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STATE OF ILLINOIS
Pollution Control Board

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO:)
REGULATION OF PETROLEUM LEAKING) R04-22
UNDERGROUND STORAGE TANKS) (UST Rulemaking)
(35 ILL. ADM. CODE 732),)

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO:)
REGULATION OF PETROLEUM LEAKING) R04-23
UNDERGROUND STORAGE TANKS) (UST Rulemaking)
(35 ILL. ADM. CODE 734)) Consolidated
)

NOTICE OF FILING

TO: ALL COUNSEL OF RECORD

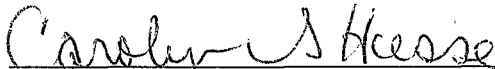
PLEASE TAKE NOTICE that on April 19, 2004, we filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of CW³M Company, Inc.'s Objection to the Illinois Environmental Protection Agency's Motion for the Adoption of Emergency Rules.

Dated: April 19, 2004

Respectfully submitted,

CW³M Company

By:


One of Its Attorneys

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CERTIFICATE OF SERVICE

I, on oath state that I have served the attached CW³M Company, Inc.'s Objection to the Illinois Environmental Protection Agency's Motion for the Adoption of Emergency Rules by placing a copy in an envelope addressed to All Counsel of Record from One North Wacker Drive, Suite 4400, Chicago, Illinois, before the hour of 5:00 p.m., on this 19th Day of April, 2004.



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APR 19 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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 REGULATIONS OF) R04-23
PETROLEUM LEAKING UNDERGROUND STORAGE) (Rulemaking-Land)
TANKS (35 Ill. Adm. Code 734))

**CW³M COMPANY, INC.'S OBJECTION TO THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
MOTION FOR THE ADOPTION OF EMERGENCY RULES**

Plaintiff, CW³M Company, Inc. ("CW³M"), objects to the Illinois Environmental Protection Agency's ("IEPA") Motion for the Adoption of Emergency Rules ("Motion"). In support of its objection, CW³M states as follows:

BACKGROUND FACTS

On January 23, 2003, CW³M filed a three count complaint for declaratory judgment and mandatory injunction (the "Complaint") in the Circuit Court of Sangamon County, Illinois, Chancery Division, Case No. 03-MR-0032, entitled *CW³M Company, Inc. v. Illinois Environmental Protection Agency*. CW³M appealed IEPA's denial of a Freedom of Information Act request for information concerning IEPA's LUST rate sheets ("Rate Sheets") and further sought the invalidation of IEPA's use of the Rate Sheets as de facto rules to determine the reasonableness of LUST site reimbursement costs (the "Rate Sheet Rules").

In January 2004, IEPA filed proposed LUST Rules with the Board (the "LUST Rules"). On March 15, 2004, the Board held its first hearing on the proposed LUST rules. Additional

hearings are scheduled for May 25 and 26, 2004. Rates contained in the proposed LUST Rules are not the same as the rates contained in the Rate Sheet Rules. At the hearing on March 15, 2004, it was obvious that stake holders such as CW³M opposed numerous provisions of the proposed LUST Rules. Documents filed by IEPA to support the proposed LUST Rules also indicated serious flaws in the proposed LUST Rules.

On April 16, 2004, IEPA filed its Motion for Adoption of Emergency Rules which ask the Board to adopt the proposed LUST Rules. CW³M's Complaint is set for trial on April 21, 2004. Despite repeated demands by CW³M for IEPA to admit that the Rate Sheet Rules were invalid, IEPA to date has not stipulated to the invalidity of the Rate Sheet Rules.

ARGUMENT

I. No Emergency Exists to Justify Emergency Rulemaking.

IEPA argues, without support, that without its improperly promulgated Rate Sheet Rules, it lacks any method for determining whether the costs submitted for approval and budgets and applications for payment are reasonable. IEPA's Motion, p. 2. IEPA further argues without support that it therefore cannot approve budgets and applications. IEPA's Motion, p. 3. Finally, IEPA expresses concern for the consultants like CW³M who "are hesitant to proceed unless they know the costs will be reimbursed from the UST Fund." IEPA's Motion, p. 3. These unsupported justifications do not justify the exercise of emergency rulemaking powers pursuant to 5 ILCS 100/5-45. Therefore, the Board should deny IEPA's Motion.

