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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAY 02 2001

IN THE MATTER OF:

AMENDMENTS TO REGULATION OF
PETROLEUM LEAKING UNDERGROUND
STORAGE TANKS:
35 ILL.ADM. Code 732

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STATE OF ILLINOIS
Pollution Control Board

R01-26

(Rulemaking - Land)

P.C. #7

NOTICE OF FILING

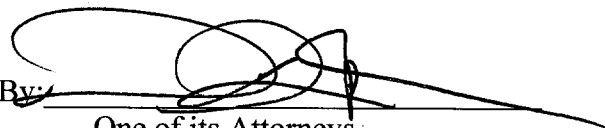
TO: Attached Service List

PLEASE TAKE NOTICE that on this date the undersigned caused to be filed with the Clerk of the Illinois Pollution Control Board, The Illinois Petroleum Council's Post Hearing Comments, a copy of which is attached hereto and hereby served upon you.

Dated this 2ndth day of May, 2001.

Respectfully submitted,

ILLINOIS PETROLEUM COUNCIL

By: 
One of its Attorneys

ROSS & HARDIES
David L. Rieser, Esq.
Brian Marquez, Esq.
150 N. Michigan Avenue, Ste. 2500
Chicago, Illinois 60601
(312) 558-1000

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THE ILLINOIS PETROLEUM COUNCIL'S
POST HEARING COMMENTS

The Illinois Petroleum Council ("IPC"), by and through its attorneys Ross & Hardies, files these comments in response to the hearings held before the Pollution Control Board regarding the above rulemaking. As it stated in its testimony, the IPC generally agrees with the proposal presented by the Illinois Environmental Protection Agency ("IEPA") and believes that most of the changes will improve the IEPA's Underground Storage Tank ("UST") program. The IPC testified, however, that the IEPA's proposal regarding off-site access should be handled differently and requests that the Board adopt the IPC's proposed language instead of that proposed by the IEPA.

In its initial Statement of Reasons and its draft regulations, the IEPA proposed that the Board delete and add language regarding the issuance of No Further Remediation ("NFR") letters at high priority sites when the UST owner or operator had not been able to obtain access to offsite properties potentially impacted by the UST release. The Board's rules had previously allowed the issuance of NFR letter to the owner/operator's site when the owner/operator had documented that it had been unable to obtain access to the off-site property. 35 Ill. Adm. Code 732.404(b)(1)(A). The IEPA modified its own policy so that it currently will not issue NFR letters with regard to the owner/operator's property if it cannot document that

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potentially impacted off-site properties are remediated as well, even if that owner/operator cannot obtain access. (T. 84, 85, April 3, 2001). In its Statement of Reasons and the prefiled testimony of Doug Clay (Exhibit 1) the IEPA indicated that it wanted to modify this rule because of the concern that owner/operators would collude with off-site property owners to avoid remediation and to provide more specific criteria for how owner/operators should document that they used their best efforts to obtain access to the off-site properties.

The language the IEPA proposed went much further. In Section 732.411, the IEPA sought to mandate the exact language of the letter that an owner/operator would send to obtain off site access by requiring the owner/operator to make numerous representations and legal conclusions. The IEPA also proposed that even if the owner/operator used its best efforts to obtain access by sending the mandated letter, that the IEPA could still refuse to issue an NFR letter to the owner/operator for its own site based on generalized site conditions. Thus, the IEPA significantly toughened the required letter but at the same time removed any standards as to whether it would issue an NFR letter even for property that had been documented to meet the Board's standards.

In its testimony and in response to questions, this issue became far murkier. The IEPA acknowledged that there had been very few instances of collusion and that their proposed language would not address collusion in any event. (T. 89-90, April 3, 2001) The IEPA also acknowledged that without proposing language to the Board, it had already modified its policy and practice to implement what is now its proposed language. (T. 84-85, April 3, 2001) Doug Clay acknowledged that the IEPA previously issued NFR letters even though the owner or operator had not remediated off site areas and then halted the practice, that the IEPA had announced the change on its website and then withdrew the announcement, but was continuing

to enforce the policy in its response to request for NFR letters. (T. 97-99, April 3, 2001) Mr. Clay stated that the reason for this IEPA policy change was a reinterpretation of the Act by the IEPA (T. 85, April 3, 2001) which was not included for the Board's consideration in the IEPA's Statement of Reasons or its testimony.

