BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

VOGUE TYRE & RUBBER COMPANY, Petitioner,	)	
v.	)	PCB No. 96-10
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(UST Appeal)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Jeffrey E. Schiller
Schuyler, Roche & Zwirner
One Prudential Plaza
Suite 3800
130 East Randolph Street
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR LEAVE TO FILE INSTANTER and RESPONSE, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: July 30, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

VOGUE TYRE & RUBBER COMPANY, Petitioner,	)	
v.	)	PCB No. 96-10
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(UST Appeal)
Respondent.	)	

MOTION FOR LEAVE TO FILE INSTANTER RESPONDENT'S RESPONSE

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, hereby submits this motion for leave to file instanter the Illinois EPA's response to the Post-Hearing Brief filed by the Petitioner. In support of this motion the Illinois EPA states as follows:

1. The Illinois EPA's response was due on July 28, 2004. However, the undersigned attorney's ability to file this response on behalf of the Illinois EPA was dependent upon receipt of an annual appointment as a Special Assistant Attorney General ("SAAG") from the Illinois Attorney General's Office.

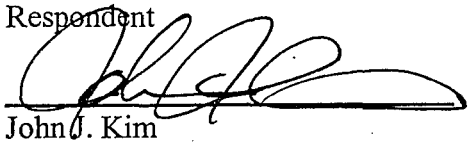
2. Due to apparent administrative delays, the undersigned attorney's appointment as a SAAG was not received until after 5 p.m. on July 29, 2004. This delay is regrettable, but should not prove to be prejudicial to the ultimate deliberation and resolution of the case, as the Petitioner has previously submitted an open waiver of the Board's decision deadline.

3. Further, the Illinois EPA has no objection to the Petitioner receiving at least an equal (if not additional) extension of time by which it may file its Reply, if any.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that this motion for leave to file instanter be allowed.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(UST Appeal)

RESPONSE TO PETITIONER'S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and pursuant to the Hearing Officer's order dated June 21, 2004, hereby submits its Response to the Petitioner's Post-Hearing Brief ("brief") to the Illinois Pollution Control Board ("Board").

I. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. An owner or operator of a leaking underground storage tank ("LUST") must prepare and submit a corrective action plan designed to mitigate any threat to human health, human safety or the environment resulting from the underground storage tank release. 415 ILCS 5/57.7(b)(2). The primary focus must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA. John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Thus the Petitioner, Vogue Tyre & Rubber Company ("Vogue"), must demonstrate to the Board that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review. Specifically in this case, Vogue must demonstrate that the release that apparently occurred at its facility is subject to the LUST program as set forth in Section XVI of the Environmental Protection Act ("Act") (415 ILCS 5/1, et seq.).

II. STANDARD OF REVIEW

Section 57.8(i) of the Act grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. Therefore, when reviewing an Illinois EPA decision on submitted technical plans or reports pursuant to the LUST program, the Board must decide whether or not the submissions demonstrate compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000). In this particular appeal, the Board must determine whether or not the facility is even subject to regulation pursuant to the LUST program.

The Board will not consider information that was not before the Illinois EPA prior to the issuance of its determination on appeal. The Illinois EPA's final decision frames the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4.

In considering whether the Illinois EPA's decision now under appeal was correct, the Board must look only to the documents within the Administrative Record ("Record"),

along with relevant and appropriate testimony provided at the hearing held in this matter.[1] Based on the information within the Record and the testimony, along with the relevant law, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

III. INTRODUCTION

Based upon the relevant facts and law, the Board should conclude that the Illinois EPA correctly determined that the documents submitted pursuant to Incident Number 942751 were not subject to regulation pursuant to the State's LUST program.

From January 1966 until July 7, 1995, Vogue owned a facility at 4801 Golf Road in Skokie, Cook County, Illinois. AR, p. 73; App., p. 64. Vogue owned or operated two 10,000-gallon gasoline underground storage tanks ("USTs" or "tanks") on this facility. The Office of the State Fire Marshal ("OSFM") assigned number 2-021982 to the facility. These USTs were removed on May 15, 1986. AR, pp. 73, 108.

On December 7, 1994, Vogue reported releases of gasoline from the 10,000 gallon USTs to the Illinois Emergency Management Agency ("IEMA"); IEMA assigned the releases Incident #942751. AR, p. 73. In the time between the removal of the tanks and the date the releases were reported, Vogue had a "mistaken belief" that gasoline had not leaked into the ground but rather had been stolen. Vogue later decided that this belief that gasoline had been stolen was a mistake, but that information and explanation as to the delay in reporting was never conveyed to the Illinois EPA in the documents in question. App., p. 48.

