

BSB

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CLERK'S OFFICE

MAR 28 2001

STATE OF ILLINOIS
Pollution Control Board

March 27, 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. # 2

Via FedEx - Overnight

Re: R01-27 (Rulemaking-Land)

Dear Ms. Gunn:

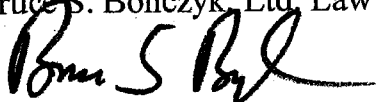
Enclosed for filing in the above Rulemaking are one original and nine copies of the following: Appearance

Motion to Oppose Certain Proposed Amendments of the Environmental Protection Agency's Proposal to Amend 35 Ill. Ad. Code 740
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 740

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

MAR 28 2001

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
SITE REMEDIATION PROGRAM) R01-27
) (Rulemaking - Land)
AMENDMENTS TO)
35 ILL. ADM. CODE 740)

NOTICE OF FILING

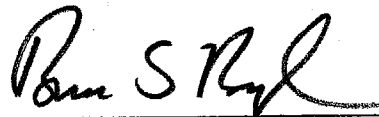
TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
(Via FedEx - Overnight)

Mr. Bobb A. Beauchamp
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
(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 to the EPA's Proposal to Amend 35 Ill. Adm. Code 740, and the Memorandum of Law in Support of the Motion to Oppose Certain Proposed Amendments to the EPA's Proposal to Amend 35 Ill. Adm. Code 740, 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 27, 2001

THIS FILING SUBMITTED ON RECYCLED PAPER

Bruce S. Bonczyk
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Service List Attached

MAR 28 2001

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

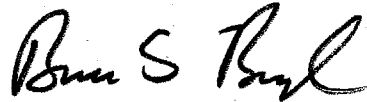
STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)	
)	
SITE REMEDIATION PROGRAM)	R01-27
)	(Rulemaking - Land)
AMENDMENTS TO)	
35 ILL. ADM. CODE 740)	

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 27, 2001

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STATE OF ILLINOIS
Pollution Control Board

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

IN THE MATTER OF:)
)
SITE REMEDIATION PROGRAM) R01-27
) (Rulemaking - Land)
AMENDMENTS TO)
35 ILL. ADM. CODE 740)

MOTION TO OPPOSE CERTAIN PROPOSED AMENDMENTS
OF THE ENVIRONMENTAL PROTECTION AGENCY'S
PROPOSAL TO AMEND 35 ILL. ADM. CODE 740

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 740, 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 740.120, and the inclusion throughout 35 Ill. Adm. Code 740 of the use of Licensed Professional Geologists to perform functions assigned to Licensed Professional Engineers by the provisions of The Environmental Protection Act, Title XVII, Site Remediation Program, 415 ILCS 5/58 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.


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Further, ISPE and CECI object to the Testimony of Lawrence W. Eastep on proposed amendments to Amend 35 Ill. Adm. Code 740 of the Environmental Protection Agency's Proposal. With respect to said testimony, ISPE and CECI object to the inclusion by the Agency of amendments throughout 35 Ill. Adm. Code 740 regarding Licensed Professional Geologists. As stated in Mr. Eastep's testimony, no changes have been made to the Act which provide for such services or certification to be made by Licensed Professional Geologists. Mr. Eastep further testified that the Professional Geologists Licensing Act was enacted after the Site Remediation Program provisions of the EPA Act. While Mr. Eastep testified that the proposed amendments to the rules allow for certain remediation site activities to be conducted by Licensed Professional Geologists, such interpretation is at odds with the express language of the statute. Section 58.6, as an example, requires all investigations, plans and reports to be prepared under the supervision of a Licensed Professional Engineer. 415 ILCS 5/58.6 There is no reference or even an indirect expression for any services by geologists. Thus, Mr. Eastep'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 include a licensing act provision enacted well after prior legislation and subsequent amendments.

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. 740, any and all references to Licensed Professional Geologists throughout the proposed amendment rulemaking, and in particular Sections 740.120, Section 740.405, Section 740.410, Section 740.425, 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 27, 2001

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BEFORE THE POLLUTION CONTROL BOARD
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STATE OF ILLINOIS
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IN THE MATTER OF:)
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SITE REMEDIATION PROGRAM) R01-27
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AMENDMENTS TO)
35 ILL. ADM. CODE 740)

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 740

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., have 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 740, 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 January 12, 2001, the Agency filed a petition that the Board accept for hearing the Agency's proposal for amendment of 35 Ill. Adm. Code 740. The Board accepted said matter for hearing on or about January 18, 2001, and by Hearing Officer order dated February 5, 2001, issued its Notice of Hearings. On February 28, 2001, the Board held its first hearing regarding this matter. The second hearing is scheduled for April 4, 2001.

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 58- 58.8 and 58.10-58.14 of the Environmental Protection Act, 415 ILCS 5/58 - 58.14, commonly known

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as the regulation of the Site Remediation Program. ("SRP"). The sections pertaining to SRP were added by Public Act 89-431, Section 5, effective December 15, 1995 and Public Act 89-443, Section 5, effective July 1, 1996. Some sections were later amended by Public Act 89-626, Article 2, Section 2-62, effective August 9, 1996, which was the First 1996 General Revisory Act which made certain technical corrections in Public Acts 89-1 through 89-443.

The original SRP enacting 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 July 1, 1997, and also amended regulations effective October 26, 1998, 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 one of the SRP enacting statutes, and concurrent with the other. The Professional Geologist Licensing Act was enacted prior to the SRP legislation contained in Public Acts 89-431 and 89-443. Subsequent amendments by Public Act 89-626 were technical and included no references to Licensed Professional Geologists.

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 SRP 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 533 at 541, 605 N.E.2d 539, 178 Ill. Dec. 745 (1992).

On its face, the SRP 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 SRP 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 legislation implementing the SRP (P.A. 89-431 and 89-443). The presumption exists that the General Assembly in implementing the SRP legislation was aware of the Professional Geologists Licensing Act, and chose not to include said professionals into the SRP.

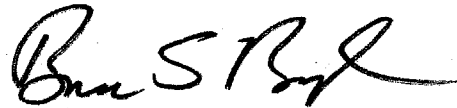
The SRP legislation specifically defines the term "Licensed Professional Engineer". 415 ILCS 5/58.2. No definition for Licensed Professional Geologists is contained in the legislation. The SRP legislation is also specific as to the remedial investigations, plans and reports to be performed by Licensed Professional Engineers, for example, as contained in 415 ILCS 5/58.6. The Professional Engineering Practice Act expressly includes such investigations as an example of professional engineering practice. 225 ILCS 745/15. The

Professional Geologist Licensing Act does not include any references to remedial investigations 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 activities of the SRP legislation to be performed by geologists.

For the above going reasons, ISPE and CECI also suggest to the Agency and Board that the testimony of Mr. Lawrence Eastep 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 SRP 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 party should be stricken as without a legal basis, and no weight with respect to the referenced testimony be afforded by the Board with respect to this limited issue.

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 and the General Assembly did not intend for the Agency and Board to include licensed geologists in addition to licensed professional engineers.

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



Bruce S. Bonczyk, One of their Attorneys

Dated: March 27, 2001

Bruce S. Bonczyk
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Springfield, IL 62704
217.525.0700
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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 740, 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 740 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 27th day of March, 2001, with sufficient postage affixed.

Lindsey E. Whitcomb
Lindsey E. Whitcomb

SUBSCRIBED AND SWORN TO BEFORE ME

this 27th day of March, 2001.

Joyce A. Gerhold
Notary Public



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March 27, 2001

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