BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO:	)	
REGULATION OF PETROLEUM LEAKING	)	R04-22
UNDERGROUND STORAGE TANKS	)	(UST Rulemaking)
(35 ILL. ADM. CODE 732),	)	
	)	
IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO:	)	
REGULATION OF PETROLEUM LEAKING	)	R04-23
UNDERGROUND STORAGE TANKS	)	(UST Rulemaking)
(35 ILL. ADM. CODE 734)	)	Consolidated
	)	

PC#9

NOTICE OF FILING

TO: ALL COUNSEL OF RECORD
(Service List Attached)

PLEASE TAKE NOTICE that on September 23, 2004, filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of Additional Comments of CW^{3}M Company, Inc. for the Environmental Protection Agency's Proposal to Adopt 35 Ill. Adm. Code 735 and to Adopt Amendments to 35 Ill. Adm. Code 732 in the above-captioned matter.

Dated: September 23, 2004

Respectfully submitted,

CW^{3}M Company

By: Carolyn Hesse
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, on oath state that I have served the attached Additional Comments of CW^{3}M Company, Inc. for the Environmental Protection Agency's Proposal to Adopt 35 Ill. Adm. Code 735 and to Adopt Amendments to 35 Ill. Adm. Code 732 by placing a copy in an envelope addressed to the Service List Attached from CW3M Company, Inc., 701 West South Grand Avenue, Springfield, IL 62704 before the hour of 5:00 p.m., on this 24th Day of September, 2004.

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ADDITIONAL COMMENTS OF CW^{3}M COMPANY, INC. FOR THE ENVIRONMENTAL PROTECTION AGENCY'S PROPOSAL TO ADOPT 35 ILL. ADM. CODE 734 AND TO ADOPT AMENDMENTS TO 35 ILL. ADM. CODE 732

The following additional comments have been prepared in response to the previous hearings as well as the Third Errata Sheet prepared by the Illinois Environmental Protection Agency (IEPA) and the Additional Testimony of Douglas Clay dated July 30, 2004, which was presented during the August 9, 2004 hearing ("Additional Testimony").

In preparation of these comments, we felt it was important to re-assess the purpose of the proposed regulations. Without a clearly stated purpose and need, the proposed regulations will fall short of their intended purpose. The proposed technical changes are clearly in response to statutory changes enacted in 2002. However, the need for the fiscal portion of the proposal, as the Agency has proposed, has been more difficult to ascertain and fails to meet the statutory requirements.

CW^{3}M has participated in the development of and supports the proposal presented by PIPE. The comments provided in this additional testimony are meant to further address unresolved issues and expand upon those presented by PIPE.

On page 3 of Mr. Clay's Additional Testimony, he states that the reimbursement changes were not added in response to the current status of the Fund. However, during the March 15, 2004 presentation of Agency testimony and the subsequent question period, Mr. Jay Koch of United Science Industries, Inc. suggested that the Agency, in conjunction with the consulting industry, develop a means of gathering cost data in a format that could be accurately and statistically analyzed. The Agency responded that there was not time for such an exercise because, due to Fund solvency concerns, actions were needed immediately. If Fund solvency was not a factor considered for the need of this rulemaking, then perhaps the fiscal portion of the proposed regulations should be tabled until such data could be collected or until the Agency and regulated community can come together and produce a set of regulations without numerous flaws and biases. Also with regards to solvency of the UST Fund, the Pollution Control Board ruled in 1992, that the Agency did not have statutory authority to preserve the Fund or limit payments from the Fund in order to protect the solvency of the Fund. *See City of Roodhouse v. IEPA*, PCB 92-31, Sept. 17, 1992

The Agency has also stated on several occasions that the proposed fiscal controls were added in order to streamline the budget and reimbursement processes. We are in favor of streamlining the process as well. However, components of the Agency's proposal create additional bureaucratic roadblocks, which undermine the streamlining process and create additional costs, which are in no way accounted for in Subpart H.

On page 4 of Mr. Clay's Additional Testimony, he states, "the Agency believes there will be significant savings in cleanup costs with the establishment of 'reasonable costs' in regulations." In CW^{3}M's testimony, discussions of the inconsistency of how the proposed rates compared to those historically deemed reasonable by the Agency were offered. Based on Mr. Clay's statement, it is important to re-emphasize this point. Mr. Doug Clay stated during the March 15, 2004 hearing that the proposed rates are consistent with rates historically approved by the Agency and the costs incurred by consultants to perform corrective action work would be in line with the proposed numbers. CW^{3}M strenuously disagrees with that statement and has proven that the proposed rates are significantly lower than rates previously or historically approved by the Agency.

If the proposed rates are consistent with those historically approved and deemed reasonable by the Agency, then how are "significant" cost savings going to occur? The only rationale answer is that the cost savings would occur by slashing reimbursement of costs once deemed reasonable which represented costs actually incurred. This results in reimbursement amounts being less than the reasonable actual costs in spite of the fact that one of the stated purposes of the Underground Storage Tank Fund is "for payment of costs of corrective action. . . ." *See* Section 57.11(a)(5) of the Act. While Section 57.7(c)(3) of the Act may allow the Agency to review plans using a procedure promulgated by the Board to determine if costs are reasonable, the Agency continues to ignore the fact that the Act still requires that corrective action costs be paid by the fund and that it is not reasonable to reimburse less than the actual costs to do the work or less than the amount that would allow the consultants to make a profit.

