

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )  
)  
VAPOR RECOVERY RULES: )  
AMENDMENTS TO 35 ILL. ADM. )  
CODE PARTS 201, 218, AND 219 )

R13-18  
(Rulemaking - Air)

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MAY 02 2013  
STATE OF ILLINOIS  
Pollution Control Board

NOTICE OF FILING

TO: John Therriault, Assistant Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601

Thomas Davis, Bureau Chief  
Environmental Bureau  
Office of the Attorney General  
500 South Second Street  
Springfield, Illinois 62706

 ORIGINAL

Richard R. McGill, Jr.  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601

Mitchell Cohen, General Counsel  
Office of Legal Services  
Illinois Department of Natural Resources  
One Natural Resources Way  
Springfield, IL 62702-1271

PLEASE TAKE NOTICE that I have today filed with the Office of the Pollution Control Board the ILLINOIS EPA RESPONSE TO BOARD ORDER of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By:   
Kent E. Mohr Jr.  
Assistant Counsel  
Division of Legal Counsel

DATED: April 29, 2013

1021 N. Grand Avenue East  
P.O. Box 19276  
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ILLINOIS EPA RESPONSE TO BOARD ORDER

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by its attorney, and hereby submits its response to the Illinois Pollution Control Board's ("Board") Proposed Rule, First Notice, Opinion and Order, dated April 4, 2013, regarding the Board's response therein to the Illinois EPA's Motion for Waiver of Copy Requirements, as directed by the Board. In support therefore, the Illinois EPA states as follows:

1. On March 18, 2013, the Illinois EPA filed a regulatory proposal with the Board entitled "VAPOR RECOVERY RULES: AMENDMENTS TO 35 ILL. ADM. CODE PARTS 201, 218, AND 219." Included with this regulatory proposal was, among other things, a "MOTION FOR WAIVER OF COPY REQUIREMENTS" ("Motion").

2. The Motion included with the Illinois EPA's regulatory proposal requested that the Board waive its normal copy requirements (35 Ill. Adm. Code § 102.200) for a document published by the Petroleum Equipment Institute entitled "Recommended Practices for Installation and Testing of Vapor-Recovery Systems at Vehicle-Fueling Sites" ("PEI"). Motion at p. 2. In its regulatory proposal, the Illinois EPA proposed to incorporate the PEI by reference and requested a waiver of the Board's normal copy requirements because the PEI is copyright protected and must be purchased at a cost to the Illinois EPA. *Id.* In this rulemaking, the Illinois EPA is proposing that the procedures contained in Section 14.6 of the PEI be followed by affected gasoline dispensing operations to decommission existing vapor recovery equipment.

3. On April 4, 2013, the Board issued a Proposed Rule, First Notice, Opinion and Order (“Order”). In its Order, the Board directed the Illinois EPA “...to file further support for its waiver motion with respect to the PEI document” and “...explain whether the Board can make the PEI document *provided by IEPA* available for public inspection and copying without running afoul of any copyright limitations.” Order at p. 5. Further, the Board specified that if it’s the Illinois EPA’s position that the Board cannot make the PEI document available for public inspection and copying without violating copyright limitations, the Illinois EPA “...must propose alternatives for how the Board can fulfill the Board’s obligations under Section 5-75(c)...” of the Illinois Administrative Procedure Act (“IAPA”) (5 ILCS 100/5-75(c)). *Id.* The Board reserved ruling on the Motion, and directed the Illinois EPA to file a document in support of its Motion by May 6, 2013. *Id.*

4. First and foremost, respectfully, the Illinois EPA’s Motion has nothing to do with the Board’s compliance with the IAPA and federal copyright law. The Illinois EPA’s Motion was made solely to request a waiver of the Board’s normal copy requirements. To reserve ruling on the Illinois EPA’s Motion on the basis of compliance with the IAPA’s public inspection and copy requirement relative to federal copyright law seems misplaced.

5. Second, the Illinois EPA historically and routinely requests by motion to file only the original of copyright protected documents (e.g. American Society for Testing and Materials standards), and the Board routinely grants such motions (e.g. R12-24). The Illinois EPA’s request of the Board to waive its copy requirements for the PEI is no different than these other routine requests that are consistently granted. To treat the Illinois EPA’s Motion differently than other similar motions would, at the least, be inconsistent with prior history and practice.

6. Irrespective of the aforementioned views, and in specific response to the Board's direction in its Order, the Illinois EPA understands from the Petroleum Equipment Institute, as it relates to copyright law restrictions, that the Board may make the PEI document available for viewing (or "inspection") by the public, but it may not be photocopied. (Exhibit 1). Federal copyright law provides further support for the lawful right of the Board to make the PEI document available for public inspection or viewing. Section 109(c) of federal copyright law authorizes the public display of a particular copy, lawfully made, without the authority of the copyright owner, to viewers present at the place where the copy is located. 17 U.S.C. § 109(c) (2011).

