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MAY 04 2005

STATE OF ILLINOIS
Pollution Control Board

May 4, 2005

Ms. Marie Tipsord
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

Re: Questions and Additional Hearing(s) pertaining to R04-22 (UST Rulemaking) &
R04-23 (UST Rulemaking Consolidated)

Dear Ms. Tipsord:

First, let me thank the Board for determining that at least one additional hearing shall be held in the above referenced matter. Also, thank you for considering and acknowledging the request of the many Southern Illinois-based employees of EcoDigital Development Group and United Science Industries, Inc.

Although by regional and national standards United Science Industries, Inc. is a very small firm, in the economy of the Southern Illinois region, our company is a significant employer. Our employees, many of which are native to Southern Illinois and desire to remain close to their roots, are appreciative of their employment and are concerned about the potential implications of this rule on their employment and our industry.

As members of the largest LUST services firm in the entire State of Illinois, USI's employees represent a client base from Chicago to Cairo, from the Indiana state line to the Mississippi River. USI's employees serve a client base which is the largest in the UST business in the State of Illinois by a factor of nearly two to our nearest competitor. USI's client's consists of owners/operators from numerous socioeconomic sectors ranging from highly profitable well-capitalized businesses to undercapitalized small businesses and even the financially destitute. Having been in the industry in Illinois since its inception, and having the practical experience of working on hundreds of LUST sites across all regions of the state for numerous owners/operators with varying social, economic and ethnic backgrounds, USI and its employees have an immense knowledge base regarding the needs and concerns of the UST owner/operator. As advocates of our clients (especially the mom & pop operator), our employees want to share their collective knowledge base with the IPCB to ensure that the record in this rulemaking reflects this vast base of knowledge and practical experience and most importantly the needs and desires of our clients.

Again, thank you for hearing each of USI's employee's individual requests. Their livelihood, and those of the hundreds of Illinois' owners/operators that USI represents are all dependent upon the long term viability of the Illinois LUST program. As a result, we are fully in support of the implementation of a fair cost containment rule that assures the viability of the LUST program for many years to come. Therefore, it is highly important to all of us that the rules that are eventually adopted pursuant to this rulemaking be based upon accurate, reliable and relevant facts and that the rule that is crafted be able to be administered fairly, objectively, uniformly and transparently. It is with these goals in mind that USI and its employees desire to participate in this process.

In one of the recent postings to your website, you requested that interested parties provide you with dates in June and July during which their time had already been scheduled so that you could consider the commitments of the various parties when contemplating dates for the upcoming hearing. I have previously scheduled commitments for the entire time period from June 1st through June 26th. I am available from June 27th through the end of July. In any case, I am committed to providing constructive input and suggestions during the remainder of this rulemaking and am willing to make sacrifices in my schedule to facilitate participation in the hearings if the proposed hearing date conflicts with my schedule. The employees of USI that desire to participate in the rulemaking will provide you with their schedules under separate cover.

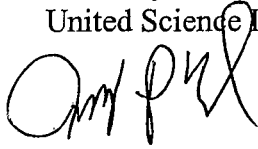
The Board also recently requested that written questions be presented by May 4, 2005. The Board also made notice that the questions posed would be answered by May 18, 2005. I assume that questions may be posed to either the Board or the Agency and will be answered accordingly. I also assume that, after all interested parties have received the answers to the questions posed pursuant to the May 4th dead-line, the Board will request pre-filed testimony for this summer hearing(s) thereby allowing the testimony of the participants to consider the Board's and Agency's responses to the questions. Therefore, although I hope to have an opportunity to testify at this summer's hearing and provide the board with a considerable amount of information that I believe needs to be on the record before a final rule is promulgated, under cover of this letter I am simply providing the questions requested of the participants by May 4th.

You will note that many of the questions that I am submitting have the goal of attempting to objectively define how the Agency intends to interpret and administer these rules with regard to professional service tasks. It is my belief, and I believe that of USI's employees and our colleagues in the industry, that the largest area of discrepancy remaining in this rulemaking is the fact that, as a practical matter, these rules if interpreted and administrated in an absolute sense by the Agency, will simply not allow enough time for the environmental professional to complete the professional service tasks required under the Act as historically enforced by the Agency.