Accordingly, CW^{3}M believes that it is imperative for the Agency to reconsider many of its proposed rates; particularly consultant's rates for reporting and field oversight activities to

maintain the integrity of the LUST Program. Alternative rates are presented in PIPE's testimony which we believe more accurately reflect the costs of performing these activities. For many of the consulting services' rates, CW^3M has participated with PIPE to develop alternative rate structures to utilize as alternatives to the Agency's lump sum proposed rates.

Additionally, cost estimates are typically prepared by registered professionals in a time-and-materials basis. The Agency is attempting to turn professional services and remediation activities into a commodity-based system. The system proposed by the Agency is oversimplified, as exemplified by comparing the number of rates included in other states rules, to the proposed Illinois regulations. While consultants are not entirely opposed to the commodity-based conversion, clear scopes of work are required for each item. In the absence of adequate breakdowns, one variable item within a given rate could lead to a substantial profit or loss for an individual site. Distance from a landfill to a site is an example of a variable that is not accounted for in the present equation, as is the cost of disposal at the landfill. A close landfill with a low cost would mean a high profit and an unreasonable LUST fund expenditure, while a distant landfill with a high cost *might* be approvable under the bidding process.

PIPE has prepared detailed scopes of work for the major tasks or technical components of the proposed regulations. Where the scope of work is more predictable and applicable to the majority of sites, a lump sum value has been derived. For tasks that have widely variable components and site-specific scopes of work, PIPE has proposed payment on a time and materials basis.

General Clarification Matters

CW^3M presented information from the Illinois Department of Transportation (IDOT) as an indication of current pricing for certain activities. CW^3M's purpose in contacting IDOT was

to show that IEPA's proposed rates are unreasonably low when compared to IDOT's real world experiences. The Agency then went to IDOT, who said that the information was taken from larger projects and should not be used for rate setting, but this is the same procedure used by the Agency in formulating the proposed rates. The Agency selectively looked at bits and pieces of prior submittals, pulled out individual items or groups of items, and created rates. As demonstrated by CW^{3}M's analysis of the Agency's spreadsheets, many of the items were used in error, or were taken out of context. The primary differences between the IDOT and the Agency's numbers are the Agency's numbers are older, not a complete sample, have fewer data points and are not an accurate or reasonable representation of the true costs to do the work.

As a point of clarification to ensure that the data provided by the Agency is not misrepresented, we offer additional comments regarding the figures presented on page 7 of Mr. Clay's Additional Testimony regarding the landfills and waste haulers in Illinois. While 48 landfills are permitted to accept LUST soils, not all of these facilities actually accept the waste. Some are at or near capacity, for example, and no longer will accept waste or accept waste over a given volume per day. The Agency indicates that 668 haulers are permitted or licensed to transport LUST soils. What is unknown is how many of those haulers are "not for hire" or how many of those haulers conduct unrelated work. While we don't dispute the Agency's number, it is important to note that there are not 668 haulers available for transporting LUST soils. For example, some haulers may devote a large majority of their work to construction activities and maintain their special waste hauler license to accommodate site-specific needs that may occur during a construction job.

The requirement to have more than one person on site in relation to Occupational Safety and Health Administration regulations is defined in 29 CFR 1926.65(d)(3), which requires use of the "buddy system", which is defined in 29 CFR 1926.65(a)(3).

Sections 732.103 & 734.115 -- Definitions

CW^3M proposes to delete the definition of "financial interest" and all references to it within the proposed regulations.

Our basis for this recommendation was addressed in our pre-filed testimony and is expanded herein.

The Agency has made several attempts to reduce or eliminate handling charges throughout the proposed regulations. After evaluating the definition of handling charge and the costs incurred by consultants or contractors to conduct corrective action activities, we believe that assessment of handling charges are necessary and legitimate components of conducting the work, regardless of the ownership interest in various firms.

Even when a contractor secures the work of a subcontractor where there may be some overlapping ownership or interest, the contractor is not relieved from incurring expenses relative to the work of the subcontractor. Perhaps the procurement element of the total list of expenses described in the definition of handling charges is less than that one would incur when hiring a subcontractor with no related interest, the other elements or associated costs are nonetheless incurred, such as insurance.

If a reasonable profit is an eligible component of a handling charge when the contractor secures the work of an unrelated subcontractor, why is it ineligible when there is a shared interest or the parties may be related? Profit is a necessary element for any business to survive and is not a derogatory word that should be avoided. The Agency is attempting to remove profit from the

consultants by eliminating the handling charge when the Agency does not clearly understand the costs associated with conducting work in the private sector.

