ILLINOIS POLLUTION CONTROL BOARD
June 3, 2004

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

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

ORDER OF THE BOARD (by G.T. Girard):

On January 13, 2004, the Illinois Environmental Protection Agency (Agency) filed a proposal for rulemaking for 35 Ill. Adm. Code Part 732 and Part 734 (proposal). The Agency proposes to amend the Board's petroleum leaking underground storage tanks rules. On January 22, 2004, the Board consolidated the two proposals for hearing. The Board held one hearing in this matter on March 15, 2004, and a second hearing on May 25 and 26, 2004.

On April 19, 2004, the Agency filed a motion for the adoption of emergency rules in this proceeding. The Board received responses to the motion as follows: April 19, 2004, CW^{3}M (Resp.1);[1] May 3, 2004, Illinois Environmental Regulatory Group (IERG) (Resp.2); May 3, 2004, United Science Industries, Inc. (USI) (Resp.3); and May 3, 2004, Professionals of Illinois for the Protection of the Environment (PIPE) (Resp.4). The responses from all four organizations opposed the Agency's motion for emergency rulemaking.

On May 4, 2004, the Agency filed a motion for delay of decision (MotD.). The Agency petitioned the Board to "delay" a decision on the motion for adoption of emergency rules "to allow for the submission of alternative emergency rules." MotD.2 at 4. On May 17, 2004, the Agency filed an amended motion for the adoption of emergency rules (Am.Mot.). On May 18,

[1] CW^{3}M points out that on January 23, 2003, CW^{3}M filed an action in the Circuit Court of Sangamon County seeking declaratory judgment and mandatory injunction. Resp. at 1, citing CW^{3}M Company, Inc. v. IEPA, Case No. 03-MR-0032. CW^{3}M appealed an Agency denial of a Freedom of Information Act request concerning the rate sheets and CW^{3}M sought the invalidation of the use of the rate sheets. *Id*. CW^{3}M's complaint was set for trial on April 21, 2004. United Science and Pipe both indicate that, on the Agency's motion and based on Illinois Ayers Oil Company v. IEPA, PCB 03-214 (Apr. 1, 2004), the circuit court declared the matter moot and instructed the Agency to stop using the rate sheets. Resp.3 at 3; Resp.4 at 4.

2004, PIPE filed a response to the amended motion supporting the Agency's motion for emergency rulemaking (Am. Resp.1). On May 19, 2004, CW^{3}M filed a response which joined in the response of PIPE to the Agency's amended motion for emergency rules, and withdrew its prior objection to adoption of emergency rules (Am. Resp.2). Also, on May 19, 2004, United Science Industries (USI) withdrew its response to the Agency's April 19, 2004 motion for emergency rulemaking (Am. Resp.3). Finally, on June 2, 2004, the Consulting Engineers Council of Illinois (CECI) filed its response to the Agency's April 19, 2004 motion for emergency rulemaking (Am. Resp.4).

For the reasons discussed below, the Board denies the Agency's motion for adoption of emergency rules. First, the Board will summarize the arguments in the Agency's motion to adopt emergency rules, and then the Board will summarize the response from IERG. The Board will not summarize the responses of PIPE, CW^{3}M, and USI to the Agency's original motion for emergency rulemaking since PIPE and CW^{3}M now support the Agency's amended motion, and United Science has withdrawn its response. The Board will then summarize the Agency's amended motion for emergency rulemaking and the response from PIPE, USI and CECI. Finally, the Board will review the legal framework for emergency rulemaking before discussing the Board's findings in ruling on this motion.

MOTION FOR EMERGENCY RULES

The Agency's April 19, 2004 motion urges the Board to adopt an emergency rule pursuant to Section 27 of the Environmental Protection Act (Act) (415 ILCS 5/27 (2002)), Section 5-45 of the Administrative Procedure Act (APA) (5 ILCS 100/5-45 (2002)), and Section 102.612 of the Board's procedural rules. 35 Ill. Adm. Code 102.612. Mot. at 1. The Agency proposed that the Board adopt the text of the proposed amendments to Part 732, and the new Part 734 the Agency had proposed in January 2004, subject to some amendments contained in the motion. The Agency claims that the Agency is seeking an emergency rule so that the Agency may "review budgets and applications for payment from the Underground Storage Tank Fund (UST Fund)."