This is very problematic as the result could be hundreds of appeals and unnecessary costs to all involved parties. Hopefully, the question and answer period proposed by the IPCB will resolve many of these issues and the remainder can be

resolved at the upcoming hearing(s). My questions are attached. Other questions are being submitted separately by other employees of United Science Industries, Inc.

Sincerely,
United Science Industries, Inc.

A handwritten signature in black ink, appearing to read "Jay P. Koch". The signature is stylized and cursive, with the first letter of each word being large and prominent.

Jay P. Koch
President

MAY 04 2005

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF)
) R04-23
REGULATION OF PETROLEUM LEAKING) (UST Rulemaking
UNDERGROUND STORAGE TANKS) Consolidated)
PROPOSED NEW ILL. ADM. CODE 734)

Proposed Rule. First Notice

PRE-FILED QUESTIONS FROM Jay P. Koch FOR THE ILLINOIS POLLUTION CONTROL BOARD'S 1st NOTICE OF AMENDMENT TO 35 ILL. ADM. CODE 734 AND 35 ILL. ADM. CODE 732.

Below are questions proposed by Jay P. Koch in response to the Illinois Pollution Control Board's request for pre-filed questions. These questions are presented in order to gain a better understanding of the Agency's intent and approach to the implementation and administration of the proposed rules and the UST program subsequent thereto in order to facilitate the preparation and development of accurate, factual and meaningful testimony for the hearing(s) to be held this summer in the above referenced matters.

Questions:

1. In Mr. Clay's testimony, he stated that groundwater remediation is, by definition, considered to be an alternative technology. Some, but not all, IEPA technical reviewers require that a Corrective Action Plan, in order to be acceptable, address both soil and groundwater remediation. In a situation where the owner/operator is proposing a corrective action to the agency for both soil and groundwater remediation and assuming that the proposed method of soil remediation would be excavation, transportation and disposal, how would the Agency administer the Subpart H maximum payment amounts? Would this be treated as a conventional cap (maximum lump sum payment amount) or an alternative technology CAP (Time & Materials) or would it be a hybrid?
2. Several consultants have recently mentioned that it is very difficult to have alternative technology CAPS (for soil remediation) approved by the Agency. If an alternative

technology CAP is submitted to the Agency and it is not approved, how does the Agency intend to deal with associated reimbursement issues under Subpart H? Specifically, if an alternative technology CAP is rejected one or more times, but is eventually approved by the Agency, will the Agency reimburse all professional service hours that are reasonable and justified so long as the rates for professional services are consistent with Appendix E? If the alternative technology Corrective Action Plan was rejected by the Agency reviewer on one or more occasions, and as a result the owner/operator elects to subsequently submit a CAP for a conventional technology, will the costs associated with the development of the alternative technology CAP be paid pursuant to Subpart H on a time and materials basis with the costs of the subsequently prepared conventional technology CAP being reimbursed on a maximum lump sum payment basis in accordance with 734.845 (c) (1)?

3. How does the Agency intend to administer the "extraordinary circumstances" provision? In order to avoid the landslide of questions and conflicts that are almost certain to arise after the implementation of any rule changes of the magnitude represented by Subpart H, is the Agency, prior to the final implementation of the rule, willing to publish on a regulation by regulation basis, examples of the types of situations that it believes will warrant a claim for "extraordinary circumstances"?

4. Market research and analysis performed by USI indicates that nearly ninety-five percent of the owners/operators that are currently engaged in LUST clean-ups in Illinois are individuals or very small businesses. Many of these individuals and small businesses do not belong to the organizations that are listed as being the parties that will appoint the Members of the LUST Advisory Committee. Will the IEPA consider allowing an additional seat or seats on the LUST Advisory Committee in order to assure the representation of this category of owner/operator?

5. The Agency is proposing revisions that would allow the Agency to remotely monitor alternative technologies? Is reimbursement for these activities to be handled on a time and material basis?

