

## **Illinois Pollution Control Board Denies Motion for Emergency Rules for Leaking Underground Storage Tank Program**

The Illinois Pollution Control Board on June 3, 2004 denied a motion from the Illinois Environmental Protection Agency (IEPA) to adopt emergency rules for the petroleum leaking underground storage tank program. The Illinois Administrative Procedure Act (APA) allows emergency rulemaking when a situation “reasonably constitutes a threat to the public interest, safety, or welfare.” After considering the Board’s recent history of emergency rulemaking, and appellate case law under the APA, the Board found no “emergency” existed under the APA. The Board will, however, expeditiously continue the regular rulemaking process for adoption of permanent rules.

On January 13, 2004, the IEPA filed two proposals for regular rulemaking. These consolidated dockets, R04-22 Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732) and R04-23 Proposed Amendments To Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 734), also respond to recent legislation. Public Act 92-0554, effective June 24, 2002, prompted the proposed amendments to Part 732 to set forth corrective action measures that must be taken in response to a leak and procedures for seeking payment from the Underground Storage Tank Fund (UST Fund). Additionally, proposed amendments prompted by Public Act 92-0735, effective July 25, 2002, would allow a Licensed Professional Geologist to certify certain information.

The proposed new Part 734, which would apply to releases reported after June 24, 2002, is identical to Part 732 except for changes enacted in Public Act 92-0554. Those exceptions include different corrective action requirements and increased caps on the total amount owners and operations can be paid from the UST Fund.

In its first motion for emergency rules on April 19, 2004, the IEPA asked the Board to adopt the proposed regular rules as emergency rules. IEPA contended that emergency rules are needed to “provide a standard methodology for determining the reasonableness of costs” submitted to the IEPA following the Board’s recent decision in Illinois Ayers Oil Company v. IEPA, PCB 03-214 (Apr. 1, 2004). In Illinois Ayers, the Board considered the legal status of an IEPA “rate sheet”, which limits the amount reimbursable for corrective action at a leaking underground storage tank site. The Board found that, by definition, the rate sheet is a rule that the IEPA should have promulgated pursuant to the APA, and the rate sheet has no legal or regulatory effect.

On May 18, 2004, IEPA filed an amended motion requesting that the Board adopt as emergency rules one new subsection at Section 732.505(d) and Section 732.Appendix D “Allowable Unit Rates”. Responses in support of the IEPA’s amended request were filed by Professionals of Illinois for the Protection of the Environment (PIPE), the consulting firms CW<sup>3</sup>M, and United Science Industries, and by the Consulting Engineers Council of Illinois (CECI). The Illinois Environmental Regulatory Group (IERG) objected to the IEPA’s original motion on the grounds that there was no emergency, but did not respond to the amended motion.

In its ruling on the amended motion, the Board recounted that it had used its emergency rule authority only a handful of times during the past eleven years, and that in one of these instances its emergency rules were invalidated by the appellate court due to lack of an “emergency” within the APA definition. See Citizens for a Better Environment v. PCB, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987), citing Senn Park Nursing Center v. Jeffrey C. Miller, 104 Ill. 2d 169, 480 N.E.2d 1029 (1984). The Board found that the concerns of the IEPA and commenters about administrative consistency and slowing depletion of the UST Fund may be legitimate but do not constitute a *threat* to the public interest, safety or welfare within the meaning of the APA.

Finally, as a practical matter, the Board observed that the participants’ desire for administrative ease and consistency would likely not be guaranteed even if the Board adopted the emergency rules proposed in the amended motion. The Board noted that it has already held three days of hearing in this matter, on March 15, 2004 and May 25-26, 2004, but had yet to hear testimony from the public or affected participants on the merits of the proposed rules. At the conclusion of the last hearing, the Board scheduled additional hearings. Under these circumstances, the Board thought it highly unlikely that it could complete permanent rulemaking within the 150-day period in which any emergency rule would be in effect.

Additional hearings in these rulemakings are scheduled to begin in Springfield June 21 and to continue through June 25, 2004 if necessary. A hearing will also be held July 6, 2004 in Springfield. Pre-filed testimony to be delivered at these hearings is due June 7, 2004. Transcripts from the first two hearings are posted to the Board’s Website.

Written comments should contain the rulemaking title and docket number (R04-22 and R04-23) and should be sent to the Clerk’s Office at the following address:

Dorothy Gunn, Clerk  
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