1-3). IERG would be open to considering additional factors beyond those

included in IPC's proposal. IERG urges the Board to act consistent with these public comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
Karen L. Bernoteit

Dated: January 24, 2002

Karen L. Bernoteit
ILLINOIS ENVIRONMENTAL
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(217) 522-5512

IERGMAIN/PROJECTS/21/Posthearing comments.LUST

CERTIFICATE OF SERVICE

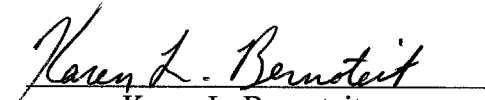
I, Karen L. Bernoteit, the undersigned, certify that I have served a copy of the
**MOTION FOR LEAVE TO FILE INSTANTER and PUBLIC COMMENTS OF
THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP** upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
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Suite 11-500
Chicago, Illinois 60601

Joel J. Sternstein
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
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SEE ATTACHED SERVICE LIST.

by depositing said documents in the United States Mail in Springfield, Illinois on
January 24, 2002.


Karen L. Bernoteit

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