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MAR 21 2001

STATE OF ILLINOIS
Pollution Control Board

601 WEST MONROE STREET, SPRINGFIELD, IL 62704
TELEPHONE (217) 525-0700 FAX (217) 525-2171

March 20, 2001

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

P.C.#1

Via FedEx - Overnight

Re: R01-26 (Rulemaking-Land)

Dear Ms. Gunn:

Enclosed for filing in the above Rulemaking are one original and nine copies of the following: Appearance


Motion to Oppose Certain Proposed Amendments of the Environmental Protection Agency's Proposal to Amend 35 Ill. Ad. Code 732

Memorandum of Law in Support of the Motion to Oppose Certain Proposed Amendments of the Environmental Protection Agency's Proposal to Amend 35 Ill. Ad. Code 732

Said copies are provided with the Notice of Filing and Certificate of Service.

Please file stamp the enclosed first page sheets for said documents and return them in the enclosed self-addressed stamped envelope. Thank you for your assistance.

Very truly yours,
Bruce S. Bonczyk, Ltd. Law Office



Bruce S. Bonczyk, P.E.

BSB:lew

cc: Mr. David Kennedy, CECI
Mr. Gary Crites, ISPE

Enclosures

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MAR 21 2001

STATE OF ILLINOIS
Pollution Control Board

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO) R01-26
REGULATION OF PETROLEUM) (Rulemaking - Land)
LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE 742))

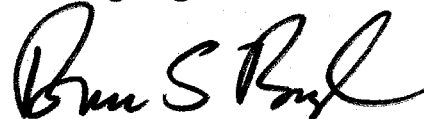
NOTICE OF FILING

TO: Ms. Dorothy M. Gunn	Mr. Joel J. Sternstein
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	James R. Thompson Center
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, IL 60601	Chicago, IL 60601
(Via FedEx - Overnight)	(Via FedEx - Overnight)

All Other Persons on the Attached Service List via U. S. Mail

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Appearance, Motion to Oppose Certain Proposed Amendments of the Environmental Protection Agency's Proposal to Amend 35 Ill. Ad. Code 732, and Memorandum of Law in Support of the Motion to Oppose Certain Proposed Amendments of the Environmental Protection Agency's Proposal to Amend 35 Ill. Ad. Code 732, in the above entitled matter, copies of which are hereby served upon you.

Respectfully submitted,
Illinois Society of Professional Engineers
Consulting Engineers Council of Illinois.



Bruce S. Bonczyk, One of their Attorneys

Dated: March 20, 2001

THIS FILING SUBMITTED ON RECYCLED PAPER

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Service List Attached

MAR 21 2001

STATE OF ILLINOIS
Pollution Control Board

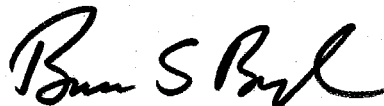
BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO) R01-26
REGULATION OF PETROLEUM) (Rulemaking - Land)
LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE 742))

APPEARANCE

The undersigned hereby enters his appearance as attorneys on behalf of the ILLINOIS SOCIETY OF PROFESSIONAL ENGINEERS and THE CONSULTING ENGINEERS COUNCIL OF ILLINOIS.

Respectfully submitted,
Illinois Society of Professional Engineers
Consulting Engineers Council of Illinois.



Bruce S. Bonczyk, One of their Attorneys

Dated: March 20, 2001

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MAR 21 2001

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

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO) **R01-26**
REGULATION OF PETROLEUM) **(Rulemaking - Land)**
LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE 742))

MOTION TO OPPOSE CERTAIN PROPOSED AMENDMENTS
OF THE ENVIRONMENTAL PROTECTION AGENCY'S
PROPOSAL TO AMEND 35 ILL. ADM. CODE 732

NOW COMES the Illinois Society of Professional Engineers ("ISPE") and the Consulting Engineers Council of Illinois ("CECI"), by and through their attorney, Bruce S. Bonczyk, of Bruce S. Bonczyk, Ltd., and requests that the Illinois Pollution Control Board ("Board") strike certain proposed amendments to the Environmental Protection Agency's proposal to amend 35 Ill. Adm. Code 732, and in particular, all references and additions to the proposed amendments which relate to "Licensed Professional Geologists". In support of their motion, ISPE and CECI state as follows:

The Illinois Environmental Protection Agency ("Agency") has exceeded the authority of its rulemaking powers by including in this proposed amendment the addition of the definition of "Licensed Professional Geologist", 35 Ill. Adm. Code 732.103, and the inclusion throughout 35 Ill. Adm. Code 732 of the use of Licensed Professional Geologists to perform functions assigned to Licensed Professional Engineers by the provisions of The Environmental Protection Act, Title XVI, Petroleum Underground Storage Tanks, 415 ILCS 5/57 et. seq. ("Act"). ISPE and CECI assert the provisions of the Act are silent as to the inclusion of Licensed Professional Geologists in the statutory language, and thus, the Agency has insufficient statutory authority as a matter of law to include such profession via its rulemaking process or by agreement with the Licensed Professional Geologists.