6. Subpart H, Appendix D provides rates for Sample Handling and Analysis. Section 734.835 indicates that these rates are for transportation, delivery, preparation, analysis and result reporting. Often times analytical samples are transported to a central shipping location by one party, delivered to the laboratory by another and then analyzed by the lab (a third party). Are the rates provided in Appendix D to cover the activities of all three parties described above?

7. In numerous instances in the Agency's testimony, the Agency testified that the proposed rules were being presented in order to "reform the budget and reimbursement process" and to "streamline the approval of budgets and the processing of reimbursement claims". An additional goal stated by the Agency was to "streamline the UST remediation process". Does this mean that the Agency's intentions are to improve upon (reduce to the greatest extent practicable) the amount of time that it takes for the various reviews, approvals and/or reimbursements?

8. The Agency testified that the rates are generally consistent with the rates the Agency currently approves. The Board accepted the Agency's position on this matter as part of the rule that was published at 1st notice. The consulting community, on the other hand, believes that the rates that are provided in the proposed regulations are not consistent with those that have historically been reimbursed. Instead the consulting community is confident that the amount of time that has been allowed for various professional service tasks and by extension the maximum lump sum payment amounts are substantially below those which have been historically reimbursed by the Agency. This has been a significant point of contention during this rulemaking and represents a conundrum. A simple answer to this conundrum would be to have a qualified and reputable independent third party audit the historical reimbursement records of the Agency with regard to the average costs for professional services per hour as well as the average number of professional service hours incurred per labor classification per task and to allow the audit report to be published, available to the public and placed on the record in this rulemaking. Is the Agency willing to allow an independent auditor to perform a statistically valid review of the Agency's historical files and to provide the results of that audit to be entered into the record in this proceeding?

9. The Board has acknowledged that the method that the Agency used to establish the rates provided in Subpart H was not based upon scientific or statistically valid means. The Board has further acknowledged that it is largely relying upon the experience of the Agency and that the Board finds the rates proposed by the Agency in Subpart H to be reasonable. I would generally agree with the Board's assessment and opinion with the exception that I believe that the number of hours that have been allotted for professional and consulting service tasks that are subject to the maximum lump sum payment amounts and therefore, by extension the maximum lump sum payment amounts themselves are substantially inaccurate. For those services the rates that have been established for professional services and consulting. It appears that the number of hours that the Agency has allotted to professional service tasks is woefully inadequate. Since the Board has acknowledged that the Agency did not use statistically valid means to establish the rates, what independent validation steps has the Board taken, or does it plan to take, in order to assure that the number of hours that the Agency has allotted for professional and consulting services is sufficient to allow a reasonably proficient professional to complete each of the necessary tasks?

10. Can the Agency please provide a list of the governmental fees and permits that it is considering not being eligible for reimbursement? Can the Agency provide a list of examples of the types of payments to other persons that it considers to be ineligible for reimbursement?

11. Because this rulemaking is likely to be the most momentous in the history of the Illinois LUST program and is likely to have a profound financial impact on numerous owners/operators and consultants across the State of Illinois, is the Board willing to make a second request for the Illinois Department of Commerce and Community Affairs to perform an economic impact study of these proposed regulations? It is my understanding

that, when requested to do so last year, the DCEO declined to provide this assessment for budgetary reasons.

12. In their 2004 testimony, the Agency indicated that 375 consultants performed work on LUST Sites in the last three years. Can the Agency provide a list of the names of the consulting firms that, in the aggregate, submitted fifty percent (50%) of the work plans, budgets and reports to the Agency from the period January 2003 to the present?

13. The Agency objected to the notion of providing a "Defined Scope of Work" for the Subpart H payment items. The Board, at first notice, agreed with the Agency's position on this matter. On page 78, the Board seems to suggest that the consulting community wanted a defined scope of work to be separately developed for each project and also suggest that such a requirement would result in a highly cumbersome rule. I agree with the Board in that regard. As a point of clarification it has not been USI's desire that a detailed scope of work be prepared for each project. Rather, USI would like some definition to be set forth, on a task by task or regulation by regulation basis, that will help everyone understand what is to be considered "typical" and what is to be considered "extraordinary". Would the Agency consider publishing, in advance of the effective date of this rule, some broad guidelines as to what is "typically required" on a task by task or regulation by regulation basis?