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[1] Citations to the Administrative Record will hereinafter be made as, "AR, p. ___." References to the transcript of the hearing will be made as, "TR, p. ___." Consistent with the abbreviation used in the Petitioner's brief, references to the Appendix to the brief will be made as, "App., p. ___." Included within the Appendix is Exhibit 1 offered at the hearing, consisting of the Petition. Also included in the Appendix is the transcript of the hearing, which includes a set of factual stipulations agreed upon by the parties.

Vogue then began corrective action and, in December 1994, submitted to the OSFM an Eligibility and Deductibility Application. AR, pp. 72-82. On February 1, 1995, the OSFM declared that since the two 10,000 gallon USTs were removed prior to September 24, 1987, they were ineligible for reimbursement pursuant to 415 ILCS 5/57.9 and 430 ILCS 15/4. AR, pp. 83-85. Vogue appealed OSFM's decision to the Board on March 6, 1995. On December 5, 2002, the Board found in favor of the OSFM. App., pp. 19-23. On February 26, 2003, Vogue appealed the Board's decision to the Illinois Appellate Court for the First District ("OSFM appeal") (Vogue Tyre & Rubber Company v. Office of the State Fire Marshal, Appellate Court No. 03-0521). That case is still pending. Vogue's Post-Hearing Brief ("Brief"), p. 3.

Vogue also submitted numerous reports to the Leaking Underground Storage Tank section of the Illinois EPA for review. The Illinois EPA received Vogue's 20-Day Report, 45-Day Report, Site Classification Completion Report, and Corrective Action Plan on April 3, 1995, Vogue's Corrective Action Completion Report on May 2, 1995, and Vogue's Site Classification Work Plan and Budget on May 19, 1995. AR, pp. 97-224; App., pp. 13, 66.

On June 15, 1995, the Illinois EPA issued a final decision in a letter denying Vogue Tyre's reports, stating that because the tanks at issue were removed in the mid-1980s, they were not subject to regulation and remediation by the Illinois EPA. App. Pp. 13-15. That final decision is the decision now under review.

IV. THE ISSUES IN THE OSFM APPEAL ARE SEPARATE

The Petitioner notes that the issue regarding whether the USTs were properly registered is now pending before the appellate court, and thus is not discussed in the

Petitioner's Brief. Petitioner's Brief, p. 4. The Illinois EPA agrees that the issues in that matter are distinct from the appeal at hand, but also wishes to clarify a statement made by the Petitioner related to the OSFM appeal. The Illinois EPA has not based any arguments in prior pleadings on the Board's decision in the OSFM case. The Illinois EPA and OSFM play separate roles and apply different statutory and regulatory provisions in the implementation of the LUST program, though those roles act in concert with one another.

It is OSFM that issues findings of eligibility and deductibility, and the Illinois EPA reviews submissions regarding corrective action and requests for reimbursement. As Section 57.5(e) of the Act (415 ILCS 5/57.5(e)) provides, it is conceivable that the an owner or operator of an underground storage tank may not be eligible for reimbursement yet is still obligated to perform corrective action as required by the Act. Thus, a finding of ineligibility for reimbursement is not tantamount to a finding of no liability pursuant to the other provisions of Title XVI of the Act.

V. VOGUE IS NOT SUBJECT TO THE LUST PROGRAM

For several reasons, the Board should affirm the Illinois EPA's finding that Vogue is not subject to the LUST program. To find otherwise would require a retroactive application of the law, which is improper both legally and for policy reasons. Vogue's argument that it has complied with the eligibility requirements presumes it is subject to the LUST program, an obstacle it cannot overcome.

A. The Illinois EPA's denial of Vogue's reports should be upheld because the tanks at issue were removed prior to the date the LUST program became effective

Simply put, the Illinois EPA lacks regulatory authority over Vogue's 10,000-gallon tanks because the tanks were removed prior to the effective date of the LUST program. The Board has recognized that when a statute involves "prior activity or a

certain course of conduct...the applicable law is the statute in place at the time of tank removal." Chuck and Dan's Auto Service v. Illinois Environmental Protection Agency, PCB 92-203 (August 26, 1993). The only relevant law is the one in place at the time the conduct actually occurred, regardless of whether or not the course of conduct was discovered or reported after the statute or amendment became effective. Id.