Sections 732.112 & 734.145 -- Notification of Field Activities

CW^{3}M welcomes the opportunity to have LUST Section personnel visit sites to observe field activities. In past years, we found it valuable for a Project Manager to have first hand knowledge of sites, particularly sites with problematic circumstances. As the Agency's proposed notification requires providing information prescribed by the Agency, which is likely to be different or dependent on the Project Manager, CW^{3}M recommends that Subpart H be modified to allow for the additional expenses incurred to prepare and provide the notification, if so requested by the Agency, as this activity is clearly beyond the scope and costs proposed. While this expense is generally quite minimal, it represents an example of additional tasks imposed by the Agency to comply with regulations without corresponding consideration to the costs. It also supports PIPE's position that detailed scopes of work are necessary to identify tasks and costs.

732.407(b) & 734.340(b) -- Alternative Technologies

The Agency has modified Sections 732.407(b) and 734.340(b) to request budget comparisons of at least two other alternative technologies to the costs of the proposed alternative technology. In some instances, other alternative technologies may not be technically feasible as a result of site conditions (such as soil types, etc.) or the contaminants of concern (some technologies are not effective on every type of contaminant). CW^{3}M proposes that language be included to address this type of situation as an unusual or extraordinary circumstance. Based on the testimony to date regarding other situations, we believe that the Agency should have no opposition to such a change when it is so demonstrated.

> An owner or operator intending to seek payment for costs associated with the use of an alternative technology shall submit a corresponding budget in accordance with Section 734.335 (or 732.404) of this Part. In addition to the requirements for a corrective action budget at Section 734.335 (or 732.404) of this Part the budget shall compare the costs of at least two other available technologies to the costs of the proposed technologies. <u>If two other technologies are unavailable or are not technically feasible corrective action measures, the owner or operator must proceed in accordance with 734.855 (or 732.855).</u>

In some cases, the use of an alternative technology is preferable for technical reasons or because the costs for using conventional technology are high. For cases where the conventional technology would exceed the amounts in Subpart H, procedures should be created so that the real cost of conventional technology at a given site is available for comparison to the proposed alternative technology, as well as other alternative technologies. Preparation of bids for a technology which has already been ruled out as unfeasible is not ethical and a waste of resources. CW^3M recommends additional language for 732.407(b) and 734.340(b):

> If the estimated costs for conventional technology exceed the maximum payment amounts set forth in Subpart H, the owner or operator shall prepare a cost estimate of the conventional technology for comparison to the alternative technology in accordance with the requirements of 732.860 (734.860) and 732.850 (734.850).

<u>Sections 732.408 & 734.410 Remediation Objectives (Board Notice), and 732.606(ggg), 732.606(hhh), 734.630(ggg) & 734.630(eee) -- Ineligible Corrective Action Costs</u>

On pages 25 and 26 of Mr. Clay's Additional Testimony and in the Third Errata Sheet, the Agency is now proposing to eliminate payment of remediation costs associated with Tier 1 objectives and forcing the use of a groundwater ordinance as an institutional control where a groundwater ordinance is already in existence. We feel it is a little late in the process to propose sweeping changes when there has not even been concurrence with what has already been

proposed. This latest proposal is a brand new twist which was not required as a result of statutory changes. We suggest that the newly proposed language be dismissed as it represents sweeping policy changes regarding protection of the environment, even beyond the scope of these proceedings. Such changes would require thorough evaluation for all environmental programs, not just the LUST regulations.

We have two primary concerns with the Agency's latest proposal. First, the level of remediation should be decided by the property owner, who is often not the UST owner or operator. Our second concern is for off-site properties and their respective owner(s). If the Agency cannot force Tier II objectives on off-site property owners, then Tier II objectives should also not apply to situations where the on-site property owner is different than the tank owner.

Page 11 of Mr. Clay's Additional Testimony refers to Exhibit 69 which was submitted by PIPE indicating that most owners and operators already utilize alternatives afforded by TACO. If this is the case, why try to force owners and operators to use components of TACO that may be detrimental to their site or adjoining properties when they already utilize TACO when it is appropriate. If the Agency is unwilling to allow owners or operators back into the LUST Program if a problem later arises as a result of forcibly imposed TACO alternatives, then the Agency should not consider requiring its use. The applicability of TACO should be left up to the discretion of the owner or operator or the property owner.

The Agency currently requires that the LUST owner or operator define the extent of contamination to Tier 1 Residential objectives. In order to do this, the consultant, on behalf of the owner or operator, contacts potentially affected neighboring or adjoining property owners and requests access. In accordance with the Agency's current policy and proposed regulatory language, the property owner is to be notified that legal responsibility to remediate the

contamination is the responsibility of the UST owner or operator and that failure to remediate contamination from the release may result in threats to human health and the environment and diminished property value. It seems unconscionable to notify off-site property owners that they may experience loss of property value because of contamination and, if remediation does not occur, to then inform them that there will be no remediation. In such cases, off-site property owners should have the discretion of remediating their property or relying on an institutional control to address whatever levels of contamination may be present and the UST Fund should cover remediation costs. The potential cost savings of the Agency's proposal may be overshadowed by increased lawsuits and indemnification costs, which have historically been rare because current Agency policy is to be certain on and off-site property owners are afforded decision-making control over their own property. The Agency's 11th hour proposal merely provides the investigative research for a property owner to claim damages.

