

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD APR 19 2004

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO REGULATION OF) R04-22
PETROLEUM LEAKING UNDERGROUND STORAGE) (Rulemaking- Land)
TANKS (35 Ill. Adm. Code 732))

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO REGULATION OF) R04-23
PETROLEUM LEAKING UNDERGROUND STORAGE) (Rulemaking- Land)
TANKS (35 Ill. Adm. Code 734))

NOTICE OF FILING

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601-3218
(Overnight Mail)

Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601-3218
(Overnight Mail)

SEE ATTACHED SERVICE LIST
(Regular Mail)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the MOTION FOR THE ADOPTION OF EMERGENCY RULES of the Illinois Environmental Protection Agency for the above-titled proceeding, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By: 
Kyle Rominger, Assistant Counsel

DATE: April 16, 2004
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544

THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **APR 19 2004**

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REGULATION OF PETROLEUM) (Rulemaking – Land)
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STATE OF ILLINOIS
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IN THE MATTER OF:)
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LEAKING UNDERGROUND STORAGE)
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
MOTION FOR THE ADOPTION OF EMERGENCY RULES

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through its attorney Kyle Rominger, and submits this Motion for the Adoption of Emergency Rules. The Illinois EPA moves that the Illinois Pollution Control Board ("Board") adopt as soon as possible the Illinois EPA's proposed amendments to 35 Ill. Adm. Code 732 and the proposed 35 Ill. Adm. Code 734 in an emergency rulemaking pursuant to Section 27(c) of the Environmental Protection Act ("Act") [415 ILCS 5/27(c)], Section 45 of the Administrative Procedures Act ("APA") [5 ILCS 100/5-45], and Section 102.612 of the Board's procedural rules [35 Ill. Adm. Code 102.612]. The Illinois EPA makes this motion so it can review budgets and applications for payment from the Underground Storage Tank Fund ("UST Fund") prior to the Board's adoption of final rules in this rulemaking.

The basis for this Motion is the Board's Opinion and Order in Illinois Ayers Oil Co., PCB 03-214 (April 1, 2004). In that opinion the Board found that the Illinois EPA's internal rate sheet is an improperly promulgated rule that should have been promulgated pursuant to the Administrative Procedures Act. Id. at 16, 18. Without the rate sheet, the Illinois EPA lacks a standard methodology for determining whether the costs submitted for approval in budgets and applications for payment are reasonable. A standard methodology for determining the reasonableness of costs is included in the proposed rules currently before the Board.

The Board's adoption of the proposed rules in an emergency rulemaking will allow the Illinois EPA to review budgets and applications for reimbursement prior to the Board's adoption of final rules. If emergency rules are not adopted, the Illinois EPA will be limited to reviewing only applications for payment that are submitted pursuant to budgets approved prior to the Board's opinion in the Illinois Ayers case. Reviews of such applications for payment can continue because the reviews consist of comparing the costs in the applications for payment to the costs approved in the budgets. The Illinois EPA cannot review other cost submissions, however, (e.g., budgets that have not yet been approved and applications for payment that are not submitted pursuant to a budget approved prior to the Illinois Ayers opinion) until a standard methodology for determining whether the costs are reasonable is adopted in rules.

The Illinois EPA believes the adoption of the proposed rules in an emergency rulemaking is proper. The Board has the authority to adopt rules in an emergency rulemaking if a situation exists which "reasonably constitutes a threat to the public interest, safety, or welfare." 5 ILCS 100/5-45; 415 ILCS 5/27(c); 35 Ill. Adm. Code

102.612. The Illinois EPA's inability to approve budgets and applications for payment from the UST Fund satisfies these criteria. The approval of budgets and payments from the UST Fund drive the remediation of Leaking Underground Storage Tanks ("LUST") sites. Many owners and operators cannot afford the costs of a LUST site remediation on their own, and many that can afford such costs are hesitant to proceed unless they know the costs will be reimbursed from the UST Fund. If the Illinois EPA cannot approve budgets and applications for payment, the remediation of these LUST sites will not proceed, which reasonably constitutes a threat to the public interest, safety, or welfare. The fact that these sites constitute such a threat if they are left unremediated has already been established by the fact that federal and state law requires their remediation. Because adoption of the proposed rules would allow the Illinois EPA to review budgets and applications for payment, thereby allowing remediation to proceed, adoption of the rules in an emergency rulemaking is proper.