In evaluating modifications to existing regulations, the Board should always examine the actual experience and practice of the IEPA and the regulated community to ensure that the proposed change addresses and solves an identified problem in the regulation's implementation. It is not clear that the Agency has made a complete case for supporting this particular modification. Its basis for changing its policy apparently relates primarily to a legal concern that it has not shared with the Board in this proceeding. The IEPA advanced no pragmatic reasons for this modification and it is difficult to discern any from the record.

In discussing this issue with the IEPA, the IPC has been willing to support reasonable modifications to address this issue. As the IPC's witness, Mr. David Piotrowski, pointed out in his testimony, however, there are significant problems with the IEPA's proposal. First, the IEPA proposes that the Board mandate a draconian "one size fits all" letter to gain access to the off site property. As Mr. Piotrowski testified, the letter is more confrontational and alarming than useful. He testified that in his extremely broad experience the letter should be tailored to fit the circumstances of the recipient, it should seek to educate the recipient, and it should not make inaccurate or legally insupportable statements. (T.86, April 3, 2001) The IPC proposed language that is broader and more suited to modification according to the circumstances.

Second, the IEPA proposed no criteria whatsoever for it to determine how it would issue a NFR letter when access had been denied. The IEPA's proposal provides a laundry

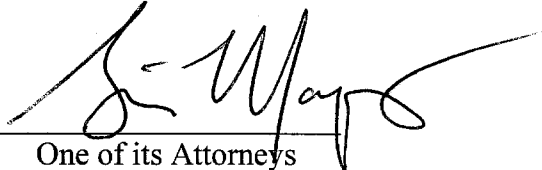
list of information regarding the site that the IEPA will consider but provides no threshold criteria as to what site conditions will require the IEPA to deny a NFR letter unless off site conditions are evaluated. In the current Board regulations, the Agency is authorized to issue NFR letters on a showing that the owner/operator made best efforts to obtain access and there is no provision for considering the extent of the off site impact. These same regulations allow the issuance of NFR letters without consideration of off site impact in any event, depending on the classification of the site. In contrast, the IPC proposes very basic and objective criteria that focus on the actual and significant off site impacts. This information should be available from early action activities which require the owner/operator to remove free product and to mitigate hazards presented by the transport of explosive vapors through subsurface structures. 35 Ill. Adm. Code 732.202. The IPC's proposed criteria will provide an objective basis for IEPA decisionmaking and a standard of review for appeals of this decision to the Board.

In short, the IPC is willing to support the IEPA in changing this regulation, but the change should be based on experience in dealing with the off site landowners, it should provide criteria so that the regulated community can be advised as to how these decisions are made and it should provide a basis for appeal in the event that the IEPA's decision is not supported by the facts.

As always, the IPC appreciated the opportunity to present testimony to the Board
and to file these comments.

ILLINOIS PETROLEUM COUNCIL

By:


One of its Attorneys

Dated: May 2, 2001
ROSS & HARDIES
David L. Rieser, Esq.
Brian Marquez, Esq.
150 North Michigan Ave.
Chicago, Illinois 60601
(312) 558-1000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she caused to be served upon the attached service list the foregoing Illinois Petroleum Council's Post Hearing Comments by U.S. Mail, proper postage prepaid, on the 2nd day of May, 2001.



A handwritten signature, appearing to read "L. May", is written in black ink. The signature is positioned above a horizontal line that spans the width of the signature.