The Agency maintains that an emergency exists as a result of the Board's recent decision in Illinois Ayers Oil Company v. IEPA, PCB 03-214 (Apr. 1, 2004). In Illinois Ayers, the Board found that the Agency's rate sheet for professional services was an improperly promulgated rule. In the instant motion, the Agency argues that without the use of the rate sheet, there is no standard methodology for the Agency to use in determining whether costs are reasonable in UST Fund reimbursement cases. Mot. at 2. The Agency asserts that adoption of the emergency rulemaking proposal will allow the Agency to review budgets and applications for reimbursement. *Id*. Without the standard methodology the Agency argues that it cannot review budgets and applications for reimbursement other than those already approved before the Board's decision in Illinois Ayers. *Id*.

The Agency argues that emergency rules are appropriate because the Board has the authority to adopt emergency rules to address a situation that: "reasonably constitutes a threat to the public interest, safety, or welfare." Mot. at 2, citing 5 ILCS 100/5-45(a) (2002). The Agency asserts that the inability to approve budgets and application for payment from the UST Fund

constitutes an emergency. Mot. at 3. The Agency argues that the approval of budgets and payments from the UST Fund "drive[s] the remediation of leaking underground storage tank (LUST) sites." *Id*. The Agency maintains that if budgets and applications for reimbursement are not processed by the Agency, then "remediation of LUST sites will not proceed." *Id*. The Agency argues that the fact that unremediated sites poses a threat to the public interest, safety, or welfare, has been established by the fact that state and federal law requires remediation. *Id*. The Agency did not cite to any case law in support of its motion.

IERG's Response

IERG opposes the use of emergency rulemaking in this proceeding. Resp.2 at 4. IERG distinguishes between the content of the proposed emergency rules "which it does not necessarily oppose" (*id.*), and whether an emergency exists sufficient to justify use of the Board's emergency rulemaking authority. IERG argues that the administrative justifications propounded by the Agency are not sufficient to establish a threat to the public interest, safety, or welfare. *Id*. IERG notes that there are numerous cases that discuss the level of justification necessary to support emergency rulemaking. But, IERG points to the similarities between the facts in this proceeding and the facts in two recent appellate cases involving emergency rulemaking.

IERG first argues that the facts here are "strikingly similar" to those in the Senn Park Nursing Center v. Jeffrey C. Miller, 104 Ill. 2d 169, 480 N.E.2d 1029 (1984). Resp.1 at 4. In Senn Park, the appropriateness of an emergency rulemaking by the Illinois Department of Public Aid (DPA) was at issue. DPA had filed emergency rules to implement a reimbursement procedure for nursing homes after the circuit court had previously declared the DPA procedure an illegally promulgated rule. Senn Park, 104 Ill. 2d at 174. The court invalidated the rule stating that there was no emergency within the meaning of the APA. The court found that any 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. The Illinois Supreme Court affirmed this decision in its review of the case. Senn Park, 104. Ill. 2d at 186.

IERG next cites to Citizens for a Better Environment v. PCB, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987) (CBE). In CBE, petitioners challenged the existence of an emergency sufficient to support the Board's adoption of emergency rules implementing Section 39 (c) of the Act. That Section prohibited deposit of hazardous waste streams in permitted hazardous waste landfills without specific Agency authorization. The court stated that "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'." CBE, 152 Ill. App. 3d 105, 109. IERG additionally recites that "the court also noted the Board realized that the administrative problem could have been prevented and that the rules should have been promulgated years before." Resp.2 at 5, citing CBE, 152 Ill. App. 3d at 110.

In summary, IERG maintains that the Senn Park and CBE cases provide "meaningful" guidance to the Board with respect to what constitutes an emergency under the APA. Resp.2 at 5. IERG asserts that, here, as in Senn Park and CBE, there is no emergency. Until permanent

rulemaking is completed, IERG suggests that the best interim course of action for the Agency may be to rely on the "years of experience in determining the reasonableness of corrective action costs in reviewing budgets and applications for reimbursement." Resp.2 at 6.

AMENDED MOTION FOR EMERGENCY RULES

The Agency's May 18, 2004 amended motion for emergency rules requests that the Board adopt as emergency rules one new subsection at Section 732.505(d) and Section 732.Appendix D "Allowable Unit Rates." The Agency requests adoption of these rules in lieu of those proposed in its original April 19, 2004 motion. Am.Mot. at 4-8.