The Illinois EPA respectfully requests that the Board adopt the proposed rules in their entirety as soon as possible, including the changes proposed in Errata Sheet 1 and the additional amendments set forth below. The Illinois EPA requests that the Board adopt the rules in their entirety due to the interdependence between proposed Subpart H and the remainder of the rules. The Illinois EPA further respectfully requests that the Board proceed with its adoption of final Board rules as quickly as possible so the Illinois EPA can review budgets and applications for payment pursuant to the final rules once the emergency rules expire.

ADDITIONAL AMENDMENTS TO PROPOSAL

In response to questions and comments at the first hearing in this rulemaking, the Illinois EPA proposes the following additional amendments to the text of the rules submitted in its proposal to the Board dated January 1, 2004:

1. In response to concerns raised at the first hearing, the Illinois EPA proposes to amend the definition of “financial interest” in Sections 732.103 and 734.115 to the following by deleting “advisor.”

“Financial interest” means any ownership interest, legal or beneficial, or being in the relationship of director, officer, employee, or other active participant in the affairs of a party. Financial interest does not include ownership of publicly traded stock.

2. In response to a suggestion from the Board’s technical staff, the Illinois EPA proposes to amend Sections 732.300(b)(3)(A), 732.307(f), and 734.445(a) to the following by replacing “or within” with “and within.” Altered wording is highlighted in bold lettering.

a. 732.300(b)(3)(A):

A) At a minimum, the owner or operator shall identify all potable water supply wells located at the site **and** within 200 feet of the site, all community water supply wells located at the site **and** within 2,500 feet of the site, and all regulated recharge areas and wellhead protection areas in which the site is located. Actions taken to identify the wells shall include, but not be limited to, the following:

b. 732.307(f):

f) Survey of Water Supply Wells. At a minimum, the owner or operator shall conduct a water supply well survey to identify all potable water supply wells located at the site **and** within 200 feet of the site, all community water supply wells located at the site **and** within 2,500 feet of the site, and all regulated recharge areas and wellhead protection areas in which the site is located. Actions

taken to identify the wells shall include, but not be limited to, the following.

c. 734.445(a):

- a) At a minimum, the owner or operator shall conduct a water supply well survey to identify all potable water supply wells located at the site **and** within 200 feet of the site, all community water supply wells located at the site **and** within 2,500 feet of the site, and all regulated recharge areas and wellhead protection areas in which the site is located. Actions taken to identify the wells shall include, but not be limited to, the following:

3. In response to a concern about paying for concrete replacement only after a No Further Remediation Letter is issued, the Illinois EPA proposes to amend Section 732.605(a)(17) (renumbered to 732.605(a)(16)) and 734.625(a)(16) to the following by replacing the second sentence with the sentences highlighted in bold lettering. The intent is to prevent the UST Fund from paying for the destruction and replacement of concrete, asphalt, or paving in the same location multiple times.

a. 732.605(a)(17):

~~16)17)~~ Costs for destruction and replacement of concrete, asphalt, or and paving to the extent necessary to conduct corrective action and if the concrete, asphalt, or paving was installed prior to the initiation of corrective action activities, the destruction and replacement has been certified as necessary to the performance of corrective action by a Licensed Professional Engineer, and the destruction and replacement and its costs are approved by the Agency in writing prior to the destruction and replacement. **The destruction and replacement of concrete, asphalt, and paving shall not be paid more than once.** Costs associated with the replacement of concrete, asphalt, or paving shall not be paid in excess of the cost to install, in the same area and to the same depth, the same material that was destroyed (e.g., replacing four inches of concrete with four inches of concrete);

b. 734.625(a)(16):

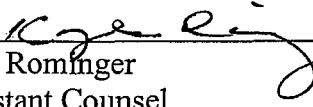
- 16) Costs for destruction and replacement of concrete, asphalt, or paving to the extent necessary to conduct corrective action if the

concrete, paving, or asphalt was installed prior to the initiation of corrective action activities, the destruction and replacement has been certified as necessary to the performance of corrective action by a Licensed Professional Engineer, and the destruction and replacement and its costs are approved by the Agency in writing prior to the destruction and replacement. **The destruction and replacement of concrete, asphalt, and paving shall not be paid more than once.** Costs associated with the replacement of concrete, asphalt, or paving shall not be paid in excess of the cost to install, to the same area and depth, the same material as was destroyed;

4. The Illinois EPA proposes to amend Sections 732.606 and 734.630 by deleting proposed Sections 732.606(ddd) and 734.630(aaa), respectively.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY



Kyle Romfinger
Assistant Counsel

DATED: 4-16-04
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

PROOF OF SERVICE

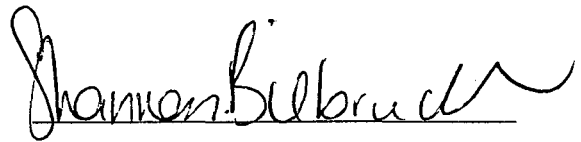
I, the undersigned, on oath state that I have served the attached MOTION FOR THE ADOPTION OF EMERGENCY RULES on behalf of the Illinois Environmental Protection Agency upon the person to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
(Overnight Mail)

Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
(Overnight Mail)

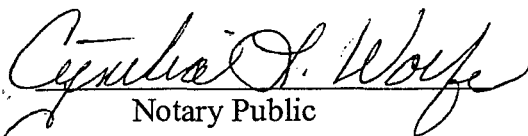
SEE ATTACHED SERVICE LIST
(Regular Mail)

and mailing it from Springfield, Illinois, on April 16, 2004, with sufficient postage affixed as indicated above.

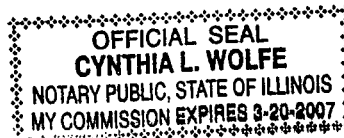


SUBSCRIBED AND SWORN TO BEFORE ME

this 16th day of April, 2004



Notary Public



Party Name	Role	City & State	Phone/Fax
<u>IEPA</u> Petitioner	1021 North Grand Avenue East P.O. Box 19276 Gina Roccaforte, Assistant Counsel Kyle Rominger, Assistant Counsel Doug Clay	Springfield IL 62794-9276	217/782-5544 217/782-9807
<u>Hodge Dwyer Zeman</u> Interested Party	3150 Roland Avenue Post Office Box 5776 Thomas G. Safley	Springfield IL 62705-5776	217/523-4900 217/523-4948
<u>Sidley Austin Brown & Wood</u> Interested Party	Bank One Plaza 10 South Dearborn Street William G. Dickett	Chicago IL 60603	312/853-7000 312/953-7036
<u>Karaganis & White, Ltd.</u> Interested Party	414 North Orleans Street Suite 810 Barbara Magel	Chicago IL 60610	312/836-1177 312/836-9083
<u>Illinois Petroleum Marketers Association</u> Interested Party	112 West Cook Street Bill Fleischi	Springfield IL 62704	217/793-1858
<u>United Science Industries, Inc.</u> Interested Party	P.O. Box 360 6295 East Illinois Highway 15 Joe Kelly, PE	Woodlawn IL 62898-0360	618/735-2411 618/735-2907
<u>Illinois Environmental Regulatory Group</u>	3150 Roland Avenue	Springfield IL 62703	217/523-4942 217/523-

