BEFORE THE 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	)	

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

To: Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

Ms. Marie E. Tipsord
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601

NOTICE OF FILING

PLEASE TAKE NOTICE that on May 18, 2004, I filed with the Clerk of the Illinois Pollution Control Board, an original and nine (9) copies of a RESPONSE OF PROFESSIONALS OF ILLINOIS FOR THE PROTECTION OF THE ENVIRONMENT (PIPE) TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S AMENDED MOTION FOR EMERGENCY RULES, copies of which are herewith served upon you.

Claire A. Manning

Claire A. Manning, Attorney

CLAIRE A. MANNING
Posegate & Denes, P.C.
111 N. Sixth Street, Suite 200
Springfield, Illinois 62701
(217) 522-6152
(217) 522-6184 (FAX)
claire@posegate-denes.com

PROOF OF SERVICE

The undersigned, being duly sworn, states that a true and correct copy of the foregoing NOTICE OF FILING, together with a copy of RESPONSE OF PROFESSIONALS OF ILLINOIS FOR THE PROTECTION OF THE ENVIRONMENT (PIPE) TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S AMENDED MOTION FOR EMERGENCY RULES, was served on the individuals as listed below, by mailing the same via the United States postal service, Springfield, Illinois on May 18, 2004:

Gina Roccaforte
Kyle Rominger
IEPA
1021 North Grand Ave. East
P.O. Box 19276
Springfield, IL 62794

Thomas G. Safley
Hodge, Dwyer, Zeman
3150 Roland Avenue
P.O. Box 5776
Springfield, IL 62705

William G. Dickett
Sidley, Austin, Brown & Wood
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603

Barbara Magel
Karaganis & White, Ltd.
414 North Orleans St., Suite 810
Chicago, IL 60610

Bill Fleischli
Illinois Petroleum Marketers Association
112 West Cook Street
Springfield, IL 62704

Joe Kelly, PE
United Science Industries, Inc.
P.O. Box 360
6295 East Illinois Highway 15
Woodlawn, IL 62898-0360

Robert A. Messina, General Counsel
Illinois Environmental Regulatory Group
3150 Roland Avenue
Springfield, IL 62703

Kenneth James
Carlson Environmental, Inc.
65 E. Wacker Place, Suite 1500
Chicago, IL 60601

Lisa Frede
Chemical Industry Council of IL
2250 E. Devon Ave., Suite 239
DesPlaines, IL 60018

Carolyn S. Hesse
Barnes & Thornburg
1 North Wacker Drive, Suite 4400
Chicago, IL 60606

Michael W. Rapps
Rapps Engineering & Applied Science
821 S. Durkin Drive
P.O. Box 7349
Springfield, IL 6279107349

Craig S. Gocker, President
Environmental Management &
Technologies
2012 West College Avenue Suite 208
Normal, IL 61761

Joel J. Sternstein
Office of the Attorney General
Environmental Bureau
188 West Randolph, 20th Floor
Chicago, IL 60601

Tom Herlacher
Herlacher Angleton Associates, LLC
8731 Bluff Road
Waterloo, IL 62298

Jennifer Goodman
Herlacher Angleton Associates
522 Belle Street
Alton, IL 62002

James E. Huff, PE
Huff & Huff, Inc.
512 W. Burlington Ave., Suite 100
LaGrange, IL 60525

Scott Anderson
Black & Veatch
101 N. Wacker Dr., Suite 1100
Chicago, IL 60606

Melanie LoPiccolo, Office Manager
Marlin Environmental, Inc.
1000 West Spring St.
South Elgin, IL 60177

Brian Porter
Terracon
870 40th Avenue
Bettendorf, IA 52722

Jonathan Furr, General Counsel
Illinois Dept. of Natural Resources
One Natural Resources Way
Springfield, IL 62702

Joe Kelly, VP Engineering
EcoDigital Development LLC
P.O. Box 360
6295 East Illinois Highway 15
Woodlawn, IL 62898

Glen Lee, Manager
Wendler Engineering Services, Inc.
1770 West State St.
Sycamore, IL 60178

A.J. Pavlick
Great Lakes Analytical
1380 Busch Parkway
Buffalo Grove, IL 60089

Joseph W. Truesdale, PE
CSD Environmental Services
2220 Yale Blvd.
Springfield, IL 62703

Ron Dye, President
CORE Geological Services, Inc.
2621 Monetga, Suite C
Springfield, IL 62704