Sections 732.411(f), 734.350(f) & 734.710(d)(3) all state that the owner or operator, despite best efforts, "is not relieved of responsibility to clean up portions of the release that may have migrated off-site". The Agency's proposed new language is also in conflict with this regulatory language.

The Agency is proposing to make ineligible for reimbursement costs associated with groundwater remediation if a groundwater ordinance has been approved by the Agency for use as an institutional control. However, even where a groundwater ordinance exists, groundwater remediation may still be needed. For example, free product must be removed, modeling must be performed to determine if there would be an issue related to vapor intrusion into surrounding buildings and, if so, the contamination must be addressed, groundwater quality standards must be met within any setback zones or regulated recharge areas in accordance with the regulations, and

surface water quality standards must be met where groundwater discharges into a surface water body.

In addition, the regulations at 35 Ill. Admin. Code 742.1015 require scaled maps delineating the boundaries of all properties under which groundwater is located which exceeds the applicable groundwater remediation objectives and scaled maps delineating the area and extent of groundwater contamination. Information must also be obtained to identify current owners of each property under which contaminated groundwater is located, and there are continuing requirements to monitor the activities of local government regarding whether the local government issues any variances to allow the installation of potable water wells or if the local government changes an ordinance prohibiting potable water wells because the ordinance could be revoked. This continuing obligation is imposed on the property owner which, in many cases, is not the same as the owner of the UST.

Further, if neighboring property owners are not going to have their properties remediated so that they will then have contaminated property and an institutional control on their property, there is an increased likelihood of litigation related to property damage and resulting reduction in values of their property. This litigation threat should not be imposed upon the property owners who may or not also be the owners of the USTs.

The fundamental purpose of the Act and these regulations is protection of human health and the environment. While exposure pathways may be temporarily addressed, protection of the environment and long term protection of human health have not been adequately researched to determine the full impact of the Agency's proposal. Therefore, the decision to rely on a groundwater ordinance or TACO Tier II analysis should be made by the owner/operator who has

been paying into the Fund and not by an IEPA employee who has never had to cleanup a LUST on property he or she owned.

Sections 732.606 (ll) & (mm) & 734.630 (hh) & (ii) -- Ineligible Corrective Action Costs

With regards to Mr. Clay's comments on page 18 of the Additional Testimony on submittal of proof of payment, we still contend that the Agency's proposal only serves to defeat the purpose of streamlining the process. We refer back to our pre-filed testimony, which elaborates on the lack of need for the Agency to require proof of payment of subcontractors. This proposed requirement is unnecessary and burdensome. The Agency is merely trying to deny handling charges as a method of cost control. As discussed in our pre-filed testimony, payment of subcontractors is only one element of the costs incurred by consultants who utilize subcontractors. The handling charges afforded by statute and regulation are already well below generally accepted industry rates, which are typically 15%, regardless of the total amount, with no sliding scale. The current handling charge is already deficient, yet the Agency is attempting to reduce it further unless consultants expend additional resources preparing lien waivers or tracking and submitting cancelled checks.

Mr. Clay's Additional Testimony provides further verification that it should not be necessary for the Agency to require proof of payment of subcontractors. On page 15, the testimony states, "The Agency is not a party to contracts between owners and operators and consultants", therefore, we believe it is beyond their duty as regulators to require proof of payment.

Doug Oakley testified that the Agency has proposed this requirement because subcontractors contact the Agency to determine payment status of their invoices. Subcontractors often contact the Agency requesting status of payments to help spur the Agency's slow review,

particularly when their payment is dependent upon the Agency's review of their costs and a "reasonable" determination has been made on the subcontractor's invoice. The Agency should direct such inquiries to be conducted through proper Freedom of Information Act requests and remove themselves from contract interference.

Sections 732.606 (ss) & 734.630 (oo) -- Ineligible Corrective Action Costs

As discussed above, CW^{3}M recommends striking the following as an ineligible cost:

> Handling charges for subcontractor costs where any person with a direct or indirect financial interest in the contractor has a direct or indirect financial interest in the subcontractor.

If the Board finds that the definition of financial interest is a necessary component of the regulations and that 732.606(ss) and 734.630(oo) are required elements we recommend striking "direct or indirect" within this section as the deleted words are not necessary and only stand to cause confusion, mis-use or misinterpretation and are not necessary to determine compliance with the definition of financial interest.

> Handling charges for subcontractor costs where any person with a ~~direct or indirect~~ financial interest in the contractor has a ~~direct or~~ indirect financial interest in the subcontractor.

Sections 732.605 & 734.625 -- Eligible Corrective Action Costs

To clarify the eligibility of handling charges within the regulations, CW^{3}M proposes the addition of the following within the summary of Eligible Correction Action Costs:

> (a)(21) Handling charges for any subcontractor cost or field purchase cost incurred by the owner or operator's primary contractor.