This same concept applies to the Illinois EPA's denial of Vogue Tyre's reports. Here, Vogue Tyre removed the 10,000-gallon tanks in May of 1986. Following the Board's decision in Chuck and Dan's, the law governing this removal is the statute that was in place at the time of removal in that same year. The earliest version of Illinois's LUST program, though, did not become effective until July 1, 1986, several months after the tank removal. See, P.A. 84-1072, sec. 1, adopting Section 1022.12 of the Act (Ill. Rev. Stat. Ch. 111 ½, par. 1022.12) (1987), effective July 1, 1986.

That the LUST program was effective only several months (as opposed to several years) after the USTs were removed is relevant to the extent that the removal predated the effective date of the LUST program by any time. At the time of the tanks' removal, there simply was no LUST program in effect as now found in the Act. The LUST program therefore cannot be applied to Vogue Tyre's tank removal, meaning the Illinois EPA has no regulatory authority to require remediation of releases from such tanks or review related reports. Lacking such authority, the Illinois EPA's denial of Vogue Tyre's reports was valid. For this reason, the Board should find that the Illinois EPA properly rejected the technical plans and reports.

B. The Illinois EPA's final decision should be upheld since applying the LUST program to Vogue would constitute retroactive statutory application

The Illinois EPA cannot regulate Vogue Tyre's 10,000-gallon tanks because to do so would constitute retroactive statutory application. The Illinois Supreme Court has recently addressed the issue of retroactive statutory application, and its clear guidance further supports the Illinois EPA's final decision under appeal.

In the case of Caveney v. Bower, 207 Ill.2d 82, 797 N.E.2d 596 (2003), the court considered arguments related to retroactive application of law. The court noted that in the case of Commonwealth Edison Co. v. Will County Collector, 196 Ill.2d 27, 38, 749 N.E.2d 964, 971 (2001), it first adopted the United States Supreme Court's retroactivity analysis as set forth in the case of Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1994). Caveney, 207 Ill.2d at 91, 797 N.E.2d at 601.

Under the Landgraf analysis, the first question is whether the legislature has clearly indicated the "temporal reach" of an amended statute. If so, then absent a constitutional provision, that expression of legislative intent must be given effect. If not, then the court must determine whether applying the statute would have a retroactive impact (i.e., whether it would impair rights possessed when the party acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed). If there would be no retroactive impact, then the amended law may be applied retroactively. If there would be a retroactive impact, however, then the court must presume that the legislature did not intend that it be so applied. Id.

The court went on to state that it had recently acknowledged in another case, People v. Glisson, 202 Ill.2d 499, 782 N.E.2d 251 (2002), that the legislature has clearly indicated the "temporal reach" of every amended statute by virtue of section 4 of the Statute on Statutes. Caveney, 207 Ill.2d at 92, 797 N.E.2d at 601. Applying its holding

in Glisson, the court held that section 4 represented a clear legislative directive as to the temporal reach of statutory amendments and repeals. Namely, that those amendments or repeals that are procedural in nature may be applied retroactively, while those that are substantive may not. Id.

Therefore, the court concluded that applying those relevant cases and their respective holdings, it is virtually inconceivable that an Illinois court (and here, the Board) will ever go beyond step one of the Landgraf approach. That deliberation should involve a determination of whether the amendment in question contains an "unequivocal expression of legislative intent" authorizing retroactive application. If the amendatory act does not contain such a clear indication of legislative intent, then the section 4 of the Statute on Statutes is the legislative indication that retroactive application of substantive statutory changes is forbidden. Caveney, 207 Ill.2d at 94-95, 797 N.E.2d at 603.

Here, there is absolutely no indication in either Section 57 of the Act (the amended portion of the Act) or Section 1022.12 (the first statutory amendment that created the LUST program) that the program was intended to be applied in a retroactive fashion. Even the Petitioner acknowledges that Section 57(a) of the Act does not explicitly state that it applies to a release that took place prior to the effective date of the LUST program. Petitioner's Brief, p. 6. More specifically, the Illinois EPA's position is that there is no language anywhere in Section 57 of the Act that indicates it is intended to apply retroactively to underground storage tanks that were not in existence at the time of the amendment that created the LUST program.

