

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 PETROLEUM LEAKING ) (Rulemaking – UST)  
UNDERGROUND STORAGE TANKS )  
35 ILL. ADM. CODE 732 )

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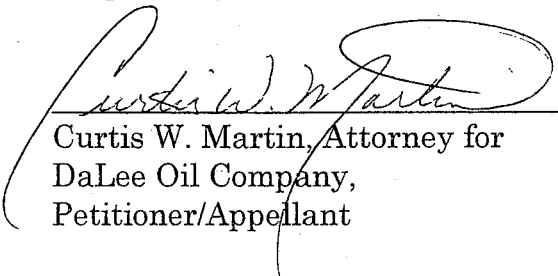
IN THE MATTER OF: )  
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PROPOSED AMENDMENTS TO: ) R04-23  
REGULATION PETROLEUM LEAKING ) (Rulemaking – UST)  
UNDERGROUND STORAGE TANKS ) Consolidated  
35 ILL. ADM. CODE 734 )

NOTICE OF FILING

TO: SEE ATTACHED PROOF OF SERVICE

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the RESPONSE OF UNITED SCIENCE INDUSTRIES, INC. TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR ADOPTION OF EMERGENCY RULES for the above-titled proceeding, a copy of which is herewith served upon you.

Respectfully submitted,

  
Curtis W. Martin, Attorney for  
DaLee Oil Company,  
Petitioner/Appellant

DATE: April 30, 2004

## PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the following individuals by enclosing the same in an envelope addressed to said persons at their last known address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a United States Post Office mail box in Mt. Vernon, Illinois, at 5:00 P.M., on the 30<sup>th</sup> day of April, 2004.

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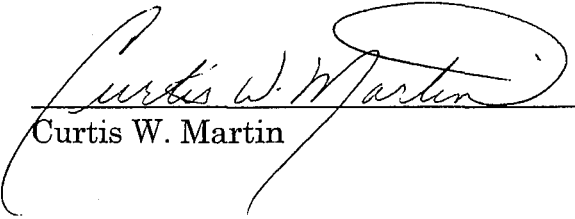
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Upon penalties as provided by law pursuant to 735 ILCS 5/1-109 (1992 State Bar Edition), the undersigned certifies that the statements set forth in this Proof of Service are true and correct.

  
Curtis W. Martin

**RECEIVED**  
CLERK'S OFFICE

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**RESPONSE OF UNITED SCIENCE INDUSTRIES, INC. TO ILLINOIS  
ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR ADOPTION  
OF EMERGENCY RULES**

NOW COMES United Science Industries, Inc. ("USI") by its attorneys, Shaw & Martin, P.C., and, in reply to the Illinois Environmental Protection Agency's ("Agency") Motion for Adoption of Emergency Rules, objects and states as follows:

As a historical review, in January, 2004, the Agency first filed proposed Leaking Underground Storage Tank ("LUST") Rules with the Pollution Control Board ("Board"). The first hearing regarding the LUST Rules was held by the Board on March 15, 2004, with further hearings scheduled for May 25 and 26, 2004 in light of numerous objections to the proposed LUST Rules by various stakeholders, including USI.

On April 1, 2004, the Board issued a decision in "*Illinois Ayers Oil Company v Illinois Environmental Protection Agency*, PCB 03-214" in which the Board found a "rate sheet" utilized by the Agency in its determination of reasonableness of remediation budgets and LUST Fund Reimbursement requests to be a rule not properly promulgated under the Illinois Administrative Procedure Act, 5 ILCS 100/1-1 *et seq.* ("APA") The Agency now posits that without the use of a rate sheet it has no "standard methodology" for determining whether costs submitted for approval in budgets and applications for payment are reasonable and that such standard methodology exists in the proposed emergency rules.

There is no question that the development of a process which effectively, efficiently, expeditiously and fairly reviews budgets and reimbursement requests ("submittals") is necessary. However, the Agency's proposed emergency rules meet none of these qualifications. In fact, the Environmental Protection Act, 415 ILCS 5/1 *et seq.* ("Act") and the its current corresponding Rules require the Agency to review submittals based upon actual costs, industry standards, documented expenditures, scope of work, and budget and project plan presentations certified by licensed professional engineers and geologists. The Board in *Ayers* recognized the significance of the certifications of professional engineers and geologists as apposed to the rate sheet utilized by the Agency, and for sound reason. It is the professional engineer or geologist who typically visits a LUST site, who is familiar with the scope of work and costs associated with the scope of work necessary to remediate a LUST site and who certifies such pursuant to the requirements of the Act and the corresponding rules.