As discussed in several sections of our additional comments, there are many elements of a handling charge that cause costs to be incurred by the contractor. The contractor should be eligible for payment of handling charges when any component of a handling charge is incurred.

Common practice for this industry as well as others, such as construction, is payment of a minimum of 15% handling charge on field purchases and subcontractor costs. While we feel that the handling charges sliding scale already puts contractors at a disadvantage for securing all potential costs associated with handling subcontractors, the difference between the sliding scale and the industry standard are substantial enough to accommodate for situations where one or more elements of the handling charge are not incurred as direct costs.

Sections 732.606 (rr) & 734.630 (nn) -- Ineligible Corrective Action Costs

Also discussed on page 18 of the Additional Testimony, it is the Agency's position that there should be no exceptions for filing payment requests later than one year after closure. If the Agency can assure us that this requirement will not be extended to 731 sites, we can concur that is it reasonable to assume that payment requests can be submitted within this timeframe, unless a budget appeal is pending. When reimbursement requests for 731 sites can take years to review by the Agency, the Agency should allow the same consideration for owners or operators when special circumstances exist. As discussed in our testimony and prior comments, it has been CW^3M's experience on a few cases, if an Illinois Pollution Control Board appeal is pending and settlement negotiations are in progress, final disposition of a case can exceed one year. In such a circumstance, the owner or operator would be prevented from submittal of a claim until the appeal is settled or a Board ruling has been finalized.

Should an owner or operator submit a plan or budget, which is rejected or modified by the Agency and deems an appeal is its best course of action, the time to reach settlement or a decision by the Board may extend beyond the timeframe for allowance of submittal for an application for payment (following approval of the budget). An example of such an instance would be a budget amendment was rejected or modified and subsequently appealed and the NFR

Letter was issued prior to disposition of the appeal. This, if an appeal is filed with the Board, the time to submit costs for payment should be extended.

In addition, an owner or operator's incapacitation, illness, inaccessibility or even death can cause delays in submittal of final plans, budgets or requests for payment. For these reasons, we request that the Board make exception for such circumstances.

Sections 732.606 (ddd) & 734.630 (aaa) -- Ineligible Corrective Action Costs

CW^3M offered significant discussion in our pre-filed testimony opposing the Agency's proposal to disallow fees associated with performing corrective action costs when such fees are assessed by governmental agencies. Such fees are unavoidable and are direct corrective action costs.

During a recent PIPE meeting, fellow members expressed concern that the Agency is now disallowing sales tax on pending applications, as the sales tax is a governmental fee. We are offering no direct testimony, however, we are asking the Agency if their intent was to also deem sales tax as an ineligible cost. If this were the Agency's intent, CW^3M would expand its objection to the entire disallowance. Sales taxes are inevitable on nearly every purchase and are a legitimate cost bore by the owner or operator to conduct corrective action activities. Since payment of taxes cannot be avoided, these costs are reasonable corrective action costs.

Section 732.614 & 732.665 -- Audits and Access to Records; Records Retention

The Agency's proposed modified language still suffers from most of the same problems that was contained in the previous draft language. The Agency's proposal continues to overstep the Agency's statutory authority. As CW^3M commented previously, Section 57.15 of the Act states in full: "The Agency has the authority to audit all data, reports, plans, documents and budgets submitted pursuant to this Title. If the data, report, plan or budget audited by the agency

pursuant to this Section fails to conform in all applicable requirements of this Title, the Agency may take appropriate actions."

Webster's New Collegiate Dictionary defines the verb "audit" as "to examine with intent to verify" and then gives the example of auditing account books. Section 57.2 of the Act states: "'Audit'" means a systematic inspection or examination of plans, reports, records, or documents to determine the completeness and accuracy of the data and conclusions contained therein." Although the Agency may have authority to audit the information that has been submitted to it, the Act does not give the Agency the authority to audit information that has not been submitted to the Agency, nor does this language does not give the agency the authority to inspect the records or offices of the professional engineers and professional geologists that consult to owners and operators of underground storage tanks.

In other words, the Agency does not have legal authority to access "the books, records, documents, and other evidence set forth [in the preceding subsection] during normal business hours for the purpose of inspection, audit, and copying," as proposed, nor does the Agency have authority to require that owners, operators, Licensed Professional Engineers, and Licensed Professional Geologists to "provide proper facilities for the Agency to review records." Furthermore, the Agency's proposal also ignores the fact that it is the owners and operators of underground storage tanks that are the regulated entities. As Doug Clay admitted during the March 15, 2004 hearing (Transcript, p. 185), the Agency does not regulate Professional Engineers. The Agency only has the authority to do those activities that are contained in legislation such as the Act. *See Reichold Chem. v. PCB*, 204 Ill. App. 3d 674, 561 N.E.2d 1333, 1345, 149 Ill. Dec. 647 (3d Dist. 1990).