Monte Nienkerk
Clayton Group Services, Inc.
3140 Finley Road
Downers Grove, IL 60515

Kurt Stepping
PDC Laboratories
2231 W. Altorfer Drive
Peoria, IL 61615

Thomas M. Guist, PE
Atwell-Hicks, Inc.
940 E. Diehl Road, Suite 100
Naperville, IL 60563

Jeff Wienhoff
CW^{3}M Company, Inc.
701 S. Grand Ave. West
Springfield, IL 62704

Jarrett Thomas, V.P.
Suburban Laboratories, Inc.
4140 Litt Drive
Hillside, IL 60162

Dan King
United Science Industries, Inc.
6295 East Illinois Highway 15
Woodlawn, IL 62898

Richard Andros, PE
Environmental Consulting &
Engineering, Inc.
551 Roosevelt Rd., #309
Glenn Ellyn, IL 60137

Terrence W. Dixon
MACTEC Engineering & Consulting, Inc.
8901 N. Industrial Road
Peoria, IL 61615

Steve Gobelman
Illinois Dept. of Transportation
2300 Dirksen Parkway
Springfield, IL 62764

Collin W. Gray
SEECO Environmental Services, Inc.
7350 Duvon Drive
Tinley Park, IL 60477

George Moncek
United Environmental Consultants
119 E. Palatine Road, Suite 101
Palatine, IL 60067

David Rieser
McGuire Woods LLP
77 W. Wacker, Suite 4400
Chicago, IL 60601

Tina Archer
Greensfelder, Hemker & Gale
10 S. Broadway, Suite 2000
St. Louis, MO 63104

Erin Curley
Midwest Engineering Services, Inc.
4243 W. 166th St.
Oak Forest, IL 60452

Ken Miller, Regional Manager
American Environmental Corp.
3700 W. Grand Avenue, Suite A
Springfield, IL 62707

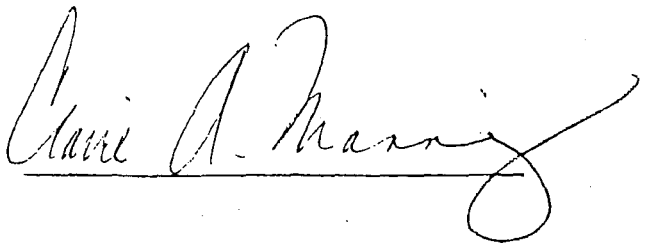
Russ Goodiel
Applied Environmental Solutions, Inc.
P.O. Box 1225
Centralia, IL 62801

Daniel Goodwin
Secor International, Inc.
400 Bruns Lane
Springfield, IL 62702

Eric Minder
Caterpillar, Inc.
100 N.E. Adams St.
Peoria, IL 61629

Daniel Caplice
K-Plus Environmental
600 W. Van Buren St., Suite 1000
Chicago, IL 60607

Kim Robinson, Brittan Bolin
Illinois Society of Professional Engineers
300 West Edwards
Springfield, IL 62704



SUBSCRIBED AND SWORN to before me this 18th day of May, 2004

NOTARY PUBLIC

CLAIRE A. MANNING
111 N. Sixth Street, Suite 200
Springfield, Illinois 62701
(217) 522-6152
(217) 522-6184 (FAX)
claire@posegate-denes.com

OFFICIAL SEAL
DEBORAH L. COOPER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-2-2005

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO:	)	R04-22
REGULATION PETROLEUM LEAKING	)	(Rulemaking – UST)
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RESPONSE OF PROFESSIONALS OF ILLINOIS FOR THE PROTECTION OF THE ENVIRONMENT (PIPE)TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S AMENDED MOTION FOR EMERGENCY RULES

Now comes the Professionals of Illinois for the Protection of the Environment (PIPE) by and through its attorney, CLAIRE A. MANNING, and responds to the Illinois Environmental Protection Agency's Amended Motion for Emergency Rules, as follows.

Background

On April 19, 2004, the Illinois Environmental Protection Agency (IEPA) filed a Motion for the Adoption of Emergency Rules. Various objections were filed to that rulemaking, including an objection filed by PIPE on May 3, 2004 and objections filed by two of its members, CW^3M and USI, on April 19, 2004 and May 3, 2004 respectively. Since those objections were filed, PIPE and its members have met with the IEPA on several occasions, in an attempt to ascertain mutual concerns regarding the entirety of this rulemaking and, in particular, the IEPA's desire for emergency rules while this rulemaking runs its course through the required public proceedings.

