

MAY 03 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **STATE OF ILLINOIS**
Pollution Control Board

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

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

NOTICE OF FILING

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

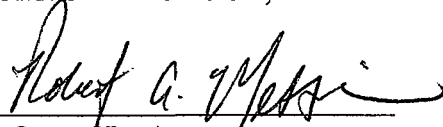
(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies each of **ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S RESPONSE TO THE ILLINOIS**

**ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR THE
ADOPTION OF EMERGENCY RULES**, copies of which are herewith served upon
you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
One of Its Attorneys

Dated: April 30, 2004

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CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached **ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S RESPONSE TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR THE ADOPTION OF EMERGENCY RULES** upon:

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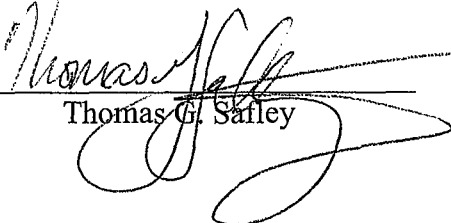
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on April 30, 2004.


Thomas G. Safley

RECEIVED
CLERK'S OFFICE

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAY 03 2004

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LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE PART 732))
_____)

R04-22)
(Rulemaking-Land)

STATE OF ILLINOIS
Pollution Control Board

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REGULATION OF PETROLEUM)
LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE PART 734))

R04-23)
(Rulemaking-Land)

**ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S RESPONSE TO THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
MOTION FOR THE ADOPTION OF EMERGENCY RULES**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP
("IERG") by and through one of its attorneys, Robert A. Messina, pursuant to 35 Ill.
Admin. Code § 101.500(d), and for its Response to the Illinois Environmental Protection
Agency's ("IEPA") Motion for the Adoption of Emergency Rules, states as follows:

I. Background

IERG is a not-for-profit Illinois Corporation composed of 65 member companies engaged in industry, commerce, manufacturing, agriculture, trade, transportation or other related activities, and which persons, entities or businesses are regulated by governmental agencies which promulgate, administer or enforce environmental laws, regulations, rules or policies. IERG was organized to promote and advance the interests of its members before governmental agencies, such as the United States Environmental Protection Agency and the Illinois Environmental Protection Agency ("IEPA" or "Agency"), and

before bodies such as the Illinois Pollution Control Board (“Board”). IERG is also an affiliate of the Illinois State Chamber of Commerce.

IERG members include Illinois companies from a variety of industrial groups, including the chemical, food, pharmaceutical, transportation, equipment, oil and utilities areas. These companies and other IERG members own and operate underground storage tanks and, therefore, are potentially regulated by the Board’s Leaking Underground Storage Tank Rules (“LUST Rules”) that are the subject of these two consolidated rulemakings. Furthermore, IERG members may be required to perform corrective action activities, which may lead to the submittal to the IEPA of associated costs for reimbursement. Therefore, IERG’s member companies have a vital interest in this matter.

On January 13, 2004, IEPA filed these proposed amendments to the LUST Rules with the Board. These rules included changes necessitated by several recent changes to the law enacted by Illinois’ General Assembly, and also include changes to certain corrective action measures, procedures for seeking payment from the Underground Storage Tank Fund, and regarding releases reported after a specified date. On March 15, 2004, the Board held its first hearing on the consolidated proposal. This proposal has not yet proceeded to First Notice.

Then, on April 1, 2004, in a separate matter before the Board, the IEPA’s internal “Rate Sheets” were determined by the Board to constitute an improperly promulgated rule and therefore, was invalid. Illinois Ayers Oil Co., PCB 03-214 (April 1, 2004). The “Rate Sheets” were internal documents generated and used by the IEPA to set standardized reimbursement amounts for certain corrective action activities.

This brings us to the matter at hand. On April 16, 2004, IEPA filed a Motion for the Adoption of Emergency Rules, which requested the Board to adopt the proposed LUST Rules, including changes proposed in Errata Sheet 1 and additional amendments set forth in its Motion. It is the Agency's contention that without these "Rate Sheets," it is unable to determine whether costs submitted to the Agency for reimbursement after the Ayers decision are reasonable, thereby rendering it impossible to review budgets and applications for reimbursement. The standstill that would result, the IEPA argues, constitutes an emergency in that the remediation of LUST sites would grind to a halt, leaving unremediated sites of contamination throughout the State. Finally, by adopting these emergency rules, the Board would allow the IEPA to continue to reimburse costs, pursuant to the terms of its Rate Sheets, during the pendency of the consolidated rulemakings currently before the Board.

