

SEP 23 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD STATE OF ILLINOIS  
Pollution Control Board

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO REGULATION OF	)	R04-22
PETROLEUM LEAKING UNDERGROUND STORAGE	)	(Rulemaking - Land)
TANKS (35 Ill. Adm. Code 732)	)	

*PC#3*

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO REGULATION OF	)	R04-23
PETROLEUM LEAKING UNDERGROUND STORAGE	)	(Rulemaking - Land)
TANKS (35 Ill. Adm. Code 734)	)	

**NOTICE OF FILING**

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Chicago, Illinois 60601-3218

Marie Tipsord  
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SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Comments of Daniel J. Goodwin, P.E. on Behalf of the American Council of Engineering Companies of Illinois, a copy of which is herewith served upon you.

Respectfully submitted,

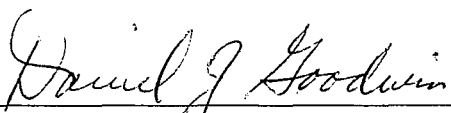


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Date: September 22, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that the attached Comments of Daniel J. Goodwin, P.E. on Behalf of the American Council of Engineering Companies of Illinois will be served on the individuals on the attached Service List by placing a copy in an envelope addressed to the address shown with first class postage affixed and mailing prior to 5:00 p.m. on September 23, 2004.

  
\_\_\_\_\_  
Daniel J. Goodwin, P.E.

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SEP 23 2004

STATE OF ILLINOIS  
Pollution Control Board

**R04-22 and R04-23 UST Rulemaking (Consolidated)**

**COMMENTS OF DANIEL J. GOODWIN, P.E.  
ON BEHALF OF  
THE AMERICAN COUNCIL OF ENGINEERING COMPANIES OF ILLINOIS  
September 22, 2004**

On August 11, 2004 the Hearing Officer in this matter issued a Hearing Officer Order establishing a 45-day period for written comments, following which a decision would be made regarding the need for further hearings prior to issuance of a First Notice by the Illinois Pollution Control Board (Board). The following comments are submitted on behalf of the American Council of Engineering Companies of Illinois (ACEC-I), formerly known as the Consulting Engineers Council of Illinois, in response to that Order. These comments are a continuation of ACEC-I's previous efforts to provide constructive advice and assistance to both the Illinois Environmental Protection Agency (Agency) and the Board in their efforts to improve the Leaking Underground Storage Tank reimbursement program.

As I stated in my comments at the August 9 hearing, the Agency's current proposal as modified by the changes contained in the "Third Errata Sheet" is much improved in comparison to the previous versions, but there are still significant issues that remain unresolved, and equally important, new issues have been raised by the introduction of three important new policies into the Agency's proposal. These new proposed policies will be addressed in these comments first, and then additional comments on other issues will be presented.

1. Competitive Bidding. The Agency's proposal to allow reimbursement in excess of the maximum lump sum or unit rates if competitive bids from at least three qualified bidders are obtained may be a good solution to the problem of determining fair reimbursement amounts for atypical situations. ACEC-I sees at least two problems in the Agency's proposed language that must be resolved before such a provision can be expected to work satisfactorily:

- In most cases it will not be practical to expect the competitive bidding process to be carried out prior to submittal and approval of the budget, given the 90-120 day periods that typify the Agency's budget review and approval process. *One solution to this problem would be to allow the owner/operator's consultant to simply identify in the budget proposal those items for which bidding will be used and to provide a non-binding estimate of the expected costs for those items. Once the Agency approved such a budget, the owner/operator would be entitled to full reimbursement of the amount of the lowest qualified bid, irrespective of how it compared with the estimate.*
- The Agency is proposing to limit reimbursement for the consultant's professional services in conducting the bidding process to only \$160. While ACEC-I cannot propose specific pricing due to constraints of anti-trust law, we hasten to point out that, using the \$90/hour rate for a Project Manager in the Agency's proposed Appendix E, and allowing no charges for administrative or technician support or for such things as postage, a



maximum of less than 1.8 hours could be reimbursed for the services of the Professional Engineer in performing the following tasks:

- Identifying and pre-qualifying at least three prospective bidders;
- Preparing and issuing biddable plans and specifications;
- Receiving, opening, reviewing, and compiling bids, including any proposed alternatives to bid plans and specifications;
- Notification of bidders of results, and award of the contract.