A similar situation was encountered in the case of OK Trucking Company v. Armstead, 274 Ill. App. 3d 376, 653 N.E.2d 863 (1st Dist. 1995). There, a party sought to

register underground storage tanks that had been removed from the ground prior to the time of the requested registration. The court held that no such registration was possible since the tanks in question did not meet the unambiguous federal definition of underground storage tank; namely, the tanks in question did not exist. OK Trucking, 274 Ill. App. 3d at 380, 653 N.E.2d at 865-866. Those definitions relied upon by the appellate court are the same as now found in Section 57.2 of the Act (415 ILCS 5/57.2). The court ruled that if the General Assembly had intended to regulate former underground storage tanks, it was confident that it would have clearly indicated such intent. However, the court found no evidence of any such intent. OK Trucking, 274 Ill. App. 3d at 380, 653 N.E.2d at 866.

Therefore, the Illinois Supreme Court's guidance should be followed, and given that there is no language in any portion of Title XVI of the Act that evidences a legislative intent that the program be applied retroactively, and since Title XVI is definitely a substantive (versus procedural) amendment to the Act itself, the Board should accept the Illinois EPA's argument that application of the LUST program to Vogue in this specific situation would constitute an improper retroactive application of law.

C. Vogue's arguments are without merit and lack factual and legal support

Vogue argues in its brief that language within Title XVI of the Act supports a finding that the LUST program applies to a release from tanks that were removed before the effective date of the program itself. In support of that contention, Vogue notes that Section 2(a)(iv) and 2(a)(v) of the Act (415 ILCS 5/2(a)(iv),(v)) provide that it is the obligation of State government to afford financial assistance in preventing environmental damage and private as well as governmental remedies must be provided to increase

public participation in the task of protecting the environment. Further, Vogue cites to the intent and purpose provisions of Title XVI of the Act. Petitioner's Brief, pp. 6-7.

While that language does accurately express the purpose of the Act in general, and Title XVI of the Act in particular, to assist in, encourage, and foster the cleanup of contaminated sites and property, it does not contain the specific legislative intent that the Act and its provisions are to applied in a retroactive fashion. Indeed, the predicate for all of the arguments of the Petitioner is that there must have been an underground storage tank meeting the statutory definition found in Section 57.2 of the Act in existence at some relevant date or time. By their own admission, Vogue removed the USTs prior to the effective date of the LUST program. That so, it could not and cannot now convincingly represent that those tanks were or are subject to the program.

Another argument advanced by the Petitioner is that the case of ChemRex, Inc. v. Pollution Control Board, 257 Ill. App. 3d 274, 628 N.E.2d 963 (1st Dist. 1993), is directly analogous and weighs in favor of Vogue. A simple reading of that case, however, reveals that if anything, ChemRex supports the Illinois EPA's final decision.

In ChemRex, an owner/operator of an underground storage tank that properly registered the tanks and was subject to the LUST program challenged an attempt by the Illinois EPA to retroactively apply an amendatory provision of the Act. The appellate court stated that as a general rule of statutory construction in Illinois, an amendatory act is to be construed as prospective only. ChemRex, 257 Ill. App. 3d at 278-279, 628 N.E.2d at 966. In reviewing the actions taken by the Illinois EPA in that case, the court found that the retroactive application of the statutory amendment in question was an abuse of discretion. ChemRex, 257 Ill. App. 3d at 280, 628 N.E.2d at 967.

Factually, the ChemRex case is distinguishable from the present situation, in that the owner/operator of the UST in question was without question subject to the LUST program. Further, the owner/operator there had properly registered the tanks in question. Here, it is disputed as to whether Vogue is subject to the LUST program, and Vogue has not properly registered its tanks in question. Thus, on those grounds the court's finding that eligibility for reimbursement from the Underground Storage Tank Fund ("Fund") should have been determined as of the time when the owner/operator notified the state agencies of the release is inapplicable, since there was no dispute the owner/operator was subject to the LUST program.

Legally, though, the fundamental statements of law cited to by the court are most relevant, in that the court recognized that as a general rule, statutory amendments in Illinois (e.g., the adoption of the LUST program into the Act) are to be applied prospectively only. The court did not find any statutory language that indicated a legislative intent that the LUST program, or any provisions therein, be applied in a retroactive fashion. Even though ChemRex was decided before the Illinois Supreme Court's most recent discourse on retroactive application (in Caveney), the appellate court did properly cite to the general principle regarding prospective application. Further, the appellate court did not find any legislative intent in the statutory provisions of the LUST program (or the Act) allowing for retroactive application of amendments.