Further, ISPE and CECI object to the Testimony of Doug Clay in Support of the Environmental Protection Agency's Proposal to Amend 35 Ill. Adm. Code 732. With respect to said testimony, ISPE and CECI object to the inclusion by the Agency of amendments throughout 35 Ill. Adm. Code 732 regarding Licensed Professional Geologists. As stated in Mr. Clay's testimony, no changes have been made to the Act which provide for such services or certification to be made by Licensed Professional Geologists. Thus, Mr. Clay's testimony recommending language to include Licensed Professional Geologists should be stricken with respect to this issue as the Illinois General Assembly has not provided specific authority or standards to empower the Agency to act to include a licensing act provision enacted well after subsequent legislative amendments.

Further, ISPE and CECI object to the Pre-Filed Testimony of Ron Dye of the Illinois Chapter, American Institute of Professional Geologists, in this matter, with respect to the inclusion of the phrase "or Licensed Professional Geologist" in Section 732.409(a)(2) and 732.307(g)(5). No changes have been made to the Act which provide for such services or certification to be made by Licensed Professional Geologists. Thus, Mr. Dye's testimony should be stricken with respect to this issue as the Illinois General Assembly has not provided specific authority or standards to empower the Agency to act to include a licensing act provision enacted well after subsequent legislative amendments.

Finally, ISPE and CECI object to the Testimony of Kenneth W. Liss and request it be stricken in its entirety. Mr. Liss requests the Agency remove all references to Licensed Professional Engineers from the proposed amendments, and only add in these amendments references to Licensed Professional Geologists. Mr. Liss' request is totally unfounded and lacks statutory authority, and on its face as a matter of law must fail.

In support of this motion, ISPE and CECI are filing concurrently a Memorandum of Law regarding the lack of statutory and rulemaking authority of the Agency to include throughout this proposed amendment any and all references to Licensed Professional Geologists. This Memorandum of Law is incorporated in this Motion as if set forth fully within.

WHEREFORE, ISPE and CECI respectfully request the Board to strike from the proposed amendments to 35 Ill. Adm. Code. 732, any and all references to Licensed Professional Geologists throughout the proposed amendment rulemaking, and in particular Sections 732.103, Section 732.307, Section 732.312, Section 732.601, and any other sections in which such references are contained.

Respectfully Submitted;
Illinois Society of Professional Engineers
Consulting Engineers Council of Illinois

By: 
One of Their Attorneys

Date: March 20, 2001

Bruce S. Bonczyk
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MAR 21 2001

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

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO) R01-26
REGULATION OF PETROLEUM) (Rulemaking - Land)
LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE 742))

**MEMORANDUM OF LAW IN SUPPORT OF THE
MOTION TO OPPOSE CERTAIN PROPOSED AMENDMENTS
OF THE ENVIRONMENTAL PROTECTION AGENCY'S
PROPOSAL TO AMEND 35 ILL. ADM. CODE 732**

The Illinois Society of Professional Engineers ("ISPE") and the Consulting Engineers Council of Illinois ("CECI"), by and through their attorney, Bruce S. Bonczyk, of Bruce S. Bonczyk, Ltd., has moved the Illinois Pollution Control Board ("Board") to strike certain proposed amendments to the Illinois Environmental Protection Agency's ("Agency") Proposal to Amend 35 Ill. Adm. Code 732, and in particular, all references and additions to the proposed amendments which relate to "Licensed Professional Geologists". In support of their motion, ISPE and CECI provide the Board this Memorandum of Law.

Factual Background

On or about December 5, 2000, the Agency filed a Motion for Acceptance that the Board accept for hearing the Agency's proposal for amendment of 35 Ill. Adm. Code 732. The Board accepted said matter for hearing on or about December 21, 2000, and by hearing Officer order dated January 29, 2001, issued its Notice of Hearings. On or about February 16, 2001, the Agency file a Motion to Amend Agency proposal Amending 35 Ill. Adm. Code 732. On February 27, 2001, the Board held its first hearing regarding this matter. The second hearing is scheduled for April 3, 2001.