The Agency reiterates that emergency rules are needed to "provide a standard methodology for determining the reasonableness of costs" submitted to the Agency. Am.Mot. at 2. The Agency asserts that since the Illinois Ayers case, the Agency has "struggled to develop" a new method for reviewing the costs; however, the process has proven difficult. *Id*. The Agency has resumed processing budgets and applications on a case-by-case basis. *Id*. The Agency maintains that without rules to govern how to determine reasonableness of costs, the Agency's ability to control costs and maintain consistent and fair review is limited. *Id*. Without the emergency rule, the Agency argues that the UST Fund will "decrease at an even faster rate." Am.Mot. at 3. The Agency further asserts that rules will "provide some cost containment measures by establishing a benchmark for rates via a limited rate sheet and a nationally recognized construction cost manual." Am.Mot. at 3. The Agency's amended motion did not address any of the case law cited in IERG's response to the Agency's original motion.

PIPE's Response To The Amended Motion

PIPE indicates that it and its members have met with the Agency and the Agency's amended motion reflects those meetings. Am.Resp.2 at 1-2. PIPE states that based on the amended motion PIPE "withdraws its objection to emergency rulemaking and supports" the proposed Section 732.505(d). Am. Resp.2 at 2. PIPE further states that while PIPE does not agree that the Illinois Ayers decision justifies an emergency rule, the Agency's reaction to the decision and "the chaos which has resulted from" the Agency's inability to use the rate sheet, does justify an emergency rule. Am.Resp.2 at 2.

PIPE argues that emergency rulemaking is in the public interest because the emergency rule will resolve "an administrative dilemma and [the rule] sets forth public parameters that are intended to create stability for the UST Fund." Am.Resp.2 at 4-5. PIPE's major concern is that dollars be available from the fund to remediate contaminated sites in the State. Am.Resp.2 at 5. PIPE agrees with the Agency that the emergency rules are necessary while the regular rulemaking is pending to ensure that the Agency and applicants are under the same "rules of the game" when seeking reimbursement. Am.Resp.2 at 6.

PIPE notes that the Agency's original motion did not provide emergency justification however, PIPE asserts the proposed subsection (d) does provide emergency justification. Am.Resp.2 at 6. PIPE maintains that the justification is that the limited subsection will provide a specific public framework for the regulated community to know what standards the Agency uses

in reviewing reimbursement and budget requests. *Id*. PIPE argues that this situation is similar to other Board emergency rules wherein the Board "recognized that, in order to avert uncertainty in the administrative process" emergency rules were justified. Am.Resp.2 at 6-7, siting 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).

USI's Response to the Amended Motion

USI supports emergency rulemaking to adopt a new subsection 732.505 (d) that was introduced in the Agency's amended motion. Am.Resp.3. USI states that "this new subsection will provide the Agency with the regulatory framework it claims it needs in order to apply a standard method of reviewing budgets, corrective action plans and requests for reimbursement while the rulemaking process proceeds on its normal course before the Board." Am.Resp.3. USI believes that numerous conferences between PIPE and the Agency have resulted in a proposed section 732.505 (d) that is reasonable, practicable and workable, and therefore withdraw its prior objection to emergency rulemaking. *Id*.

CECI's Response to the Amended Motion

CECI's response supports adoption of the Agency's amended emergency proposal at the Board's meeting June 3, 2004. CECI states that it is one of the groups that met with the Agency, and that the amended proposal will "serve satisfactorily as an interim guide for the Agency's decisionmaking." Am. Resp.4 at 1. While CECI believes some aspects of the proposal "could be improved," it suggests that the Board adopt "emergency rules because it is in the public interest that the Agency be given formal guidelines for determining reasonableness of LUST costs for reimbursement purposes, and that those guidelines be known to all interested parties." Am. Resp. 4 at 2.

LEGAL FRAMEWORK

The Illinois Administrative Procedure Act (APA) sets forth the requirements for emergency rulemaking in Illinois (5 ILCS 100/5-1 *et seq.* (2002)). The Board's procedural rules concerning emergency rulemaking quote the APA. The APA defines an "emergency" as:

> the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare. 5 ILCS 100/5-45(a) (2002).

The courts have reviewed emergency rulemakings filed by agencies, including one case where the Board adopted an emergency rule. The Illinois Supreme Court in Senn Park found that an emergency rule adopted by the Illinois Department of Public Aid (DPA) was invalid because there was no emergency. The facts surrounding the adoption of the emergency rule by DPA are very similar to the facts in this proceeding. In Senn Park, the DPA's procedure for the reimbursement of Medicaid services was determined to be an invalid rule. Senn Park, 104 Ill. 2d 174. DPA then used the emergency rule process to amend the means by which nursing homes received Medicaid reimbursements. Senn Park, 104 Ill. 2d at 175. The court found that the

emergency rule was invalid. *Id*. at 184-85. The court found DPA's arguments unpersuasive including an argument that without the rule the State could lose matching federal funds.

