

4. The Matt Haller Act is a new law. Its interpretation and the application of various provisions of the Act will be of considerable public interest and importance. The legislative history is complicated, and involves provisions sourced from multiple competing bills. Amici submit that the Court may need to consider the intent and purpose of the Act in the context of the proposed Consent Order (which will necessitate an opportunity for the public to be heard prior to entering, entering with modifications, or rejecting it).

5. Movants' proposed Amicus brief details and compiles for the Court's convenience aspects of the legislative history for the Act, and in particular the relevance and intent and goals of certain subsections in the Act that *amici* anticipate will be relevant to the issues raised in the pending lawsuit; consent order; and construction permits going forward.

6. In view of the foregoing, Movants respectfully request that this Court accept for consideration Movants' proposed Amicus Brief of John F. Curran; James B. Durkin and Deanne M. Mazzochi Regarding the Interpretation of SB 1852/Public Act 101-0022, The Matt Haller Act, 415 ILCS 5/9.16. A copy of the proposed brief, and accompanying Exhibits A-M, is attached as Exhibit 1 to this Motion.

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EXHIBIT 1 to Motion for Leave to File Amicus Brief

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS
CHANCERY DIVISION**

PEOPLE OF THE STATE OF ILLINOIS)	
<i>ex rel</i> KWAME RAOUL Attorney General)	
of the State of Illinois, and)	
<i>ex rel</i> ROBERT BERLIN, State's Attorney)	No. 2018 CH 001329
for DuPage County, Illinois)	Hon. Paul Fullerton
<i>Plaintiffs,</i>)	Room 2005
)	
v)	
)	
STERIGENICS U.S., LLC)	
a Delaware limited liability company,)	
<i>Defendant.</i>)	
)	

**AMICUS BRIEF OF JOHN F. CURRAN; JAMES B. DURKIN AND
DEANNE M. MAZZOCHI REGARDING THE INTERPRETATION OF
SB 1852/Public Act 101-0022, The Matt Haller Act, 415 ILCS 5/9.16**

Dated: July 23, 2019

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Exhibit	Description
A	Proposed Consent Order submitted by the State of Illinois et al. and Sterigenics U.S. LLC
B	SB1854, reprinted from www.ilga.gov
C	SB1853, Amendment 3, reprinted from www.ilga.gov
D	HB1841 Amendment 1 (relevant excerpts), reprinted from www.ilga.gov
E	HB457, Amendment 4, reprinted from www.ilga.gov
F	SB1852 as-introduced; and as-enrolled, reprinted from www.ilga.gov
G	Report of Air Pollution Testing of an Ethylene Oxide Emission-control System Operated by Sterigenics, US, LLC in Willowbrook, Illinois on September 21, 2018, excerpts. A full copy of the 176 page report is at https://www2.illinois.gov/epa/topics/community-relations/sites/sterigenics/Documents/WBI%20rev1.pdf (last entered 7/19/2019).
H	Annotated excerpts of data from Exhibit G; green text and yellow highlighting added.
I	Collection of reports of Sterigenics non-compliance with legal standards.
J	Statement of Illinois Attorney General's Office reported by Capitol Fax, July 19, 2019.
K	Seal Order, Illinois EPA, dated 2/15/2019
L	Table summarizing USEPA ethylene oxide test results, found at https://www.epa.gov/sites/production/files/2019-03/documents/copy_of_031519_willowbrook_eto_master_data_table_for_web.pdf (last entered 7/19/2019)
M	March 29, 2019 Cancer Incidence Assessment near Sterigenics in Willowbrook, IL 1995-2015 (Abstract). http://www.dph.illinois.gov/sites/default/files/publications/sterigenicswillowbrookcancer-investigation-final.pdf (last entered 7/19/2019).

I. Introduction

On June 21, 2019, SB1852, “The Matt Haller Act,” Public Act 101-0022, 415 ILCS 5/9.16, was signed into law. John Curran, the original chief sponsor, is an Illinois State Senator for the 41st Senate district. Jim Durkin is the Minority Leader of the Illinois House of Representatives, representing the 82nd House District. Deanne Mazzochi is an Illinois State Representative for the 47th District. Both were chief co-sponsors for SB 1852 in the House. The Sterigenics facility directly impacts residents in the Curran, Durkin and Mazzochi districts.

On July 18, 2019, this matter came before the Court, including for a proposed Consent Order. (Exhibit A). Counsel for Sterigenics proposed that the Consent Order moots this suit, despite pending intervention motions. The Court acknowledged the new ethylene oxide law. The Illinois Attorney General later made statements about its legislative scope and purpose. Curran, Durkin and Mazzochi submit this *amicus* brief to provide additional background about the law’s language and intent that may prove helpful to the Court going forward.