THIS FILING IS SUBMITTED ON RECYCLED PAPER

The Agency's proposed amendments to the rules are intended to clarify and refine certain provisions, taking into consideration the experience the Agency has gained in administering said rules. The proposed amendments encompass Sections 57- 57.17 of the Environmental Protection Act, 415 ILCS 5/57 - 57.17, commonly known as the regulation of Petroleum Leaking Underground Storage Tanks ("LUST"). The sections pertaining to LUST were added by Public Act 88-496, Section 15, effective September 13, 1993. Those provisions were amended by Public Act 89-428, Section 395, effective January 1, 1996, subsequently found to be in violation of the single subject requirements of the Illinois Constitution. Public Act 89-457, Article 3, Section 395 contained identical amendments, and reenacted the amendment of the text contained in Public Act 89-428, effective May 22, 1996.

The original enacting legislation, and subsequent amendments to such legislation, contained only references to Licensed Professional Engineers in the definitional and operational sections of the legislation. The Board adopted regulations implementing the legislation effective September 23, 1994, and also amended regulations effective July 1, 1997, both of which contain only references to Licensed Professional Engineers for both definitional and operational purposes.

The Professional Geologist Licensing Act was enacted by Public Act 89-366, effective July 1, 1996. The effective date of this act is after the effective date of the LUST enacting legislation and subsequent amendatory legislation, although the Professional Geologist Licensing Act was enacted prior to the amendatory LUST legislation contained in Public Acts 89-428 and 89-457.

Legal Argument

ISPE and CECI believe the longstanding rule of law in Illinois precludes the Agency and Board from including references to "Licensed Professional Geologists" into the proposed amendments to the LUST regulations. An administrative agency has only such authority as is conferred by express provisions of law or is found, by fair implication, to be

incident to the express authority conferred by such legislation. People of the State of Illinois v. Hall, 314 Ill. App.3d, 688, 732 N.E.2d 742, 247 Ill. Dec. 687 (4th Dist. 2000); R. L. Polk & Co. v. Ryan, 296 Ill. App.3d 132, 230 Ill. Dec. 749, 694 N. E.2d 1027 (1998); Village of Lombard v. Pollution Control Board, 66 Ill.2d 503, 363 N.E.2d 814, 6 Ill.Dec. 867 (1977), State Disbursement Unit for Child Support - Recovery of Emergency Payments, 2000 WL 640226 (Ill. A. G.).

ISPE and CECI do not challenge the Board's rulemaking authority. Specifically, ISPE and CECI challenge the inclusion of language incorporating Licensed Professional Geologists into the proposed rulemaking as being without a statutory basis, and hence, beyond the Board's incidental reach of rulemaking authority. The issue is one of statutory construction, and therefore, the intent of the legislature must be given effect. Ogle County Board v. Pollution Control Board, 272 Ill. App.3d 184, 649 N.E.2d 545, 208 Ill. Dec. 489 (2nd Dist. 1995). Such inquiry properly begins with the language of the statute. State Farm Fire & Casualty Co. v. Yapejian, 152 Ill.2d 533at 541, 605 N.E.2d 539, 178 Ill. Dec. 745 (1992).

On its face, the LUST legislation only refers to Licensed Professional Engineers. Further, an examination of the legislation provides no other guidelines or standards upon which the Agency or Board may conclude that Licensed Professional Geologists are equally charged by the General Assembly to provide the enumerated services in the statute, thus rendering the proposed promulgation of such rules to include licensed geologists to likely be invalid. In order to support such a delegation through rulemaking, the statute must contain standards to guide the agency charged with implementing the statute. Village of Lombard, Id. at 870.

The express enacting legislation and amendatory legislation for the LUST program is silent as to the inclusion of Licensed Professional Geologists. This is true even though the Professional Geologists Licensing Act (P.A. 89-366) was adopted into law prior to the amendatory legislation affecting the LUST program (P.A. 89-428 and 89-457). The presumption exists that the General Assembly in formulating the subsequent changes to the

LUST legislation was aware of the Professional Geologists Licensing Act, and chose not to include said professionals into the LUST amendments.