The courts have also reviewed the Board's use of emergency rulemaking in CBE. In CBE, the appellate court found that the Board's rules, adopted as emergency rules, were invalid because there was no emergency. Specifically, in CBE, the Board had adopted emergency rules to implement the provisions of Section 39(h) of the Act (Ill. Rev. Stat. 1985 ch. 111 1/2 par. 1039(h)). Section 39(h) of the Act was enacted to prohibit the deposit of hazardous waste streams in permitted hazardous waste landfills unless the waste generators and site owners and operators obtain specific authorization from the Agency to do so. (Ill. Rev. Stat. 1985 ch. 111 1/2 par. 1039(h)), CBE at 504 N.E.2d at 168. The Board argued that the amendments were necessary to clarify Section 39(h) and reduce uncertainty in the industry. Further, the Board argued that the rules would lessen the number of potential appeals. The court was unpersuaded and found that none of these reasons constituted a threat to the public interest, safety, or welfare.

DISCUSSION

Before proceeding to a discussion on the merits of the motion, the Board will summarize the emergency rulemakings undertaken by the Board in the last 11 years. Then the Board will discuss the merits of the motion.

History of the Board's Recent Use of Emergency Rulemaking

Before proceeding with a discussion of the merits of the proposed emergency rule, the Board will review the recent history of emergency rulemaking before the Board. In the past eleven years the Board has entertained emergency rule proposals only a handful of times. Twice the Board adopted emergency rules to address waste left behind after the devastating flood of 1993. *See* Emergency Amendments to Landfill Rules for the On-Site Burial of Dead Animals in Flood-Disaster Counties, R93-25 (Sept. 23, 1993) and Emergency Amendments to the Open-Burning Rules, R93-15 (Aug. 20, 1993). The Board also adopted emergency livestock waste management rules. *See* Emergency Rulemaking: Livestock Waste Regulations 35 Ill. Adm. Code 505, R97-14 (Oct. 29, 1996 and Mar. 20, 1997). And the Board adopted two emergency rules addressing air pollution in the Metro-East area. *See* Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a), R95-10 (Feb. 23, 1995) and 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). The Board has also declined to proceed with an emergency rule proposal. *See* Revisions of Treatability Testing Exclusion Limits: Amendments to 35 Ill. Adm. Code 721.104(f)(3) through (f)(5), R94-18 (July 21, 1994).

With regards to the flood-related emergency rulemakings (R93-25 and R93-15), the Board noted that the sheer volume of waste created by the flood and potential health hazards to leaving the waste unmanaged resulted in a threat to the public interest safety and welfare. *See*, R93-25, slip op at 5; R93-15. slip op at 5. In R93-15 and R95-10, the Board found a threat to public interest because of the economic hardships that would be placed on businesses dispensing and producing gasoline in the Metro East area. *See* R93-15, slip op at 8; R95-10, slip op at 5.

The Board's reasons for emergency rulemaking in R97-14 were to alleviate a potential threat to public health and interest by adopting design standards for livestock management facilities at a time when such facilities had begun to proliferate in the State. *See* R97-14, slip op at 6.

Discussion of the Amended Motion for Emergency Rulemaking

In analyzing any request for emergency rulemaking, the Board must determine first whether an emergency within the meaning of the APA exists, and only second what the content of the emergency rule should be. Here, the Board's analysis begins and ends at the answer to the first question, and the Board need not address the content of the proposed emergency rules.

The Board has rarely used emergency rulemaking in the last 11 years. In each instance where the Board decided to proceed with the emergency rulemaking, a serious threat to the public existed. In this proceeding, the Board is not persuaded that a situation exists which "reasonably constitutes a threat to the public interest, safety, or welfare" (5 ILCS 100/5-45(a) (2002)). In fact the Board finds that the situation created by the Board's decision in Illinois Ayers and the resulting response of the Agency to that decision is completely analogous to the facts of CBE.

