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CLERK'S OFFICE

MAY 30 2001

STATE OF ILLINOIS
Pollution Control Board

May 25, 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.#10

Certified Mail - Return Receipt

Re: R01-26 (Rulemaking-Land)

Dear Ms. Gunn:

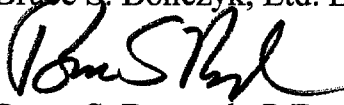
Enclosed for filing in the above Rulemaking are one original and nine copies of the following:

Post Hearing Comments of ISPE and CECI regarding 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 additional copy of the 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

RECEIVED
CLERK'S OFFICE

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

MAY 30 2001

STATE OF ILLINOIS
Pollution Control Board

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

R01-26
(Rulemaking - Land)

NOTICE OF FILING

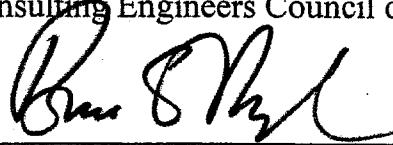
TO: Ms. Dorothy M. Gunn
Clerk of the Board
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James R. Thompson Center
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(Via FedEx - Overnight)

Mr. Joel J. Sternstein
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
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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 Post Hearing Comments of ISPE and CECI 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: May 25, 2001

THIS FILING SUBMITTED ON RECYCLED PAPER

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21010-5401

MAY 30 2001

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

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))

**POST HEARING COMMENTS AND REPLY OF THE
ILLINOIS SOCIETY OF PROFESSIONAL ENGINEERS AND
CONSULTING ENGINEERS COUNCIL OF ILLINOIS**

The Illinois Environmental Protection Agency ("Agency"), in its Memorandum of Law in Support of the Illinois Environmental Protection Agency's Comments, misinterprets and misconstrues the arguments presented by the Illinois Society of Professional Engineers ("ISPE") and the Consulting Engineers Council of Illinois ("CECI") in its comments and objections to the proposed rulemaking. ISPE and CECI wish to clarify their positions and identify the inaccuracies which result from the Agency's response.

First, the Agency contends the proposed regulations will not exceed the rulemaking authority of the Agency or Board. The Agency indicates the Board has already determined it has authority to provide for certifications of Licensed Professional Geologists in its rules. As was specifically stated in the Memorandum of Law in Support of the Motion to Oppose Certain Proposed Amendments with respect to this rulemaking, ISPE and CECI "do not challenge the Board's rulemaking authority" (page 3). What is in question is the legality of any rule which arbitrarily adds language or provisions that are in direct conflict with those provisions contained in the underlying legislation subject of the rulemaking. Such is the rule proposed to the Board by the Agency: actions specifically cited to be performed by Professional Engineers as contained in Public Law are being twisted by the Agency to be performed also by Licensed Professional Geologists.

THIS FILING SUBMITTED ON RECYCLED PAPER

It is quite interesting that all the citations utilized by the Agency to support its proposition allowing for certifications by Licensed Professional Geologists do not have any basis in the underlying legislation wherein there is an express reference to the Licensed Professional Geologists Act ("LPGA"). For instance, the Livestock Waste Regulations, have their genesis from the statutory authority of the Livestock Waste Management Act. That act has no express references to specific acts to be performed by licensed professional engineers or geologists. Likewise, neither the Illinois Historic Preservation Agency's rules, nor the Department of Agriculture's rules, are derived from statutes which expressly define whether engineers or geologists are to perform certain functions. Thus, if the statute is devoid of express provisions, then the Board may promulgate rules within its authority and identify certain professions.

Unfortunately, the inverse argument proffered by the Agency has the cart before the horse. If there is an express provision in the statute requiring a specific professional to perform certain functions, the Agency, and this Board, is without authority to redefine or redirect these activities. The regulations derive from the statutory authority, and not in reverse fashion. Thus, if the statutory provision is silent, the Agency and Board may properly assign such functions. The rulemakings relied upon in the Agency's response are such a derivation. However, the Agency cannot provide a citation to where such determinations have been made in derivation to the statutory provision. This remains the assertion of ISPE and CECI that Licensed Professional Geologists cannot by rule be assigned functions expressly delegated by the General Assembly to Licensed Professional Engineers.

Thus, the lengthy dissertation of the Agency regarding the applicability of the work contained in the Licenced Professional Geologists Act is of no relevance. Granted, as testimony and comments of ISPE and CECI stated, Licensed Professional Geologists may perform limited practical activities as a subset of services defined in the LUST and SRP legislation. This does not however grant the Agency or Board the latitude to expand these certifications or activities beyond the express statutory authority regarding these sections.

The bootstrap argument, that the description of work contained in the Licensed Professional Geologists Act somehow trumps the express statutory language regarding Licensed Professional Engineers in the LUST and SRP provisions is albeit amusing, but totally without merit and not based in any doctrine of statutory construction.