In light of those meetings, the IEPA has withdrawn its request that the Board adopt, in emergency fashion, its proposed modifications to Part 732 and its proposed new Part 734. Instead, it now requests that the Board amend current Section 732.505 by adding, in emergency fashion, a new subsection: Section 732.505(d). That new subsection will provide the IEPA with the regulatory framework it asserts that it needs in order to apply a standard method of reviewing budgets, corrective action plans and requests for reimbursement while its more expansive rulemaking proposal is being publicly heard and considered by the Illinois Pollution Control Board (Board). Accordingly, PIPE withdraws its objection to emergency rulemaking, and supports the proposed Section 732.505(d). The individual PIPE members who also filed objections, CW^3M and USI, are also expected to withdraw their objections and offer their support to this new proposed emergency rule.

Previously, the Illinois Environmental Protection Agency argued that an emergency rule was necessitated because of the Board's decision in *Illinois Ayers Oil Company v. Illinois Environmental Protection Agency ("Ayers")*, PCB 03-214 (April 1, 2004). While PIPE does not agree that the Ayers decision, in and of itself, justifies emergency rulemaking pursuant to the APA, it does agree that, given the IEPA's response to *Ayers*, as well the chaos which has resulted from the UST unit's inability to utilize the improperly promulgated rate sheet, a situation justifying the proposed limited emergency rule now exists.

Proposed Emergency Rule: Section 732.505(d)

The proposed emergency rule will allow the IEPA to utilize a standard method of reviewing claims while their proposed rules are being heard and considered by the Board. Specifically, the rule simply adds a new subsection (d) to current Section 732.505, which is entitled "Standard for Review of Plans or Reports." The new subsection would provide:

- That for all budgets, corrective action plans, amendments and applications that were received prior to the effective date of the emergency rule, but are still subject to IEPA review, the IEPA's approval will be based upon the certification of the licensed professional engineer (LPE) or licensed professional geologist (LPG). *Section 732.505(d)(1)*

- That for all budgets and corrective action plans that have been approved pursuant to Section 732.505, the IEPA shall approve as reasonable all costs that are contained therein, without further review or modification. *Section 732.505(d)(1)*

- That for all budgets, plans, amendments and applications for payment that were received by the IEPA after the effective date of the emergency rule (except for applications for payment of costs that are contained in an approved budget or plan), so long as the costs are consistent with emergency Appendix D and E, the IEPA will presume them to be reasonable. *Section 732.505(d)(2)(A); Appendix D, "Allowable Unit Rates;" and Appendix E, "Personnel Titles and Rates."*

- That, for items not contained in Appendix D and E, costs that are consistent with the standard industry RS Means publications, will be presumed to be reasonable. *Section 732.505(d)(2)(B)*

- That for costs that are not identified in Appendix D or E and cannot be determined utilizing the RS Means publications, costs justified by objective evidence such as catalogue or vendor information will be presumed to be reasonable. *Section 732.505(d)(2)(C)*

- That the LPE and LPG will certify, on a form prescribed by the IEPA, the reasonableness of all costs requested for reimbursement. If the costs exceed those presumed to be reasonable in Section 732.505(d)(2), the LPE or LPG will delineate and justify those costs. The IEPA can approve those costs based upon this justification. *Section 732.505(d)(3) and (4)*

- That the IEPA will provide written advance notice to the owner or operator whenever it anticipates denying, modifying or rejecting any portion of a submitted budget, plan, amendment or application for payment – so long as the owner or operator agrees to a 60-day review waiver. During this review period, the owner and operator will be provided an opportunity to address the reasons given by the IEPA for its intended action. *Section 732.505(d)(5)*

Section 732.505(d) was carefully drafted, and is the result of many hours of meetings and consultations between PIPE and its representatives and the IEPA and its representatives. PIPE believes that this negotiated provision is reasonable and workable. Moreover, PIPE agrees that,

given the circumstances that have arisen since the Board's decision in *Ayers*, the limited emergency rule proposed here is both justified and prudent.