II. Legislative history.

SB1852 was not the first or only ethylene oxide-related bill before the General Assembly:

- In February 2019, Curran introduced SB1854. As-introduced, it banned facilities that had fugitive ethylene oxide emissions “above zero.” (Exhibit B, SB1854 at 2, line 10).
- On March 15, 2019, Curran introduced Amendment 3 to SB1853, limiting ethylene oxide use to only medical technology that the Agency determines lacks substitute sterilization technology; and within one-year of the law’s effective date, revoked the CAAPP permits of any facility emitting ethylene oxide within one mile of a school, childcare center or residence. (Exhibit C, SB1853 Amend. 3).
- In March 2019, Durkin and Mazzochi cosponsored HB1841 House Amendment 1, with specific findings that “the emission of ethylene oxide may constitute a threat to public health and welfare, depress property values, and diminish quality of life”; called for Agency emergency rulemaking to “ensure that no ethylene oxide is discharged into the atmosphere or water without being given the degree of treatment and control necessary”; and “set the rules to maximize the health and safety of both workers” and “members of the public exposed as a result of ethylene oxide emissions.” (Exhibit D, HB1841 Amend. 1 (relevant excerpts), p. 17, l. 6 – 18, l. 17).

- On April 11, 2019, for the Illinois EPA and Attorney General's office, State Representative Sam Yingling authorized filing Amendment 4 to HB 457. (Exhibit E).

During bill negotiations, Illinois EPA representatives indicated that any rules the Agency was inclined to adopt under HB1841 were those generally set forth in HB 457 at proposed paragraphs (b)-(i). (*Compare, e.g.,* Exhibit E, pp. 2-10; with 415 ILCS 5/9.16(b)(1), (c), (d), and (f)).

The legislators argued that the Agency needed better standards than those set forth under, *e.g.,* the Illinois EPA's dispersion modeling approach, including target atmospheric goals no greater than statistical background levels. *Representatives from the offices of the Illinois EPA, Illinois Attorney General and the Governor refused to accept such language for the final bill.*

Concerned that the Administration's language was insufficiently aggressive, legislative negotiators nevertheless issued an ultimatum: include the subsection (g) "Seal Order" requirements, or they would withdraw their sponsorship and support for the bill. It reads:

(g) A facility [1] permitted to emit ethylene oxide [2] that has been subject to a seal order under Section 34 is prohibited from using ethylene oxide for sterilization or fumigation purposes, unless (i) the facility can provide a certification [3] to the Agency by the supplier of a product to be sterilized or fumigated that ethylene oxide sterilization or fumigation is the only available method to completely sterilize or fumigate the product and [4] (ii) the Agency has certified that the facility's emission control system uses technology that produces the greatest reduction in ethylene oxide emissions currently available. ... [5] A facility is not subject to the requirements of this subsection if the supporting findings of the seal order ... are found to be without merit by a court of competent jurisdiction.

(*Cf.* Exhibit F, SB1852 (introduced) with SB 1852 (enrolled) (bracketed numbers added)).

This "Seal Order" language was essential given reports alleging that Sterigenics released ethylene oxide into the air despite promises that its equipment adequately captured emissions. For example, the House's Energy and Environment committee (Mazzochi is a member) reviewed a test report from ECSi, Inc. (retained by Sterigenics) on "an ethylene oxide (EtO) emission-control device operated by Sterigenics US, LLC at their Willowbrook I ethylene oxide

sterilization facility,” to “control emissions from fourteen sterilizer backvents, and three aeration rooms.” (Exhibit G, ECSi report page 1).¹ The report proposed that ethylene oxide was “ND” (not detected) in *any* outlet chromatograms, to yield over 99.5% efficiency; but this was questioned at the House hearing when raw exit data displayed off-kilter baselines, potential ethylene oxide signal, and “unknown” compounds. (See Exhibit H, annotated Run 3BV inlet/outlet results). Sterigenics also had a reported history of non-compliance and unauthorized releases. (See Exhibit I). This all raised questions about Sterigenics’ real-world compliance.

Separately, the legislators also added subsection (k), which provides that “[n]othing in this Section shall be interpreted to excuse the ethylene oxide sterilization source from complying with any applicable local requirements.” 415 ILCS 5/9.16(k). Legislators knew that nuisance claims were raised in the above-captioned litigation; and that building modifications would require additional local code compliance. It was purposeful to *not* have the statute preempt or moot those common law claims; or local ordinance requirements. It *was not* the legislative intent to deny local municipalities Sterigenics nuisance claims; or to prevent municipalities from denying construction permits or enforcing building codes. A more detailed explanation of the legislators’ intent and envisioned application about this negotiated language is set forth below.