R01-26 SERVICE LIST
In the Matter of Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732
Revised April 23, 2001

lname	fname	company	Address	city/state	zip
Anderson	Scott	Black & Veatch	101 N. Wacker Drive, Suite 1100	Chicago, IL	60606
Aronberg	Garry	Kuhlmann Design Group	15 East Washington	Belleville, IL	62220
Biarco	Christie	Chemical Industry Council of Illinois	9801 W. Higgins Road, Suite 515	Rosemont, IL	60018
Bonezyk	Bruce		601 W. Monroe	Springfield, IL	62704
Carson, P.E.	Robert A.		924 Cherokee Drive	Springfield, IL	62707
Chappel, P.E.	Harry A.	Inland/Chappel Environmental	144 Lacombe	Springfield, IL	62707
Consalvo	Cindy	Pioneer Environmental	1000 N. Halsted Suite 202	Chicago, IL	60622
Dickett	William G.	Sidley & Austin	Bank One Plaza 10 South Dearborn Street	Chicago, IL	60603
Dombrowski	Leo P.	Wildman, Harrold, Allen & Dixon	225 W. Wacker Drive, Suite 3000	Chicago, IL	60606
Dye	Ron	CORE Geological Services, Inc.	2621 Montego, Suite C	Springfield, IL	62704
Dyer	Judith S.	Assistant Counsel Division of Legal Counsel Illinois Environmental Protection Agency	1021 North Grand Avenue East P.O. Box 19276	Springfield, IL	62794-9276
Falbe, Esq.	Lawrence W.	Wildman, Harrold, Allen & Dixon Attorney at Law	225 W. Wacker Drive, Suite 3000	Chicago, IL	60606-1229
Flynn	Neil F.	Arcadis	1035 South Second Street	Springfield, IL	62704
Gleinn	Sid	Goodwin Environmental Consultants, Inc.	35 East Wacker, Suite 1000	Chicago, IL	60601
Goodwin, P.E.	Daniel J.	SEBCO Environmental Services, Inc.	400 Burns Lane	Springfield, IL	62702
Gray	Collin W.	Clerk of the Board	7350 Duynon Drive	Tinley Park, IL	60477
Gunn	Dorothy	Illinois Pollution Control Board	100 West Randolph Street Suite 11-500	Chicago, IL	60601
Herlacher	Thomas L.	Herlacher Angleton Associates, LLC	8731 Bluff Road	Waterloo, IL	62298
Huff, P.E.	James E.	Huff & Huff, Inc.	512 W. Burlington, Suite 100	LaGrange, IL	60525
James	Kenneth	Carlson Environmental, Inc.	65 E. Wacker Place, Suite 1500	Chicago, IL	60601
Kelly, PE	Joe	United Science Industries, Inc.	P.O. Box 360	Woodlawn, IL	62898
Liss	Kenneth W.	Andrews Engineering, Inc.	3535 Mayflower Boulevard Bld F	Springfield, IL	62707
Ludewig	Pat	Caterpillar	P.O. Box 1875	Peoria, IL	61656-1875
Magel	Barbara	Tech Center Karaginis & White, Ltd.	Suite 810, 414 N. Orleans	Chicago, IL	60610
Moncek	George F.	United Environmental Consultants, Inc.	119 East Palatine Road, Suite 101	Palatine, IL	60067
Nienkerk, P.G.	Monte M.	Senior Project Manager Clayton Group Services, Inc.	3140 Finley Road	Downers Grove, IL	60515
Rieser	David	Ross & Hardies	150 N. Michigan	Chicago, IL	60601
Smith	Wayne	Pioneer Environmental	1000 N. Halsted Suite 202	Chicago, IL	60622

801-26 SERVICES LIST
In the Matter of: Amendments to Regulation of Petroleum Leasing Underground Storage Tanks: 35 Ill. Adm. Code 732
Revised April 23, 2001

Shenstone	Joel J.	Flowing Office	100 West Randolph Street	Chicago, IL	60601
		Illinois Pollution Control Board	Suite 11-500		
Strubel	Don	Speedway Super America, LLC	P.O. Box 1500	Springfield, OH	45001
Sydora	David A.	Illinois Petroleum Council	P.O. Box 12047	Springfield, IL	62791
Vickos	George	Council	2501A Paul Jones Street	Great Lakes, IL	60088-2845
		Naval Training Center			
Walker	Rodger	Wellstar Engineering	900 W. Harris Street	Harris, IL	62448
Watson	John	Gardner, Curtis & Douglas	321 N. Clark Street	Chicago, IL	60610
Zolysak	Gary T.	U.S. Army Environmental Center	Northern Regional Environmental	Aberteen Proving	21010-5401
			Office, Building B-4480	Ground, MD	