IEPA's "emergency" is based entirely on the alleged additional administrative burden a case-by-case analysis of LUST reimbursement requests and budget proposals would entail. Yet IEPA fails to make any factual connection between its past use of the illegal Rate Sheets, and its alleged current and future inability to determine the reasonableness of LUST costs. Before IEPA

began to use the Rate Sheets as a bar to obtaining reimbursement for costs and tasks in excess of the Rate Sheet amount, IEPA reimbursed hundreds, if not thousands, of requests. Without the crutch of the Rate Sheets, IEPA administrators will only be burdened with the additional task of actually reviewing the work performed or the budget proposal submitted for reasonableness, without automatically cutting anything that was "above average."

IEPA's alleged concern over providing certainty for the regulated community is disingenuous. Anyone in attendance during the initial hearing on the proposed LUST Rules understands that a little bit of uncertainty is a small price to pay to avoid the random chaos inflicted by IEPA's application of the proposed LUST Rules or the existing Rate Sheet Rules.

IEPA's administration of LUST fund reimbursement requests and budget proposals forms the heart of the alleged "emergency." Yet, these administrative justifications are insufficient to constitute an emergency under 5 ILCS 100/5-45. *Citizens for a Better Environment v. The Pollution Control Board*, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987). As the court in *Citizens for a Better Environment* stated, "the need to adopt emergency rules in order to alleviate an administrative need, which, by itself, does not threaten the public interest, safety, or welfare, does not constitute an 'emergency'." *Id.*, 152 Ill. App. 3d at 109. As in *Citizens for a Better Environment*, the IEPA's justifications concerning the administrative burden of reviewing the reasonableness of costs submitted is wholly inadequate.

Further, in *Citizens*, the court recognized that the Board could have adopted rules years before. *Id.*, 152 Ill. App. 3d at 110. As in *Citizens for a Better Environment*, in the instant case, IEPA could have started the rulemaking process much earlier. In fact, 1996 Amendments to the Illinois Environmental protection Act provides as follows at subparagraph 57.7(c)(4)(C) "In approving any plan submitted pursuant to Part (E) of this paragraph (4), the Agency shall

determine, by a procedure promulgated by the Board under item (7) of subsection 57.14, that the costs associated with the plan are reasonable. . . .” [emphasis added]

Further, at least as early as January 2003, IEPA knew, or should have known as a result of CW3M’s Complaint, that the LUST Rules were of questionable validity. Yet, rather than addressing these challenges properly by immediately following the proper procedures for promulgating rules, IEPA instead filed a Motion for Summary Judgment against CW³M on the grounds that IEPA was not required to promulgate these rules. Only after this unsupported Motion for Summary Judgment was denied did IEPA follow the appropriate procedures to begin the rulemaking process.

IEPA’s inexcusable delay does not threaten the public interest, safety, or welfare, but merely threatens to increase IEPA’s administrative burden in determining the reasonableness of reimbursements under the LUST Fund.

IEPA’s actions in this case are similar to the actions taken by the Illinois Department of Public Aid in *Senn Park Nursing Center v. Jeffrey C. Miller*, 104 Ill.2d 169, 470 N.E.2d 1029 (1984). In *Senn Park*, after the circuit court invalidated illegally promulgated rules concerning the reimbursement for Medicaid services, the Department of Public Aid filed an emergency rulemaking in an effort to circumvent the circuit court’s determination. *Senn Park*, 104 Ill.2d at 174, 470 N.E.2d at 1032. The appellate court invalidated the emergency rule. *Id.*

In the instant case, less than a week before trial on CW³M’s Complaint concerning whether the LUST Rules were improperly promulgated, IEPA, like the Department of Public Aid in *Senn Park*, attempted to circumvent the circuit court by propounding an emergency rule when no emergency existed. The appellate court in *Senn Park* invalidated emergency rulemaking under similar circumstances.

Because IEPA's justification for the emergency rulemaking is purely administrative, no emergency exists. IEPA's Motion should therefore be denied.

WHEREFORE, for the reasons set forth herein, CW³M Company, Inc. respectfully requests that the Board deny the Illinois Environmental Protection Agency's Motion for Emergency Rulemaking.

Respectfully submitted,

CW³M Company

By:

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