Emergency Justification

As justification for emergency rulemaking, the IEPA states that emergency rules are "needed to provide a standard methodology for determining the reasonableness of costs submitted to the IEPA for approval" and that "(S)ince the Ayers case, the Illinois EPA has struggled to develop a new method for determining the reasonableness of the myriad costs it reviews." (IEPA Amended Motion, p. 2) The IEPA goes on to state that any standard methodology would "necessarily be generally applicable, and therefore could not be implemented until adopted as a rule." (IEPA Amended Motion, p. 2)

PIPE certainly appreciates that the IEPA now understands the necessity for rulemaking prior to utilizing any standard methodology in making determinations of reasonableness. However, it is not this understanding, or the *Ayers* case, which justifies emergency rulemaking. While PIPE believes that the IEPA was remiss in not proposing these rules to the Board at the time the UST law was changed, and certainly at the time that the IEPA began using a standardized "rate sheet" for costs, the parties nonetheless find themselves in a situation where emergency rulemaking is in the public interest.

Indeed, in response to litigation declaring the invalidity of the "rate sheet" (see *CW³M Company, Inc. v. Illinois Environmental Protection Agency*, Circuit Court of Sangamon County, NO. 03-MR-0032 (April 21, 2004), as well as the Board's decision in *Ayers*) the IEPA temporarily halted the processing of many claims for remediation and payment from the UST fund, claiming that if it couldn't utilize the "rate sheet" it couldn't process claims. While PIPE continues to believe that this IEPA response was totally unjustified, especially given the Act's

requirement of LPE or LPG certification of virtually every aspect of a UST remediation, PIPE is also convinced that it is in the public's interest for the Board to adopt this limited emergency rule. This particular emergency rule proposal, unlike the IEPA's previous one, is directly responsive to the claimed emergency. It specifically resolves an administrative dilemma and sets forth public parameters that are intended to create stability for the UST fund.

The requirements for Board emergency rulemaking are set forth both in the Administrative Procedures Act (APA), 5 ILCS 100/5-45 and the Illinois Environmental Protection Act (Act), 415 ILCS 5/27. Section 27(c) of the Act allows the Board to promulgate emergency rules pursuant to Section 5-45 of the APA whenever "a situation exists which reasonably constitutes a threat to public interest, safety or welfare."

The IEPA argues that these emergency rules are necessary to protect the proceeds of the UST fund since, without a standard methodology for reviewing claims, the fund will dissipate at a greater rate than otherwise: "without rules to govern how to determine the reasonableness of costs, the Illinois EPA's ability to control costs and maintain consistent and fair reviews is limited." (IEPA Amended Motion at p. 2) The IEPA goes on to argue that, based upon recent submissions, reimbursement dollars have increased since the IEPA stopped using the rate sheet and, accordingly, it is in the public interest to immediately adopt these rules.

PIPE agrees that it is in the public interest for the Board to adopt this limited rule and, therefore, emergency rulemaking is justified. PIPE's major concern is that dollars be available from the fund for their intended and legislated purpose: to remediate sites contaminated by leaking underground storage tanks. As PIPE has suggested to the IEPA, a standard regulatory methodology for reviewing claims is helpful to that purpose, so long as such standard methodology has been publicly recognized and adopted via rulemaking.

PIPE disavows any assertion, direct or otherwise, on the part of the IEPA that the claimed increase in reimbursements is attributable to any excessive claims since the invalidation of the rate sheets. Nonetheless, PIPE agrees that, during the pendancy of the regular rulemaking, these emergency rules are justified to ensure that all those accessing the fund, and those reviewing the claims, are operating under the same "rules of the game." In fact, PIPE would assert that if such were the case prior to *Ayers*, that case – and its attendant costs – may not have even been necessary. Indeed, it is PIPE's belief that these emergency rules, especially with the proviso that the IEPA will give notice of the reasons for an intended denial, will serve to stabilize the fund. Such stabilization is in the public interest because it will allow maximum use of limited resources to remediate and enhance the environment.

While *Citizen's for a Better Environment v. Illinois Pollution Control Board,* 152 Ill.App.3d 105, 105 Ill. Dec. 297, 504 N.E.2d 166 (1st. Dist. 1987), sets the stage for the appropriateness of emergency rulemaking under the APA, that case also recognizes the deference that appropriately should be accorded an agency when they have made a reasonable justification for the promulgation of an emergency rule. While the IEPA's initial emergency proposal (that the Board promulgate, in emergency fashion, its modifications to 35 Ill. Adm. Code Part 732 and adopt a new 35 Ill. Adm. Code Part 734) did not provide any such emergency justification, proposed subsection (d) does. This is so because this limited subsection will provide the specific public framework necessary for the regulated community to know what standards are being utilized by the IEPA in reviewing requests for payment from the fund for the next 150 days, while the Board considers the entirety of the proposed rules.