The Agency is absolutely correct when it stated on page 16 of its Memorandum that "The legislature did not intend every statute in Illinois to be amended to reflect the passage of the PGLA." Anyone vaguely familiar with the legislative process understands the sponsor of the bill confers with the staff of the Legislative Reference Bureau (LRB) when drafting said legislation. The LRB is charged with incorporating the proposed legislation into the Illinois Compiled Statutes. While this licensing bill for geologists is a stand alone act, if indeed the intent was to apply its provisions to allow its practical application to services assigned by prior laws to Professional Engineers, there would have been other sections of amendatory language doing so. As addressed in a question to the Agency during the hearing process, the Agency has not requested a review or informal opinion of the Attorney General as to the intended application being proposed by the Agency. The Agency has cited no legislative history nor hearing testimony by the sponsor to confirm its applicability that Licensed Professional Geologists were to perform the same functions assigned to the Licenced Professional Engineers. All of this most likely did not occur, because, as above, the Agency knows the LUST and SRP statues were not intended to be addressed by the passage of the PGLA.

Likewise, the Agency also misconstrues the position of ISPE and CECI regarding the ability of Licensed Professional Geologists to perform physical soil classifications. A focused scrutiny of ISPE's and CECI's objections and memorandum will not detect this argument at all. The Agency misrepresents this argument as one of ISPE and CECI, when in reality it is promoted by the Agency to support its position. Both ISPE and CECI, in its arguments and testimony, clearly indicate that Licensed Professional Geologists, along with Licenced Professional Engineers, may perform these functions in accordance with their disciplines and specific licensing provisions. However, the LUST and SRP statutes only

provide for Licensed Professional Engineers to certify such actions and other reports. In actuality, it was stated Licensed Professional Engineers may at times subcontract with geologists to assist with such work. This has been occurring for years. This does not, however, alleviate the statutory mandate that Licensed Professional Engineers are the only discipline designated to perform such certifications and sealing of reports.

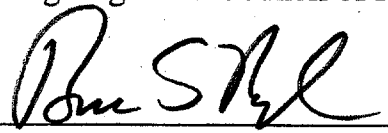
In convoluted arguments, the Agency spends an enormous amount of time to actually question the validity of its existing regulations. For instance, the Agency indicates that in the event of Low Priority or No Further Action sites, the soil classifications of Licensed Professional Engineers pursuant to existing Board regulations are invalid because they are not "incidental to work related to an engineering system or facility." (Page 18 of Memorandum) The Agency even goes further to place itself into the shoes of the Department of Professional Regulation and opine that "soil classification falls within the practice of professional engineering only when it is incidental to specific work related to an engineering system of (sic) facility." Not only is this assertion ludicrous, but it conflicts with the definitional terms previously passed as part of the regulatory process by the Board. 35 Ill. Adm. Code 732.103 (regarding "Licensed professional engineer" and "Physical soil classification") Is this Board going to vacate all prior certifications because the Agency now asserts the actions were not related to an engineering system or facility? Unfortunately, the Agency reaches so far to place geologists into the rules, that it has lost sight of the purpose of remediation and containment facilities.

Finally, in a desperate attempt, the Agency misstates the argument made in both the ISPE and CECI memorandum and testimony. The presumption against liability is based upon the No Further Remediation ("NFR") letter which, if certified by a Licensed Professional Engineer, will protect the subsequent owners, operators, etc. against claims or liability from the release event. 415 ILCS 5/57.10(c) Common sense dictates that the NFR letter represents the "all clear" to the property owner and subsequent purchasers, thus creating the presumption against liability. Without the NFR letter, no presumption would exist, as defined by statute, that all statutory and regulatory corrective actions have taken

place, nor that all corrective action has been completed, nor that no further corrective action is necessary. 415 ILCS 5/57.10(c) The property owners would be no better off than before the release event, if this section did not create the presumption against their liability. The Agency fails to note this provision, which was clearly made in testimony in response to questions. (Hearing Transcript of April 3, 2001 - pages 49 & 50) The Agency clearly seeks to confuse the Board with the limitation of liability with respect to the engineer's certification, versus a presumption against liability for owners, operators, subsequent purchasers or transferees, etc., after completion of remediation and compliance with the LUST law.

As can be seen by the misinformation and lack of citations, the Agency cannot refute the fact there is no statutory authority to place Licensed Professional Geologists into the LUST and SRP rules where express authority is granted to Licensed Professional Engineers. This and prior comments have espoused the several legal and practical bases to support such conclusion. We trust the Board will fully review this matter and find the positions of the ISPE and CECI will support the exclusion from this rulemaking of Licenced Professional Geologists as stated in this and previous motions and comments.

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

By: 
One of Their Attorneys

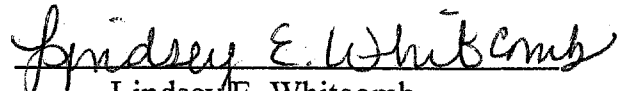
Date: May 25, 2001

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)
COUNTY OF SANGAMON)

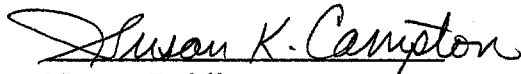
PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Public Comments of Bruce S. Bonczyk in Opposition to 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 6th day of April, 2001, with sufficient postage affixed.


Lindsey E. Whitcomb

SUBSCRIBED AND SWORN TO BEFORE ME

this 25th day of May, 2001.


Notary Public



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