In CBE, the legislature added Section 39(h) of the Act (415 ILCS 5/39(h) (2002)) in 1981, although the section did not become effective until January 1, 1987. CBE, 504 N.E.2d at 168. On October 23, 1986, the Board adopted emergency rules. *Id*. at 169. The Board argued several reasons for the emergency which justified rulemaking under Section 5.02 of the APA (5 ILCS 100/5-02 (2002)). CBE, 504 N.E.2d at 169. First the Board argued that the emergency rules clarified the generally worded provisions of Section 39(h) and the clarification would reduce uncertainty in the regulated community. *Id*. The Board also argued that clarifying Section 39(h) would reduce appeals to the Board and ease the transition period when final rules are adopted. *Id*.

The court in CBE was not persuaded. The court noted that emergency rulemaking is justified "when there *exists* a situation which reasonably constitutes a *threat* to the public interest, safety or welfare." CBE, 504 N.E.2d at 169. The court went on to state:

> Stated differently, 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. Notwithstanding that the reason given by the Board to justify the invocation of emergency rulemaking would indeed ease in the implementation of Section 39(h) no facts have been presented to show that without the emergency rules the public would be confronted with a threatening situation. *Id.*

The court found that the Board had not established that ambiguity in Section 39(h) constituted a threat to the public. *Id*. The court further found that the Board's argument concerning the limiting of appeals also did not establish a threat to the public safety or welfare. *Id*.

In this instance, the threat to the public interest as argued by the Agency appears to be two-fold. First, the Agency argues the Agency cannot guarantee consistency in decisions without the emergency rule. Second, the Agency predicts the fund will be depleted at "an even faster rate." Am.Mot. at 2, 3. PIPE asserts that a threat to the public interest exists because of an "administrative dilemma." Am.Resp.1 at 4-5. Neither the Agency nor PIPE has supplied facts that establish a situation exists which "reasonably constitutes a threat to the public interest, safety, or welfare" (5 ILCS 100/5-45(a) (2002)). Prior to the Agency's use of the rate sheet, the Agency processed reimbursement and budget requests and the UST Fund survived. *See*, *e.g.*, Platolene 500, Inc. v. IEPA, PCB 92-9 (May 7, 1992); Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996); Riverview F.S. v. IEPA, PCB 99-227 (May 3, 2001); Rantoul Township High School Dist. No. 193 v. IEPA, PCB 03-42 (Apr. 17, 2003); and Riverview FS, Inc. v. IEPA, PCB 97-226 (May 3, 2001). Thus, the concerns about consistency and slowing depletion of the fund may be legitimate concerns, but do not constitute a *threat* to the public interest, safety or welfare.

Furthermore, as the court found in CBE, easing administration of the program while proceeding with permanent rules also does not constitute an emergency. In this case, adopting an emergency rule to assist the Agency in processing reimbursement and budget requests while the permanent rules are proceeding under the APA, does not amount to an emergency situation within the meaning of the APA. Therefore, the Board finds that there is no situation exists which "reasonably constitutes a threat to the public interest, safety, or welfare" (5 ILCS 100/5-45(a) (2002)) and the motion and amended motion are denied.

Finally, as a practical matter, the Board observes that the participants desire for administrative ease would likely not be guaranteed even if the Board were to grant the Agency's amended motion and today adopt the emergency rules proposed in the motion. The Board notes that it has already held three days of hearing in this matter, on March 15, 2004 and May 25-26, 2004. The Board has not yet heard testimony from the public or affected participants on the subject of the proposed rules. At the conclusion of the last hearing a new round of hearings was scheduled for the week of June 21, 2004, with an additional day scheduled for July 6, 2004. Under these circumstances, it is highly unlikely that the Board can propose a permanent rule for first notice and complete permanent rulemaking in this consolidated docket within the 150-day period in which any emergency rule adopted today would be in effect.

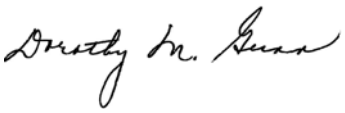
CONCLUSION

The Board has reviewed the APA and the recent history of emergency rulemaking before the Board, including court decisions in Senn Park and CBE. Based on the definition of "emergency" in the APA, as well as the ruling in Senn Park and CBE, the Board finds that the Agency has not demonstrated that a situation exists which is a threat to the public interest, safety, or welfare justifying an emergency rulemaking. Therefore, the Board denies the Agency's motion and amended motion for adoption of emergency rules in this proceeding. In so ruling, the Board makes no comment on the merits of the content of the rules proposed in the Agency's amended motion.

Hearings in this docket will continue as scheduled beginning June 21, 2004.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 3, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board