USI, as a member of the recently incorporated Not for Profit professional organization known as "PIPE", desires to cooperate with the Agency in an effort to establish a methodology for the Agency's review of costs associated with the remediation of leaking underground storage tank sites throughout Illinois. USI's goal is the establishment of an expeditious and fair reimbursement process that recognizes the reasonableness of the actual costs associated with remediation as well as a deference afforded the judgment inherent in the professional engineer's or geologist's certification required by the Act and corresponding Rules. To that end, USI objects to the Agency's request for emergency rulemaking in this matter since the proffered "emergency" is alone the creation of the Agency, resulting directly from its decision to utilize a rate sheet to determine reimbursement from the LUST Fund without complying with procedures required under Sections 27 and 28 of the Act and Section 5-45 of the APA.

Illinois caselaw and Board precedent, knowledge of which the Agency cannot deny, requires public rulemaking pursuant to the APA prior to the Agency's use of standardized rates, formulas, data and/or methodology for reimbursement of remediation costs related to underground storage tank sites. See *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 470 N.E. 2d 1029, 83 Ill. Dec. 609, (1984) and *Citizen's for a Better Environment v. Illinois Pollution Control Board*, 152 Ill.App. 3d 105, 504 N.E.2d 166, 105 Ill.Dec. 297 (1<sup>st</sup> Dist. 1987). Even after *Ayers*, the Agency continued using the rate sheet until April 21, 2004 when it was instructed by the Circuit Court of Sangamon County to cease such use in Cause No.



2003-MR-32 entitled “CW<sup>3</sup>M Company, Inc. v Illinois Environmental Protection Agency.” Since that time, the Agency has re-evaluated numerous reimbursement claims and provided amended reimbursement letters to USI and various other PIPE members, essentially reinstating the entirety of the requested reimbursement, all without use of any rate sheet.

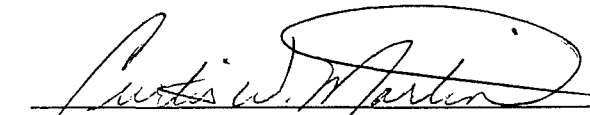
Thus, while the Agency has reviewed countless numbers of LUST fund claims for nearly fifteen (15) years, the Agency now suddenly seeks the Board’s immediate approval of the use of the rate sheet via its Motion for Adoption of Emergency Rules. Illinois law is clear that the Agency cannot create its own circumstances, call it an “emergency”, and then request emergency rulemaking of the Board as a situation that “reasonably constitutes a threat to the public interest, safety, or welfare.” See 5 ILCS 100/5-45, *Citizens for a Better Environment*, and *Senn Park*. The Agency’s mere need to adopt the emergency Rules in order to alleviate its administrative need which, by itself does not threaten the public interest, safety or welfare, does not constitute an emergency warranting the immediate implementation of the rules proposed by the Agency.

In addition to the procedural deficiencies outlined above, as should be evident to the Board from its first hearing in this matter, PIPE members, including USI, take significant issue with the “rate sheet” developed by the Agency and now proposed in Subpart H. USI and other interested parties should be given the opportunity, pursuant to the requirements of the APA, at the next regularly scheduled hearing on May 25 and 26, to air their issues and submit their own approach to the reasonableness determination the Agency is called upon to provide

by the Act and its Rules. Because the Agency's justification for the emergency rulemaking is purely administrative, no emergency exists as contemplated by the APA and the Agency's Motion should be denied.

WHEREFORE, for the reason set forth herein, United Science Industries, Inc., respectfully requests the Board deny the Agency's Motion for Adoption of Emergency Rules.

Respectfully submitted,



Curtis W. Martin, Attorney for  
United Science Industries, Inc.

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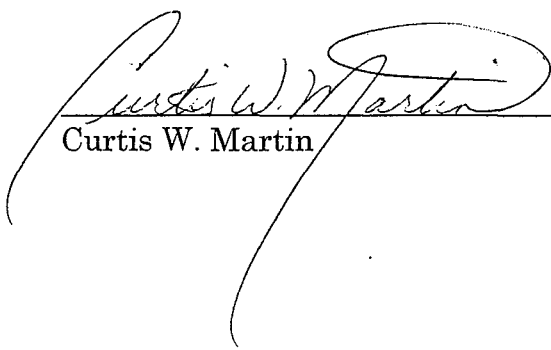
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