7. As to "copying," it is possible, and seems reasonable, that the Board could comply with the IAPA requirement that the PEI document be available for "copying" without running afoul of federal copyright law by purchasing additional "copies" of the PEI for requesting members of the public and charging such requesting members for the actual purchase cost of the PEI. The IAPA specifically provides that an agency incorporating a document by reference shall make such document available for inspection and copying "at no more than cost." 5 ILCS 100/5-75(c) (2010). The regulations of the Joint Committee on Administrative Rules ("JCAR"), which implement and are authorized by the IAPA, reiterate the permissible charge for "copying" documents. 1 Ill. Adm. Code § 220.760(b) (2010). Similarly, and possibly even more dispositive of the issue, in the context of "underlying data," Illinois Secretary of State ("SOS") rules, which implement and are authorized by the IAPA, provide that "[i]f the agency must pay a fee to a contracting entity to obtain a copy of the underlying data, the agency may charge the requester a fee equaling the cost of obtaining the data" and "[t]his fee shall reflect actual costs incurred by the agency." 1 Ill. Adm. Code § 100.355(c) (2010). Therefore, the IAPA

requirement to make incorporations by reference available for “copying” necessarily could include purchasing, and thereby making available, additional “copies” of the PEI, the actual cost of which is permissibly charged to the requester. This method of compliance with the IAPA appears to be consistent with federal copyright law where it allows the owner of a particular copy, lawfully made, to dispose of the copy by sale or any other means. See 17 U.S.C. § 109(a) (2011).

8. While an unknown to the Illinois EPA, it is possible that federal copyright law could trump the IAPA’s requirement that documents incorporated by reference be available for copying where they are also copyright protected documents. Further, it is possible that a specified limitation to federal copyright law restrictions could apply based on the application of certain factors or conditions to a particular circumstance involving the use of the PEI (e.g. “fair use” under 17 U.S.C. § 107).

9. Ultimately, it is for the Board to determine whether and how it can comply with both the IAPA and federal copyright law.

10. If the Board believes that it cannot comply with the IAPA due to federal copyright restrictions, then an alternative would be to not incorporate the PEI by reference, identify it only as a published study or report used in developing the rule amendments, and specifically write vapor recovery equipment decommissioning procedures into its vapor recovery rule at 35 Ill. Adm. Code § 218.586 that do not run afoul of federal copyright restrictions. It is important to note, however, the Illinois EPA has relied on the PEI decommissioning procedures because it does not have the expertise to develop its own decommissioning procedures.

11. The Illinois EPA again requests that the Board waive its normal copy requirements at 35 Ill. Adm. Code § 102.200, allowing the Illinois EPA to provide only the already submitted PEI document.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By:   
Kent E. Mohr Jr.  
Assistant Counsel  
Division of Legal Counsel

DATED: April 29, 2013

1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
(217) 782-5544  
(217) 782-9143 (TDD)

**Mohr, Kent**

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**From:** Pierceall, Tracy  
**Sent:** Wednesday, April 17, 2013 4:19 PM  
**To:** Mohr, Kent  
**Subject:** FW: copyright license question

I received a reply from PEI, below. Let me know if you have any additional questions. I told him we would follow up if there was anything else we needed.

Tracy Pierceall  
Illinois EPA  
Library #18  
1021 N Grand Ave E  
Springfield IL 62702  
Ph: 217-782-9691  
Fax: 217-524-4916  
Email: [tracy.pierceall@illinois.gov](mailto:tracy.pierceall@illinois.gov)

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**From:** Robert Renkes [<mailto:rrenkes@pei.org>]  
**Sent:** Wednesday, April 17, 2013 4:12 PM  
**To:** Pierceall, Tracy  
**Subject:** RE: copyright license question

Tracy—You can certainly make it available for public viewing at the library.

The document cannot be photocopied.

I am not familiar with the fair-use copyright practices.

Bob

Bob Renkes  
Executive Vice President/General Counsel  
PEI  
P. O. Box 2380, Tulsa, OK 74101  
918-494-9696

*[Follow me on Twitter!](#)*

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**From:** Pierceall, Tracy [<mailto:Tracy.Pierceall@Illinois.gov>]  
**Sent:** Wednesday, April 17, 2013 2:59 PM  
**To:** [rrenkes@pei.org](mailto:rrenkes@pei.org)  
**Subject:** copyright license question

Good afternoon. Several months ago, we purchased two copies of “Recommended Practices for Installation and Testing of Vapor-Recovery Systems at Vehicle-Fueling Sites,” standard number PEI/RP300-09, in association with an environmental rulemaking in the State of Illinois.

What I wanted to know was if there is a licensing agreement that accompanies your standards that stipulates appropriate uses. Specifically, are we permitted to make this publication available for public viewing (e.g. a

library setting), and are we permitted to provide a copy/allow copying of the publication in association with this rulemaking, as long as it follows fair-use copyright practices?

Please advise at your earliest convenience, as the attorney in charge of the rulemaking needs to respond to the Board regarding this matter. Thank you for your time.

Tracy Pierceall  
Illinois EPA  
Library #18  
1021 N Grand Ave E  
Springfield IL 62702  
Ph: 217-782-9691  
Fax: 217-524-4916  
Email: [tracy.pierceall@illinois.gov](mailto:tracy.pierceall@illinois.gov)

STATE OF ILLINOIS )  
 )  
COUNTY OF SANGAMON ) SS

RECEIVED  
CLERK'S OFFICE  
MAY 02 2013  
STATE OF ILLINOIS  
Pollution Control Board

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served the attached ILLINOIS EPA RESPONSE TO BOARD ORDER of the Illinois Environmental Protection Agency upon the following persons,

John Therriault, Assistant Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601

Thomas Davis, Bureau Chief  
Environmental Bureau  
Office of the Attorney General  
500 South Second Street  
Springfield, Illinois 62706

Richard R. McGill, Jr.  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601

Mitchell Cohen, General Counsel  
Office of Legal Services  
Illinois Department of Natural Resources  
One Natural Resources Way  
Springfield, IL 62702-1271

by mailing a true copy thereof in an envelope duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois on April 29, 2013.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By:   
Kent E. Mohr Jr.  
Assistant Counsel  
Division of Legal Counsel

DATED: April 29, 2013

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Springfield, Illinois 62794-9276  
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