In sum, the Agency is ignoring the plain language of the Act which limits its authority to audit to only those data, reports, plans, documents or budgets that are submitted pursuant to the Act. Thus, proposed Section 732.614 and 734.665 and especially subsections b and c should not be adopted by the Board. The Agency can accomplish the purposes of the Act by requesting, as it currently does, documentation of costs such as copies of invoices and other records such as manifests that document volumes of wastes that were disposed of at landfills and volumes of backfill material that were purchased to perform its auditing function.

Sections 732.825 & 734.825 -- Soil Removal and Disposal

New proposed 734.825(a) and 734.825(a) propose that the maximum rate for soil removal, excavation and transport be $57.00 per cubic yard. Considerable testimony, comments and discussions have occurred during the proceedings to date. We believe that the record shows that the $57.00 per cubic yard rate is out of date and was unreliably calculated. Accordingly, the Board should consider a rate more applicable to current and realistic rates. Ideally, rates could be developed which take into account site-specific factors, such as distance to the landfill or backfill supply; i.e., a rate for 0-20 miles, 20-40 miles, etc. The Agency does not want to raise the rate, as sites that fall under the $57/yd rate would be eligible for payment of more than the actual costs. However, by keeping the rate low, they penalize other sites and force many from automatically falling within an approvable rate, particularly sites located in southern Illinois or other areas that are remote from landfills. Without adequate flexibility in this rate it will become necessary to utilize the "unusual or extraordinary" option or bidding process to alleviate this issue.

CW^3M's May 2004 testimony included a demonstration of the impact of the Implicit Price Deflator for the Gross National Product for the excavation, transportation, and disposal

rate, assuming it was $57.00 when first established. The rate was estimated to be $61.43, using the October 1, 2003, factor. Using the most currently available number, the April 1, 2004 value, and the rate would now be $62.54. Considering the amount of time that will pass until the proposed regulations go into effect and begin to be adjusted for inflation, it is extremely important to use current, accurate rates. Similarly, the $20 rate for backfill would now be $22.74.

Sections 732.845 & 734.845 -- Professional Consulting Services

On pages 29 through 30 of the Third Errata Sheet (734.845(e)), the Agency has proposed a schedule for payment of travel costs based upon distance to the site. CW^3M supports PIPE's proposal for reimbursement of travel expenses, the following modifications should be made:

1. Allotment for distances greater than 60 miles should be included. On the basis of the Agency's proposal, an incremental increase should be allotted for every additional 30 miles.

2. The hourly rate of $80.00/hour (based on the Agency's average of personnel rates) should not be utilized for professional staff conducting site investigation of corrective action field activities as the $80.00/hr rate includes personnel rates for support or clerical office staff.

The Agency has again based its travel upon one person traveling to the site in the matter as follows:

0 to 29 miles	1 person	1 hour $80/hour	$60/day for vehicle	$140
30-59 miles	1 person	2 hours$80/hour	$60/day for vehicle	$220
60+ miles	1 person	3 hours$80/hour	$60/day for vehicle	$300

3. We feel that this formula should be modified in three ways, and the travel should be allocated for 2 people in accordance with OSHA and workload requirements as has been discussed previously. The personnel rate used to calculate the total should not be a rate weighted with office/clerical staff rates but should represent technical/professionals who will be conducting the work.

Also, there is no reason to stop the travel at 60+ miles. Therefore this section should be as is follows:

1 hour is allocated towards travel for every 30 miles of one-way travel or fraction thereof. Two personnel are allowed to travel at a total rate of $158.25/hour based on the Agency's personnel rates. Plus $60/day vehicle charge.

In this scenario:	0-29 miles	$218.25
	30-59 miles	$376.50
	60-89 miles	$534.75
	90-119 miles	$693.00
		...and so on

And as specified below, the mileage should be based off of the office in which the employees come from instead of the nearest office, since all of a company's offices may not be staffed with all types of personnel.

CW^{3}M recommends revising the language regarding multiple offices. While a consultant may maintain more than one office, satellite offices may not be equipped with the specific needs or personnel to conduct a given activity. Accordingly, the consultant will need to schedule and assign the appropriate personnel to a given field task and should have the option of budgeting the travel time from the location most appropriate for the task. Therefore, we suggest changing the language to the following:

734.845(e) Distances shall be measured in ground miles and rounded to the nearest mile. If a consultant maintains more than one office, distance to the site shall be measured from the consultant's <u>office in which the personnel completing the task are located.</u>

<u>732.845(a)(2)(A) & 734.845(a)(2)(A) -- Professional Consulting Services</u>

In the Third Errata Sheet, the Agency modified the oversight rate of 250 cubic yards to 225 cubic yards as a result in the proposed changes to the number of hours considered for a half-day rate. On page 14 of Mr. Brian Bauer's pre-filed testimony, the 250 rate was derived from the National Construction Estimator Guide and rounded down to 250 yards per day as a

conservative estimate. Utilizing a standard ratio, the revised conservative estimate should be 200 yards per the half-day rate for excavation activities alone.