14. Is it the Agency's intention that upon satisfaction of the deductible, and provided that the limitations on total payments provided for in 734.620 have not been exceeded, that the LUST Fund reimburse all corrective action costs that are eligible under 734.625?

15. If funds are not available under the LUST Fund program, or as a result of the implementation of Subpart H, the Agency is unable to pay for all of the eligible (pursuant to 734.625) corrective action costs incurred by an owner/operator in excess of the deductible, does this in any way relieve the owner/operator of the responsibility to comply with IEPA regulations and remediate the site?

16. If the answer to the above question is "no" then, does the Agency intend to enforce the Act and the LUST regulations, including the levying of fines and penalties, against owners/operators that are unable to comply?

17. A practice, which has become common in the industry in Illinois, and which is necessitated by long reimbursement cycles, is for consultants and/or contractors to perform corrective action work for the owner/operator and to generally wait for payment for their services until such time that the owner/operator has been reimbursed by the LUST Fund. What is the Agency's opinion on consultants/contractors deferring payment for their services in excess of the deductible until such time that the owner/operator is reimbursed? What is the IPCB's opinion on this issue? Do the Agency and the Board believe that the proposed regulations, or any portion thereof have any bearing on this practice on the part of the consultant's/contractors?

18. In the late 1980's and the early 1990's the Agency administered a Joint Payment Program whereby the Agency would make joint reimbursement payments to the Owner/Operator and their primary consultant/contractor. Why did the Agency do away with this program?

19. In Mr. Chappel's testimony, he indicated that the activities conducted by a consultant in each step of the LUST process and the estimated personnel time required for each activity were provided to the Agency by ACECI. Who, at ACECI or from other organizations, participated in this process? What are their qualifications and credentials? How much experience, do they have in Illinois LUST work and in what capacity? What scope of work was given to them in order for them to determine what was required at each step in the process? After receiving the estimated personnel titles and the estimated number of hours from ACECI did the Agency make any modifications or additions to the information provided by ACECI before incorporating the information into the proposed rule? Why in this instance did the Agency rely on a third party to estimate the appropriate staffing and level of effort required instead of using information from its historical experience? When was the information provided to the Agency by ACECI?

20. Is the Agency familiar with a USEPA initiative referred to as TRIAD?

21. Is it the Board or the Agency's intention that personnel that do not meet the degree, licensing or experience requirements of Appendix E. but that have been previously employed in their respective positions prior to the effective date of the rules, be grandfathered into their current positions? In the alternative will these personnel be disqualified from their positions and subject to layoff? If a person does not meet the degree, licensing and experience requirements for the Project Manager labor category, but can demonstrate that it has been able to successfully develop work plans and budgets, gain Agency approval of those work plans and budgets and successfully manage the project with a high level of reimbursement by the Agency, can is it the intent of Subpart H and the Agency that this person will no longer be considered qualified to perform their job and therefore be subject to potential layoff by their employer?

22. If a person does not strictly meet the degree, licensing or experience requirements of Appendix E how would the Agency go about determining what T&M billing rate would be applicable to the individual?

23. 734.850 indicates that the reimbursement of personnel costs will be based upon the work being performed and not the classification or title of the person performing the work. Can the Agency provide a list of the classifications/titles that it considers to be appropriate to the various tasks/regulations?

24. Does the Agency consider consulting/professional services to be subject to the bidding requirements in Subpart H 734.855 as an alternative means of establishing the maximum payment amount? I assume the bidding requirement only pertains to contractors since the rule clearly delineates that consultants will be paid for bid

solicitation preparation and bid review on a time and materials basis. Please clarify the Agency's intentions with regard to this matter.

25. If the answer to the question above is "yes" what scope of work should be used in the bid solicitation since the scope of work associated with professional services is usually unknown at the time that the owner/operator hires the consultant?

26. By what means is the owner/operator and his or her consultant required to solicit bids? If a bid solicitation results in less than three bids, how many rounds of solicitation are required?