The LUST legislation specifically defines the term “Licensed Professional Engineer”. 415 ILCS 5/57.2. No definition for Licensed Professional Geologists is contained in the legislation. The legislation is also specific as to the operations and certifications by Licensed Professional Engineers, for example, as contained in 415 ILCS 5/57.7, including “physical soil classifications”. The Professional Engineering Practice Act expressly includes soil classifications as an example of professional engineering practice. 225 ILCS 745/15. The Professional Geologist Licensing Act does not include any references to soil classifications in the examples of professional geology. 225 ILCS 325/4. Therefore, beyond the express absence of Licensed Professional Geologists in the legislation, it is apparent on its face the General Assembly did not intend the “physical soil classifications” of the LUST legislation to be performed by geologists. Such operations were excluded from the geologists licensing act, but were reserved specifically for professional engineers in their practice act and the LUST legislation.

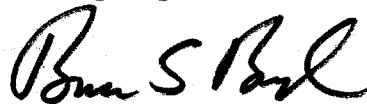
Beyond legal issues, there are practical problems with the proposed inclusion of Licensed Professional Geologists in the proposed rules. Throughout the LUST legislation, specific references to the use of Licensed Professional Engineers are contained. The legislation embodies a provision which creates a presumption against liability for the Professional Engineers’ certifications pursuant to the statute. 415 ILCS 5/57.10. As proposed by this rule, the inclusion of Licensed Professional Geologists in Section 732.402 will disrupt the General Assembly’s scheme for presumption against liability, as this specific law contains no reference to Licensed Professional Geologists, thereby detrimentally affecting the viability of the certification and the ability to ensure protection to owners, operators, heirs, etc. The Agency’s issuance of a no further remediation letter will be of no effect if based upon the certification of a Licensed Professional Geologist as there will be no statutory basis for the protection afforded by said letter.

For the above going reasons, ISPE and CECI also suggest to the Agency and Board

that the testimony of Mr. Doug Clay, Mr. Ron Dye and Mr. Kenneth Liss is without weight or merit with respect to the inclusion of Licensed Professional Geologists in the proposed amendments. The lack of express language in the LUST provisions and a lack of standards enumerated by the General Assembly in the law preclude the suggested references to Licensed Professional Geologists, and thus the testimony of the above parties should be stricken as without a legal basis, and no weight with respect to the referenced testimony be afforded by the Board.

ISPE and CECI respectfully request the Board to strike any references to "Licensed Professional Geologists" from the proposed rulemaking on the grounds that: there is no express statutory provision allowing for said inclusion; the General Assembly did not intend for the Agency and Board to include licensed geologists in addition to licensed professional engineers; the plain language of the statute does not include licensed geologists nor standards to discern the inclusion of said geologists; and practical difficulties at odds with provisions of the statute would be created.

Respectfully submitted,
Illinois Society of Professional Engineers
Consulting Engineers Council of Illinois.



Bruce S. Bonczyk, One of their Attorneys

Dated: March 24, 2001

Bruce S. Bonczyk
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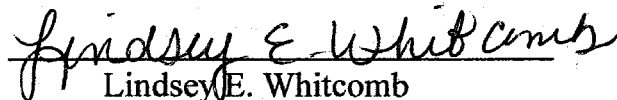
MAR 21 2001

STATE OF ILLINOIS
Pollution Control Board

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

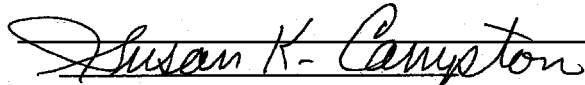
PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Appearance, Motion to Oppose Certain Proposed Amendments of the Environmental Protection Agency's Proposal to Amend 35 Ill. Ad. Code 732, and Memorandum of Law in Support of the Motion to Oppose Certain Proposed Amendments of the Environmental Protection Agency's Proposal to Amend 35 Ill. Ad. Code 732 upon the person to whom it is directed, by placing it in an envelope addressed to the person or persons on the Attached Service List, and mailing it from Springfield, Illinois on the 20th day of March, 2001, with sufficient postage affixed.


Lindsey E. Whitcomb

SUBSCRIBED AND SWORN TO BEFORE ME

this 20 day of March, 2001.


Notary Public



THIS FILING SUBMITTED ON RECYCLED PAPER

R01-26 SERVICE LIST
 In the Matter of: Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732
 Revised March 6, 2001

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R01-26 SERVICE LIST

In the Matter of: Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732
Revised March 6, 2001

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