Finally, Vogue argues that "it cannot be clearer that Section 57.9" of the Act (415 ILCS 5/57.9) applies to notifications and corrective actions taken after the date of the enactment. Unfortunately, the Petitioner does not point to any specific language in that provision that is consistent with that contention. Again, if Vogue did not have any USTs

in existence at the time the LUST program became effective, then it did not have any underground storage tank that met the definition such that it would be subject to the provisions of the LUST program. It is impossible for Vogue to claim it met all of the eligibility requirements in Section 57.9 of the Act if it never had an underground storage tank in existence at any time the LUST program was effective. For that reason alone, the Board should affirm the Illinois EPA's final decision.

D. The Illinois EPA's final decision is consistent with public policy

The LUST program should not be applied to the tanks removed prior to the effective date of the LUST program as a matter of public policy. The tanks were not subject to regulation under the LUST program when they leaked or when they were removed, and they should not be subject to regulation now. Had Vogue discovered the releases at the time the USTs were removed, the provisions of the LUST program would not have applied since there was no LUST program to speak of.

If the Board were to accept Vogue's claim that the USTs not in existence at the time of the effective date of the LUST program are nonetheless subject to the LUST program, any past owner or operator of such an underground storage tank would be subject to the corrective action provisions now found in Title XVI of the Act. Although Vogue is presenting itself as a willing party, others in that situation may not be so eager to concede such obligations. Further, since Vogue's tanks were removed prior to the effective date of the LUST program, and the related provisions regarding payment of fees into the Fund, Vogue would be availing itself of a pool of money to which it never contributed as part of the LUST program.

Further, to require that the Illinois EPA accept the plans and reports submitted by Vogue would effectively reward them for belated conduct and activity in that they would potentially be able to seek reimbursement from the Fund. To allow an owner or operator that would not have qualified for eligibility under the LUST program due to removal of tanks prior to the effective date of the LUST program itself to nonetheless "backdoor" themselves into eligibility by reporting a suspected release after the effective date of the program simply allows the owner or operator a benefit (i.e., reimbursement of costs) to which they were never entitled. The Illinois EPA has recognized that its authority has limitations that must be respected, and similarly the Board should make clear to the Petitioner that there are certain limitations to the Fund that cannot be circumvented.

While the Petitioner has stated it had a "mistaken belief" for not making a timely report of the release or submitting plans and reports, the Petitioner acknowledges that "mistaken belief" was never conveyed to the Illinois EPA. Therefore, based upon the documents and information before it at the time of its decision, the Illinois EPA had no reason to believe there was any justification or explanation for the delay of several years between the removal of the tanks and the subsequent report of a release. If the owner or operator of an underground storage tank that was removed even in the 1960s now finds evidence of petroleum contamination at the site, Vogue would have the Illinois EPA accept that owner or operator stepping forth to be able to claim reimbursement for any corrective action taken in association with that contamination. The fact pattern is identical to the situation here: Tanks were removed before the effective date of the LUST program, the tanks were not in existence at any effective time of the LUST program, and yet an owner/operator seeks to avail itself of reimbursement from the Fund.

Admittedly, that party would also conceivably have to perform all necessary work, but it still would result in the application of a law that was not in effect at the time the subject of the law (i.e., underground storage tanks) were in existence.

VI. CONCLUSION

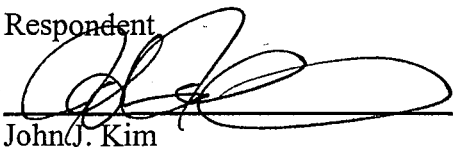
Vogue's plans and reports were not subject to review by the Illinois EPA under the LUST program since the subject tanks were not subject to the LUST program. The removal of the 10,000-gallon tanks was subject to the law in existence at the time the tanks were removed, and that excludes the LUST program. Consequently, the 10,000-gallon tanks, as well as any substances released from such tanks, are not subject to the LUST program or to Illinois EPA regulation pursuant to the LUST program.

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision under appeal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent,



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: July 30, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on July 30, 2004, I served true and correct copies of a MOTION FOR LEAVE TO FILE INSTANTER and RESPONSE, by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Jeffrey E. Schiller
Schuyler, Roche & Zwirner
One Prudential Plaza
Suite 3800
130 East Randolph Street
Chicago, IL 60601

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
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