CW^3M recommends revising the yardage rate to reflect actual field conditions during an excavation. We are not disputing the rate the Agency extracted from the guide, however, the rate fails to account for all of the activities underway which will affect the overall time on the job, hence the amount oversight time required. The 57 yards per hour rate assumes no activity except excavation. However, reality is that backfill operations are often conducted concurrently with the excavation. Depending on the location of the landfill in proximity to the location of the backfill suppliers, trucks may deposit a load of contaminated soil at the landfill and pick up a load of backfill on the return trip. If that cannot be accomplished, a portion of the trucks may be assigned to landfill runs only and some to backfill only. Often, excavated areas need to be backfilled in order to advance equipment to the next area of the excavation, which requires positioning trucks and equipment over the previously-excavated area. What the 57-yard per hour rate also does not take into account is movement of equipment and trucks during the excavation. Even when trucks are loaded continuously, time is spent to position the truck and excavator and to line the truck prior to loading. Interruptions in loading may occur to check load distribution and estimated weight prior to departure. During the excavation and loading, if a wall begins to fail or loose material needs to be removed and secured, the excavator's loading will be interrupted and the truck may need to be repositioned. The 57-yard rate also does not factor loading in tight spaces which requires the operator to maneuver more slowly around structures, overhead lines, etc. The excavation will also be interrupted during sample collection activities.

Field oversight also does not begin the minute the first scoop of soil is excavated. Personnel overseeing the excavation are required to arrive ahead of the heavy equipment crews

to prepare for the day's activities, which may include assessing the excavation (wall stability, accumulation of groundwater, etc.) setting up traffic patterns, re-arranging site barricades, having manifests ready and distributing them to each driver, relaying the days assignments, and collecting tickets and documentation from the previous day's work. Similarly, at the close of the excavation each day, oversight personnel will assess the site, assure it is secured for the evening, provide instructions for crew for the following morning, check material supplies and make arrangements or go secure additional materials for the next day's work (truck lining material, site safety equipment, sampling supplies, etc.). If samples were collected, they will need to be delivered or taken to a shipping location as well.

We estimate that these additional activities for oversight account for 20% of the professional's time during excavation oversight. Therefore, we believe the most accurate number that should be used to calculate excavation oversight is 160 cubic yards, a 20% reduction of the 200 cubic yard rate.

Additionally, while the Agency's estimate was solely based on the amount of time in which it takes to load a truck, the Agency has indicated during its testimony that oversight also needs to cover backfilling activities.

The Agency's estimate then must assume that the first load of backfill is being dumped at the same time as the first scoop of soil is excavated. This would apply to the entire job and to each single day. There is time at the beginning and end of each day and each job when only one of the two activities are being performed and the Agency has failed to take this fact into account in its proposed rate.

732.845(g) & 734.845(g) -- Professional Consulting Services

732.855 and 734.855, added by the Agency in response to its bidding proposal, has allotted a meager $160.00 per task bid. The allotment fails to take into account the extent of work associated with bid preparations. Bid specifications must be prepared for each task that clearly define the scope of work and cost items included therein. The consultant will have to send requests for bids, which requires time and office-related expenses (i.e., postage and copies). The consultant will also have to screen the qualifications of those it solicit bids from or those it may receive bids from to ensure that they are even capable and qualified to perform the tasks. Technical professionals will be doing the majority of work, particularly developing the specifications and scope of work; this is not a task for an office clerk, whose role would be limited to copying and mailing the bids. The allotted amount also does not account for the time needed to summarize and complete the Agency's forms. Therefore, the $80.00 hourly rate is insufficient, as is the number of hours allotted for this task.

On page 30-35 of the Third Errata Sheet, (addition of Sections 732.845(g) and 734.845(g)), the Agency has proposed to add costs for bid preparation when the subcontractor is paid directly by the owner or operator and deny the consultant handling charges as well. Whether or not the consultant or the owner/operator pays the subcontractor, the consultant is going to incur considerable expenses preparing the bid specifications and scope of work, finding and screening subcontractors, and evaluating bids. The Agency is attempting to force the bidding process, yet denying the consultant payment of legitimately earned costs. Further, the Agency continues to allege that if an owner or operator pays the subcontractor directly, the consultant is not entitled to handling charges. CW^3M discussed this it its pre-filed testimony. Payment of the subcontractors is only one element of the costs incurred "handling" the work of

subcontractors. Costs are also incurred to secure certificates of insurance, verify subcontractor invoices, secure required back-up or supporting documentation, request and secure revisions to the invoice and prepare the invoice for payment, document payments or prepare and secure lien waivers. The definition of "Handling Charges" means administrative, insurance, and interest costs and a reasonable profit for procurement, oversight, and payment of subcontracts and field purchases. As is evident from the definition, consultants of contractors incur expenses for more than just the interest charges associated with paying subcontractors. For example, our professional and general liability insurance premiums are based on total sales and revenues. If ½ of the company's gross sales are the costs of subcontractors, the insurance company will assess premium rates based on the company's gross. Subsequently, we pay insurance for subcontractor invoices. There are also administrative costs incurred for handling subcontractor invoices, such as reviewing invoices, supporting documentation and securing revised invoices if errors are found.