Interested Party

4948

Robert A. Messina, General
Counsel

Carlson
Environmental, Inc.
Interested Party

65 E. Wacker Place
Suite 1500

Chicago
IL 60601

Kenneth James

Chemical Industry
Council of Illinois
Interested Party

9801 W. Higgins Road
Suite 515

Rosemont
IL 60018

Lisa Frede

Barnes & Thornburg
Interested Party

1 North Wacker Drive
Suite 4400

Chicago 312/357-
IL 60606 1313
312/759-
5646

Carolyn S. Hesse, Attorney

Rapps Engineering &
Applied Science
Interested Party

821 South Durkin Drive
P.O. Box 7349

Springfield 217/787-
IL 62791- 2118
7349 217/787-
6641

Michael W. Rapps

Office of the Attorney
General
Interested Party

Environmental Bureau
188 West Randolph, 20th Floor

Chicago 312/814-
IL 60601 2550
312/814-
2347

Joel J. Sternstein, Assistant
Attorney General

Herlacher Angleton
Associates, LLC
Interested Party

8731 Bluff Road

Waterloo 618/935-
IL 62298 2262
618/935-
2694

Tom Herlacher, P.E., Principal
Engineer

Illinois Pollution
Control Board
Interested Party

100 W. Randolph St.
Suite 11-500

Chicago 312/814/3956
IL 60601

Dorothy M. Gunn, Clerk of the
Board

Marie Tipsord, Hearing Officer

<u>Huff & Huff, Inc.</u> Interested Party	512 West Burlington Avenue Suite 100 James E. Huff, P.E.	LaGrange IL 60525
<u>Black & Veatch</u> Interested Party	101 North Wacker Drive Suite 1100 Scott Anderson	Chicago IL 60606
<u>Claire A. Manning</u> Interested Party	111 N. Sixth Street Claire A. Manning, Posegate & Denes	Springfield 217-522- IL 62701 6152
<u>Marlin</u> <u>Environmental, Inc.</u> Interested Party	1000 West Spring Street Melanie LoPiccolo, Office Manager	South 847-468- Elgin 8855 IL 60177
<u>Terracon</u> Interested Party	870 40th Avenue Brian Porter	Bettendorf (563) 355- IA 52722 0702
<u>Illinois Department of</u> <u>Natural Resources</u> Interested Party	One Natural Resources Way Jonathan Furr, General Counsel	Springfield 217/782- IL 62702- 1809 1271 217/524- 9640
<u>EcoDigital</u> <u>Development LLC</u> Interested Party	PO Box 360 6295 East Illinois Hwy 15 Joe Kelly, VP Engineering	Woodlawn (618) 735- IL 62898 2411
<u>Wendler Engineering</u> <u>Services, Inc.</u> Interested Party	1770 West State Street Glen Lee, Manager	Sycamore 815-895- IL 60178 5008
<u>Great Lakes</u> <u>Analytical</u> Interested Party	1380 Busch Parkway A.J Pavlick	Buffalo (847) 808- Grove 7766 IL 60089
<u>CSD Environmental</u> <u>Services, Inc</u> Interested Party	2220 Yale Boulevard	Springfield 217-522- IL 62703 4085

<u>CORE Geological Services, Inc.</u> Interested Party	Joseph W. Truesdale, P.E. 2621 Monetga, Suite C	Springfield 217-787- IL 62704 6109
<u>Clayton Group Services Inc</u> Interested Party	Ron Dye, President 3140 Finley Road	Downers Grove IL 60515 630.795.3207
<u>PDC Laboratories</u> Interested Party	Monte Nienkerk 2231 W. Altorfer Dr.	Peoria il 61615 309-692- 9688
<u>Atwell-Hicks, Inc.</u> Interested Party	Kurt Stepping, Director of Client Services 940 East Diehl Road Sute 100	Naperville IL 60563 630 5770800
<u>CW3M Company, Inc.</u> Interested Party	Thomas M. Guist, PE, Team Leader 701 South Grand Ave. West	Springfield IL 62704 217-522- 8001
<u>Suburban Laboratories, Inc.</u> Interested Party	Jeff Wienhoff 4140 Litt Drive	Hillside IL 60162 708-544- 3260
<u>United Science Industries, Inc.</u> Interested Party	Jarrett Thomas, V.P. 6295 East Illinois Hwy 15	Woodlawn IL 62898 618-735- 2411 e
<u>Environmental Consulting & Engineering, Inc.</u> Interested Party	Dan King, Team Leader 551 Roosevelt Road #309	Glenn Ellyn IL 60137
<u>MACTEC Engineering & Consulting, Inc.</u> Interested Party	Richard Andros, P.E. 8901 N. Industrial Road	Peoria IL 61615

Terrence W. Dixon, P.G.

Illinois Department of Transportation
Interested Party 2300 Dirksen Parkway Springfield
IL 62764

Steven Gobelman
SEECO Environmental Services, Inc.
Interested Party 7350 Duvon Drive Tinley
Park
IL 60477

Collin W. Gray
Herlacher Angleton Associates, LLC
Interested Party 522 Belle Street Alton
IL 62002

Jennifer Goodman
United Environmental Consultants, Inc.
Interested Party 119 East Palatin Road Palatine
Suite 101 IL 60067

George F. Moncek
McGuire Woods LLP
Interested Party 77 W. Wacker Chicago
Suite 4400 IL 60601

David Rieser
Greensfelder, Hemker & Gale
Interested Party 10 S. Broadway St. Louis 314-241-
Suite 2000 MO 9090
63104

Tina Archer, Attorney
Midwest Engineering Services, Inc.
Interested Party 4243 W. 166th Street Oak Forest 708-535-
IL 60452 9981

Erin Curley, Env. Department
Manager
American Environmental Corp.
Interested Party 3700 W. Grand Ave., Suite A Springfield (217) 585-
IL 62707 9517

Ken Miller, Regional Manager
Applied Environmental Solutions, Inc.
P O Box 1225 Centralia 6185335953
IL 62801

Interested Party

Russ Goodiel, Project Manager

**Secor International,
Inc.**

400 Bruns Lane

Springfield
IL 62702

Interested Party

Daniel J. Goodwin

Caterpillar, Inc.
Interested Party

100 NE Adams Street

Peoria 3096751658
IL 61629

Eric Minder, Sr. Environmental
Engineer

**K-Plus
Environmental**
Interested Party

Suite 1000
600 W. Van Buren Street

Chicago 312-207-
IL 60607 1600

Daniel Caplice

Harry Walton

2510 Brooks Drive

Decatur, IL 62521