In its prior applications of the APA and Section 27 (c) of the Act, as well as the *Citizens for a Better Environment* case, the Board has recognized that, in order to avert uncertainty in the

administrative process, limited emergency rulemaking was justified. For example, in 1993 the Board allowed the IEPA, via emergency rulemaking, to extend the compliance date for Stage II vapor recovery equipment in the Metro-East area, because of the "intolerable uncertainty" attendant to whether the federal requirements that were the subject of the deadline would actually be implemented. See *In the Matter of Emergency Rule Amending the State II Gasoline Vapor Recovery Rule in the Metro-East Area*, 35 Ill. Adm. Code 219.586(d), R93-12 (May 20, 1993) While the Board admonished the IEPA for its actions in necessitating emergency rulemaking ("(T)he Board notes that the extreme action of an emergency rulemaking might have been avoided if the IEPA had acted in more timely fashion"), the Board nonetheless concluded that the emergency rule was justified by the public interest.

The Board has also adopted, in emergency fashion, discrete specific regulatory sections to deal with specific issues in emergency fashion. For example, in *In the Matter of Emergency Amendments to the Landfill Rules for On-Site Burial of Dead Animals in Flood-Disaster Counties*, 35 Ill. Adm. Code 807.106, R93-25 (Sept. 23, 1993), the Board adopted 35 Ill. Adm. Code Section 807.106 as an emergency rule in order to exempt the burial of dead animals from specific landfill requirements during the Great Flood of 1993. Also during that flood, the Board exempted flood-generated waste from open burning requirements. See *In the Matter of Emergency Amendments to the Open-Burning Rules*, 35 Ill. Adm. Code 237.121, R93-15. While PIPE recognizes that these flood-related rules were also justified by public health and safety considerations, the Board's adoption of a limited regulatory section to deal with a specific issue, as the one now proposed here, is well within the parameters of emergency rulemaking.

For these reasons, PIPE fully supports the adoption of new subsection (d) of Section 732.505 as an emergency rule.

Emergency Rule's 150 Day Requirement

PIPE recognizes that any emergency rule will automatically terminate after 150 days. See 5 ILCS 100/5-45. As PIPE acknowledged in its previous filing, promulgating a permanent rule within this timeframe will be difficult. However, because PIPE and IEPA have begun to meet and will continue to meet, PIPE does not believe promulgation within this timeframe will be impossible. Rather, PIPE hopes that the parties will be able to identify issues of commonality, and difference, in order to present them to the Board – concisely, within whatever timeframe the Board suggests is necessary. Toward that end, any Board established tentative timetable or other direction would provide much assistance in these efforts.

CONCLUSION

PIPE respectfully requests that the Board adopt proposed subsection (d) to be added to current 35 Ill. Adm. Code 732.505 as an emergency rule to guide the IEPA's review of UST claims for the next 150 days. However, if the Board denies the IEPA's request, despite its wholehearted support from PIPE and its members, PIPE respectfully requests that the Board direct the IEPA in how to proceed with UST reimbursement claims during the pendancy of this rulemaking, as any halting of the UST program and attendant funding causes chaos in UST remediation, presents an intolerable situation for those involved in the business of UST remediation and, moreover, violates the letter and spirit of the Act.

Respectfully submitted,

Claire A. Manning

Claire A. Manning, Attorney

CLAIRE A. MANNING
Posegate & Denes, P.C.
111 N. Sixth Street
Springfield, Illinois 62705
(217) 522-6152
(217) 522-6184 (FAX)
claire@posegate-denes.com

POSEGATE & DENES, P.C.
Attorneys at Law
111 North 6th Street, Suite 200
P.O. Box 338
Springfield, IL 62705-0338

Carol Hansen Posegate
Jane Nolan Denes

Claire A. Manning
Of Counsel

Telephone (217) 522-6152
Facsimile (217) 522-6184

FAX TRANSMISSION

DATE: 05/18/04
TIME: 3:45 pm

TO: Marie E Tipsord
FAX NO: 312-814-3669

FROM: Claire A. Manning
FAX NO: (217) 522-6184

RE: R04-22, R04-23

MESSAGE:

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