Sections 732.855 & 734.855 -- Bidding

Sections 732.855 & 734.855 Bidding, should be modified to remove the elimination of securing bids from entities with financial or related interest as well as the phrase "direct or indirect," as follows:

> a) A minimum of three written bids shall be obtained. The bids shall be based upon the same scope of work and shall remain valid for a period of time that will allow the owner or operator to accept them upon the Agency's approval of the associated budget. Bids shall be obtained only from persons qualified and able to perform the work being bid. ~~Bids shall not be obtained from persons in which the owner or operator, or the owner's or operator's primary consultant, has a direct or indirect financial interest~~.

c) The maximum payment amount for the work bid shall be the amount of the lowest bid, unless the bid is less than the maximum payment amount set forth in this Subpart in which case the maximum payment amount set forth in this Subpart H shall be allowed. The owner or operator is not required to use the lowest bidder to perform the work, but instead may use another person qualified and able to perform the work~~, including, but not limited to, a person in which the owner or operator, or the owner's or operator's primary consultant, has a direct or indirect financial interest~~. However, regardless of who performs the work, the maximum payment amount will remain the amount of the lowest bid.

If the Board finds that the definition of "financial interest" is a necessary component of the regulations and that 732.855 and 734.855 are required elements we recommend striking "direct or indirect" within this section as the deleted words are not necessary and only stand to cause confusion, mis-use or misinterpretation and are not necessary to determine compliance with the definition of financial interest.

For consultants, who can provide services such as drilling, excavation, and transportation of materials, the acquisition of three external bids will be difficult. There is no incentive for an external contractor to provide a bid if the work may not be awarded to them, even if they provide the low bid. External contractors also begin the bid process with a competitive disadvantage; handling charges are not needed if the consultant does the work.

If the proposed maximum rates are set such that 90% of actual costs are at or below them, then the problems associated with bidding will be encountered by only 10% of the projects. Since the rates were selected using the average of outdated data, the use of extraordinary circumstances and the bid procedures will be commonplace.

If a consultant is unable to obtain bids, the Agency could claim that not enough effort was used. Given the Agency's proposed two-hour limit, a consultant cannot afford to put in

much of an effort. If bids are obtained, but the contractors that provide them are the same or similar from project to project, there could be the appearance of collusion. The proposed bidding procedures need to be further developed to define "best efforts" in relation to obtaining bids, considering the proposed dollar limit. We believe that "best efforts" should be defined in a way similar to that of off-site access requests. We believe that certified letters should be sent to a minimum of three contractors, notifying them of the scope of work, required qualifications and allowing 14 days to respond. These efforts should qualify as "best effort" requirements for obtaining three bids. Similar to off-site access, an affidavit would be an acceptable means to demonstrate that "best efforts" were completed.

The bidding procedures suggested by the Agency are yet another demonstration of their lack of understanding of the realities of conducting LUST investigations and remediations. Bids must be reviewed in the same unit rates as the rate structure proposed in Subpart H. Therefore, additional breakdown for bidding purposes is not practical and may not even be possible. For example, if excavation, transportation, and disposal are lumped into a single rate, one cubic yard, then bids must be obtained from contractors as a single price for excavation, transportation, and disposal. Requiring three individual bids for each component would require a matrix so that Trucking Company A can provide bids to work with Excavation Company A and take the soil to Landfills A, B, or C, work with Excavation Company B and take the soil to Landfills A, B, or C, etc. This makes the bidding process unnecessarily complicated. Despite the Agency's assertion that all excavators are the same, some have larger or smaller equipment, and more or less experienced operators, thereby allowing them to load trucks faster or slower than others; directly affecting the trucking costs. Similarly, trucking companies have different numbers and sizes of

trucks available, and route selection to the landfill affects the speed of travel and may impose loading limits, all of which affect the excavation contractor's production.

During the August 2004 hearing, the Agency discussed the IDOT information and bidding/awards process, indicating that rates extracted from the total should not be relied upon without looking at the entire award. However, the Agency is now proposing to piece together total project costs from individual and unrelated bids. This appears to be contradictory to the statements made on page 22 of Mr. Clay's Additional Testimony that the bids should be evaluated on the total costs and not by comparing individual line items such as excavation, transportation and disposal.

It is not practical to have two contractors on site during the excavation and backfill, therefore, reviewing bids for excavation, transportation, and disposal, and backfill as separate items is not realistic.

We believe that PIPE's proposal, which allows for Subpart H rates, bidding and/or a time and materials submittal, would alleviate many of the concerns that we have regarding the bidding process and the alternative technology cost comparison process.

Summary

In conclusion, CW^{3}M would like to reiterate that it fully supports the positions of PIPE throughout this rulemaking process. We also feel that we have provided additional testimony to demonstrate what our concerns are with rules as proposed by the Agency. If the Pollution Control Board wishes to hold another hearing, we would be willing to participate in any additional hearings.

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Respectfully submitted,

CW^{3}M Company

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