III. The subsection (g) Seal Order language’s legislative intent and goals.

The Illinois Attorney General’s Office has asserted that:

Sterigenics could have qualified for the [subsection g] exception if it proved to a court that the findings of the seal order were without merit. The consent order takes away Sterigenics’ ability to even make this argument in court. As a result, Sterigenics no longer has the ability to qualify for the exception to the certification requirements.

¹ This testing “was to demonstrate compliance with the conditions established in Section 6 of the Construction Permit ... granted to Sterigenics by the ... IEPA.” (*Id.*) It evaluated inlet and outlet concentrations for a series of samples. But the detection method changed for the inlet ethylene oxide emissions and the outlet system. (*Id.* at report page 7 (FID vs. PID methods)). The report assumed this was an adequate apples-to-apples comparison. (*Id.* at 8-9 (mass control efficiency measurements from inlet/outlet calculated using equation in Section 5.9).

(Exhibit J, Capitol Fax, July 19, 2019). That does not accurately characterize how subsection (g) was designed to work, which is why the proposed consent order perversely makes it easier for Sterigenics to reopen. As noted above, subsection (g) provides that:

a facility “[1] permitted to emit ethylene oxide [2] that has been subject to a seal order ... **is prohibited** from using ethylene oxide for sterilization or fumigation purposes, **unless** [3] (i) the facility can provide a certification to the Agency by the supplier of a product to be sterilized or fumigated that ethylene oxide sterilization or fumigation is the only available method to completely sterilize or fumigate the product **and** [4] (ii) the Agency has certified that the facility’s emission control system uses **technology that produces the greatest reduction in ethylene oxide emissions currently available.**

This prohibition-presumption provision would not apply only “where the [5] “supporting findings of the seal order... **are found to be without merit by a court of competent jurisdiction.**” When SB 1852’s language was drafted; discussed in the House’s Energy and Environment committee; and ultimately approved, it was known to all parties that on February 15, 2019, the Illinois EPA had issued a Seal Order against the Sterigenics facility in Willowbrook to shut it down. (*See, e.g.*, Exhibit K). Such a facility thus qualifies as a subsection (g) facility, because the Agency previously “[1] permitted [it] to emit ethylene oxide” and it had “[2] been subject to a seal order.” This renders Sterigenics “prohibited from using ethylene oxide for sterilization or fumigation purposes.” 415 ILCS 5/9.16(g).

A. Only a court can make a “without merit” finding.

The Illinois Attorney General’s Office has reportedly asserted that its proposed consent order “takes away” Sterigenics’ ability to argue the validity of the original Seal Order. (Exhibit J). That is misleading; the Consent Order proposes to “resolv[e] the legal challenges made by Sterigenics to the findings and assertions set forth in the Seal Order, *without any admission by Sterigenics as to their veracity, ... and which Sterigenics continues to dispute.*” (Exhibit K, Consent Order at I.C, ¶ 2 (emphasis added)). For Sterigenics to avoid this prohibition, it must

invoke the subsection (g) text following bracket 5 to demonstrate:

[5] ... the supporting findings of the seal order under Section 34 are *found to be without merit by a court of competent jurisdiction.*

The legislative intent behind the subsection (g) language as-enacted was to ensure that a party ever subjected to a Seal Order was excused from the ethylene oxide prohibition absent *a court* of competent jurisdiction having “found” that the allegations in the Seal Order were “without merit.” The statute does not allow the Agency and litigants to “agree to disagree,” or otherwise punt on the merits, as the Attorney General seeks to do in the Consent Order here.

Legislators were well aware that Sterigenics disputed the Seal Order’s validity; and that Sterigenics challenged the Illinois EPA’s grounds for issuing the Seal Order. However, even assuming that the Seal Order issued on shaky assertions, factual findings within it plainly were meritorious—ethylene oxide testing around the Sterigenics facility witnessed a remarkable drop in ethylene oxide emissions post-shutdown. (See Exhibit L (Village Hall readings that repeatedly spiked up to the 4-19 $\mu\text{g}/\text{m}^3$ range pre-shutdown never exceeded 0.4 $\mu\text{g}/\text{m}^3$ post-shutdown)). In March 2019, the Illinois Department of Public Health issued a report concluding that its cancer study results “when taken as a whole, indicated that some cancers were elevated in populations living near the Sterigenics facility in Willowbrook, Illinois.” (Exhibit M, Report p. 4). *It is surprising that the Illinois Attorney General implies with its statements that it does not believe it can defend the Seal Order’s original findings: that Sterigenics was emitting ethylene oxide at above-ambient levels in a manner that harmed to the surrounding community.* The Illinois Attorney General need not have all of its evidence in-hand the day the Seal Order issued. Legislators understood that a party issuing, or receiving, a Seal Order may need to later develop evidence as to a given Seal Order’s merits. But legislators were not willing to let the Agency (or the Illinois Attorney General, for that matter) have unfettered discretion to revoke or nullify a