In the best of circumstances, it is unlikely that all of these actions could be completed in a sound fashion with only 1.8 hours of professional effort. In the kind of situation where bidding is most likely to be used—atypical site conditions or other unusual circumstances—just the essential act of preparing biddable plans and specifications may take several hours effort involving the Project Manager and perhaps other professionals, as well as drafting and clerical assistance. *A solution to this problem would be to allow the professional services entailed in carrying out the bidding process to be reimbursed on a time and materials basis. The consultant would have to estimate the time and expenses involved for each subcontract to be bid out and include that estimate in the budget before the charges could be reimbursed.*

2. The Agency has proposed that reimbursement for use of alternative technology will require cost estimates for that particular technology, plus at least two other alternative technologies, plus conventional technology. The cost for

the proposed alternative technology may neither be greater than that for conventional technology, nor substantially higher than that for any of the alternative technologies. This pre-supposes that there are at least three workable alternative technologies available for a given site, which may not be the case. It also assumes that feasibility and estimated costs for three alternative technologies can be determined with sufficient certainty to allow a meaningful comparison, without costly collection of additional site-specific data or performance of pilot testing. It is also noted that there is no provision for taking into consideration differences in the anticipated length of the remediation schedule for different technologies. Reimbursement of a marginally higher total cost for use of a technology that will achieve the remediation objectives in substantially less time should be an available option. Even though this alternative technology may have the lowest cost, the owner/operator should be free to choose a speedier technology. *All of these concerns can be addressed by addition of appropriate exception language to the Agency's current proposal.*

3. The Agency has proposed that language be added to the rules stipulating that costs for on-site corrective action to achieve remediation objectives more stringent than the TACO Tier 2 objectives will be ineligible for remediation, and that certain site-specific parameters be determined as part of the site investigation process to be eligible for reimbursement for remediation costs. The costs for gathering this additional information would be reimbursable.

ACEC-I endorses these proposed changes in the rules. We believe the potential cost savings for the Underground Storage Tank Fund are significant. The use of Tier 2 clean-up objectives in no way compromises public health or the environment, and does not increase risk of exposure to unsafe contaminant concentrations for anyone, either on-site or off-site. ACEC-I believes the opposition that has been voiced to this proposal reflects either a misunderstanding of the "Tiered Approach" or unwarranted concern about the dominance of perception over reality in the real estate marketplace.

4. ACEC-I has a continuing concern with the lack of clear delineation of the scope of services to be covered by the various lump sum payments for professional services proposed by the Agency.. This concern has been voiced previously during the hearings, but the Agency has not alleviated this concern.

*We therefore ask that the Board use the detailed information provided in Attachment B to my earlier pre-filed testimony, as well as relevant information from PIPE , to remedy this deficiency in the Agency's proposal.*

5. We are disappointed that the Agency has rejected our proposal to establish a formal procedure for notifying an owner/operator in advance of the Agency's tentative determination to deny or cut a reimbursement payment and for providing an opportunity to meet to discuss the issues involved before final action is taken. While this is a change the Agency could make without regulatory authorization by the Board, the Agency's unwillingness to do so compels us to

ask the Board to mandate such a procedure. The explanation offered by Doug Clay of the reasons for the Agency's rejection of this plan in his August 9 testimony (pp. 13-14) is not convincing. One point that he does not address in his explanation is the fact that the denial letters that are issued presently often do not contain specific information regarding the reasons for denial and what is needed to remedy the deficiency. He also does not state why the 120-day review clock cannot be stopped by a voluntary waiver from the owner/operator, analogous to the Agency's routine practice for several categories of permit actions. This waiver would allow whatever time might be needed to resolve the issues involved in the tentative denial. This plan would entail essentially no additional cost, and would greatly reduce the number of appeals to the Board and their attendant costs.

Finally, it is ACEC-I's recommendation that at the conclusion of this comment period, the Board should move ahead with drafting and issuance of a First Notice based on the record as it stands. There will be further opportunity to comment after that step, and in our view that is the best way to move toward resolution of the many unresolved issues remaining in this proceeding.