II. Emergency Rulemakings

According to Section 27(c) of the Illinois Environmental Protection Act ("Act"), if the Board "finds that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5-45 of the Illinois Administrative Procedure Act." 415 ILCS § 5/27(c). Case law and Board opinions generally discuss whether the proposed emergency rulemaking meets the definition of "emergency" within the Illinois Administrative Procedure Act ("IAPA"). Such a determination is typically made after factoring in the goals of the proposed emergency rulemaking in accordance with the purpose and sufficiency of the current rules or environmental provisions, legislative determinations with regard to these regulations, legislative policy considerations, whether the rulemaking

alleviates an administrative need, whether the situation necessitates removal from notice and comment procedures, the interests of the public, and the concerns of the State.

III. Discussion

While IERG does not necessarily oppose the adoption of the “unit cost” rules as proposed by the Agency in this consolidated proceeding, it does have a concern regarding the Board’s authority to adopt these rules in an emergency rulemaking proceeding. IERG believes the administrative justifications propounded by the IEPA likely do not rise to the level of an “emergency” so as to constitute a threat to public interest, safety, or welfare.

There are numerous cases that discuss the justification that must be shown before properly adopting emergency rules. In Senn Park, a case strikingly similar to the present matter, the appropriateness of an emergency rulemaking is at issue. In that matter, the plaintiff requested reimbursement of Medicaid services in accordance with an “inflation-update” procedure rather than a new procedure the Department of Public Aid adopted through emergency rulemaking. Senn Park Nursing Center v. Jeffrey C. Miller, 104 Ill. 2d 169, 174, 470 N.E.2d 1029, 1032 (Ill. 1984). In that instance, the Department had a similarly nuanced claim of emergency – the rules dealt with reimbursement of costs associated with nursing home care for needy residents of the State. An emergency was present, the Department argued, because failure to adopt the rules would jeopardize Federal matching funds and, possibly, the ability of the State to subsidize the care of its most disadvantaged citizens.

As in the matter currently before the Board, Senn Park involved a reimbursement procedure that the appellate court determined was a “rule” within the meaning of the IAPA, that was not published in accordance with the IAPA or the Federal notice and

comment regulations, and was therefore invalid. Senn Park, 104 Ill. 2d at 175. Also, similar to the current matter, the State agency subsequently enacted an emergency rule to address the court's ruling. Id. The plaintiff in Senn Park argued that the emergency rule was void because there was no emergency as defined in the IAPA. The appellate court agreed and found that the emergency "was the result of an avoidable administrative failure to properly enact a rule in accordance with statutory requirements, and the reasons given by defendant in support of his finding of an emergency are all tainted by this fact." Senn Park, 104 Ill. 2d at 184. On appeal, the Supreme Court of Illinois affirmed this decision, finding no emergency within the meaning of 5 ILCS § 100/5-45. Id. at 186.

Also, In Citizens, petitioners challenged the adoption of emergency rules regarding implementation of Section 39(h) of the Act arguing that there was no authority to adopt the rulemaking because there was no emergency pursuant to 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). The appellate court in Citizens 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.'" Citizens, 152 Ill. App. 3d at 109. Further, in Citizens, the court noted the Board realized that the administrative problem could have been prevented and that rules should have been promulgated years before. Id. at 110.

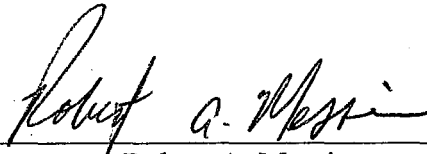
Senn Park and Citizens provide meaningful guidance to the Board with respect to what constitutes an emergency for the purpose of the IAPA and when emergency rulemaking is appropriate. IERG believes the justifications propounded by the IEPA likely do not rise to the level of an "emergency" so as to constitute a threat to public

interest, safety, or welfare. The best course of action for the IEPA to follow may well be, in the interim, to rely upon its years of experience in determining the reasonableness of corrective action costs in reviewing budgets and applications for reimbursement. At the same time, the IEPA could seek expedited handling of the current consolidated before the Board.

WHEREFORE, the ILLINOIS ENVIRONMENTAL REGULATORY GROUP respectfully prays that the Illinois Pollution Control Board deny the Illinois Environmental Protection Agency's Motion for the Adoption of Emergency Rules.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
Robert A. Messina

Dated: April 30, 2004

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