Seal Order once one issues to the exclusion of public interest considerations. Ethylene oxide involves heightened public health and safety concerns. Multiple parties may have personal or legal interests impacted by a Seal Order, including members of the public; businesses; and local municipalities. Given these competing interests, it is most appropriate to resolve the scientific merits of a Seal Order's underlying findings by generating evidence through appropriate discovery channels, and/or with the assistance of expert testimony. This is why the statutory language deliberately and intentionally placed the decision on whether the factual justifications for a Seal Order are meritorious within "a court of competent jurisdiction." This gives all sides court access; necessary due process protections; while adequately protecting the public interest.

Ensuring that independent findings are made on the merits of a Seal Order also serves multiple policy goals. First, it ensures that a state agency does not issue a Seal Order lightly; it should be prepared to defend its actions in court with facts, not fiction. Second, it ensures that a litigant subjected to such an Order secures due process rights, including the right to present evidence and witnesses on its behalf. Third, it ensures that anyone else impacted by potentially unsafe ethylene oxide emissions secures a public forum and opportunity to be heard on the merits. Courts can then do what they do best – serve as a neutral arbiter of the facts, and render a decision. Such decisions will, in turn, allow the legislature to ascertain whether more (or less) is needed to achieve its public policy goals of safe air for Illinois residents.

To reiterate: when legislators supported SB 1852, they knew that Sterigenics was the subject of a seal order; and that Sterigenics had challenged the seal order's merits. They were aware that the Seal Order insisted that emissions from Sterigenics "are continuing to contribute to ambient levels of ethylene oxide in the atmosphere" in a way that created "an imminent and substantial endangerment to public health or welfare." (Exhibit K at ¶ 18). They were aware

that, e.g., test results indicated that Sterigenics as it stood was emitting ethylene oxide from the facility into the ambient air; and that those emissions significantly dropped after the seal order was put in place and Sterigenics stopped operations. The legislature heard testimony about the real-world cancer and health impacts attributed to ethylene oxide emitting from the Sterigenics facility, including from the Act's namesake, Matt Haller, who lived nearby; and the ongoing adverse impact that the facility has had on Willowbrook (including driving employees away from other businesses in the area) and surrounding municipalities. To date, no-one has issued findings that pre-shutdown conditions *did not* place the public health and welfare in jeopardy. The factual basis for, e.g., the Seal Order's Paragraph 18 allegation have not been shown in this Court to lack merit. Unless and until such findings are made, under subsection (g) Sterigenics remains "prohibited from using ethylene oxide for sterilization or fumigation purposes."

B. The subsection (g) exceptions.

The Illinois Attorney General's statement separately asserts that Sterigenics "*could have* qualified for the exception" in subsection (g) following brackets 3 and 4 above. (Exhibit J) (emphasis added). It offered no substantive analysis to support this (troubling) blanket assertion. This is perhaps not surprising, because it is utterly premature and unfounded.

Again: Sterigenics in the present day remains prohibited from using ethylene oxide under subsection (g) given the Seal Order, "unless" two additional requirements are satisfied:

[3] (i) the **facility can provide a certification** to the Agency by the supplier of a product to be sterilized or fumigated that ethylene oxide sterilization or fumigation is the only available method to completely sterilize or fumigate the product **and**

[4] (ii) **the Agency has certified** that the facility's emission control system uses **technology that produces the greatest reduction in ethylene oxide emissions currently available.**