27. As an example, an owner/operator has an approved budget for a corrective action to excavate, transport and dispose of 2,000 yards of contaminated soil. One evening during the corrective action work it rains two inches and the excavation fills with water which becomes contaminated when it comes into contact with soils in the excavation. The costs of the water disposal was not in the budget. How would the Agency administer this type of situation, assuming that the owner/operator makes a claim for reimbursement of the water disposal costs from the LUST Fund?

28. As an example, an owner/operator hires a consultant to perform consulting and professional oversight services at its LUST site. The consultant performs the work required to obtain Agency approval of a Corrective Action Plan for conventional technology. The consultant bills the owner/operator for the service and the owner/operator is reimbursed. The owner/operator pays the consultant. After the completion of the excavation work stipulated in the approved CAP, the Agency reviewer requests a groundwater remediation to be performed. How will Subpart H be applied to this situation? Will the time necessary to develop the groundwater CAP be reimbursed on a time and materials basis.

29. In calculating the maximum lump sum payment amounts for the various plans and reports required as part of Early Action, Site Investigation and Corrective Action phases of a project, did the Agency assume that the various plans and reports would be approved by the Agency reviewer on the 1st submission? I assume this is the case since \$640 is provided for Amended Plans and Amended Reports?

30. 734.845 (f) provides \$640 for the amendment of a plan or report. It would appear that this amount could be excessive in some instances and insufficient in other instances. Because the degree of modification or amendment to a plan or report can vary widely, it seems more appropriate and cost effective for the LUST Fund for this task to be performed on a time and materials basis. Would the Agency consider the use of a T&M billing method for the development of amended plans and reports?

31. 734.800 (b) states that only some of the costs associated with each task are provided in Section 734.810 through 734.850 and that they are not intended as an exclusive list of all of the costs associated with each task for the purposes of payment from the Fund. 734.800 (c) goes on to state that Subpart H sets forth only the methods that can be used to

determine the maximum amounts that can be paid from the Fund for eligible corrective action costs. The rules go on to state that whether a particular cost is eligible for payment must be determined in accordance with Subpart F. If a cost item that is typically incurred on a LUST project has been accidentally omitted from Subpart H, how would the owner/operator go about seeking reimbursement for that costs?

32. If an owner/operator engages the services of a professional consultant and the consultant, in good faith, initiates the development of a corrective action plan, only to find out after the work was initiated and a substantial amount of time, energy and money had been expended that the project conditions warrant a level of effort that is likely to cause its charges for the professional/consulting services to greatly exceed the maximum payment amount provided in Subpart H. In this instance, does the Agency prefer to be notified immediately of the potential "extraordinary circumstance"? It seems as though all parties involved would want to know whether the Agency would consider the situation to be extraordinary or not before continuing to proceed with the work. In the example provided above, how should the owner/operator and his or her consultant handle this situation with the Agency?

33. Does the Agency intend to develop internal standard operating procedures to help improve and ensure uniformity, consistency and objectivity in its technical review of work plans, budgets and reports?

34. The time to prepare and submit an application for reimbursement is an eligible cost under 734.625 (a) (14). No maximum lump sum payment amount is provided for these activities. Will a maximum lump sum payment amount be provided for this activity?

35. Under 734.445 (c) the Agency may require additional investigation of potable water supply wells. From reading this provision within the regulations, this requirement is contingent and at the discretion of the individual Agency reviewer. Does the Agency consider wells surveys conducted pursuant to this paragraph to be typical or extraordinary?

36. Historically, the Agency has reimbursed on a time and materials basis the costs for field instrumentation, equipment, materials and supplies (field purchases), materials and supplies (stock items) and subcontractors related to professional and consulting services. Subpart H provides Appendix D which deals with acceptable rates for sample handling, transportation, delivery, analysis and reporting and Appendix E which provides personnel titles, qualifications and acceptable hourly rates. However, Subpart H does not provide a list of field instrumentation, equipment and materials and supplies that are acceptable in situations where the rules call for time and materials billing. Will the Agency be providing time and materials rates for field instrumentation, equipment and materials and supplies that will be considered to be the maximum payment amounts for those items when the work is associated with a time and materials task?