These items were added as part of the compromise negotiations given the terms found in Amendment 3 to SB1853. The only exception to the continued closure and prohibition is limited

to a specific set of circumstances, and *Sterigenics and the Agency each* must do their part to ensure that Sterigenics actually (not “could”) satisfies both to be legally compliant. That means that first, Sterigenics must “provide a certification to the [Illinois EPA] by the supplier of a product to be sterilized or fumigated that ethylene oxide sterilization or fumigation is the only available method to completely sterilize or fumigate the product.” 415 ILCS 5/9.16(g). Sterigenics nowhere does so in the Consent Order; in its construction permit application; and the Agency has not required it in the proposed Consent Order either. Neither Sterigenics nor the Agency has discretion to waive this statutory requirement; and without a substantive record to consider, the Illinois Attorney General cannot presume Sterigenics can secure any valid certifications. Second, Sterigenics also cannot restart any ethylene oxide use until “(ii) *the Agency has certified* that the facility’s emission control system uses technology that produces *the greatest reduction in ethylene oxide emissions currently available.*” 415 ILCS 5/9.16(g) (emphasis added). Neither the Attorney General nor the Agency can presume that of the thousands of products Sterigenics might seek to sterilize, the Agency can or will validly confirm that the Sterigenics approach to sterilizing *each* product will use “technology that produces the greatest reduction in ethylene oxide emissions currently available.” This subsection (g) standard is far more stringent than subsection (b), and requires a separate and independent Agency analysis that, to date, cannot or could be done, let alone published, or otherwise reviewed.

Moreover, the Agency may not assume that Sterigenics “might” be able to comply with these exceptions in the future, particularly where, as here, the Sterigenics construction permit proposed and accompanying modeling necessitates assuming an 87 foot stack height contra to local height restrictions; and other aspects of Sterigenics operations would require new construction permits that it may not obtain as a matter of right from the Village of Willowbrook.

IV. The proposed consent order.

As noted above, it appears to be the position of the presently-named parties in their proposed Consent Order that the merits of the underlying Sterigenics Seal Order need not be resolved; that Sterigenics can reopen in the future without having the health, safety and welfare issues that the Seal Order raised left unvetted by this Court; and that Sterigenics is not prohibited from using ethylene oxide going forward even though neither it nor the Agency have performed the additional certification steps found in subsection (g) (either in the proposed Consent Order or proposed construction permit) as discussed in Section III(B), above. *Amici* submit that this interpretation is inconsistent with the subsection (g) statutory framework and its intent.

The Illinois Attorney General has asserted its consent decree is a “Loophole Closure” that will “eliminate Sterigenics’ eligibility for the exception to certification requirements.” (Exhibit J). The proposed Consent Order creates, rather than closes, a loophole. The Agency’s consent order makes a troubling commitment that, “[n]otwithstanding any other provision in this Consent Order” and “solely at the discretion of the State, the State may approve temporary, limited Operations at Willowbrook I [even if the construction permit is not approved] if the State obtains information identifying a critical need for sterilization of one or more medical devices necessary to protect public health,” and states that this decision is “not subject to ... review by the Court.” (Exhibit A, Consent Order at Section III.B ¶ 7). The legislature did not adopt this new and nebulous “critical need” standard in subsection (g) – it set a standard where the *only* exception to Sterigenics’ use of ethylene oxide is if Sterigenics suppliers certify ethylene oxide sterilization is the “*only* available method” to sterilize that product, and the Agency makes independent findings that Sterigenics will sterilize that product using technology yielding “the greatest reduction in ethylene oxide emissions currently available.” Nor does subsection (g) shield such decisions from judicial review, as the Consent Order proposes.

Nor can a construction permit to the Agency sidestep these provisions once Sterigenics was subject to a Seal Order, absent a court concluding the Seal Order findings were without merit. Since the proposed Consent Order expressly avoids asking the Court for this finding, no construction permit can or should issue unless and until Sterigenics provides the requisite certifications; *and* the Agency separately reviews and certifies for each product that Sterigenics' proposed method will yield the greatest reductions available on a per product basis. This has not been done, and the terms of the Consent Order will not ensure that this is done.²

V. Conclusion

The Illinois Legislature acted to address ethylene oxide with highly restrictive sterilization limits, with an eye towards balancing medical product sterilization needs against the devastating effects ethylene oxide has had on district residents, their daily activity, and property. The legislature chose to particularly scrutinize and constrain the permissible activities of entities found to have put public health and safety so at risk that it necessitated issuing a Seal Order—and ensures that this issue cannot be mooted by the Agency and company alone. Given the lengthy and complex legislative record that rests in multiple places and bills; the potential misapplication of the statutory language and requirements in the proposed Consent Order; and that this Court's interpretations will be keenly watched and followed, *Amici* respectfully requests that this Court consider the relevant aspects of the legislative history for The Matt Haller Act in the above-captioned matter set forth above. *Amici* are available to assist the Court on any matter set forth above or other issues relating to legislative intent at the Court's desire and convenience.

² It also is doubtful the construction permit complies since it does not capture and control post-sterilization product being loaded into shipping trucks, where off-gassing can continue to occur.

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