

BEFORE THE POLLUTION CONTROL BOARD **RECEIVED**
OF THE STATE OF ILLINOIS CLERK'S OFFICE

MAY 04 2005

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

STATE OF ILLINOIS
Pollution Control Board

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

NOTICE OF FILING

TO: ALL COUNSEL OF RECORD
(Service List Attached)

PLEASE TAKE NOTICE that on May 4, 2005, filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of Pre-Filed Questions from CW³M Company, Inc. for the Illinois Pollution Control Board's 1st Notice of Amendments to 35 Ill. Adm. Code 734 and 35 Ill. Adm. Code 732 in the above-captioned matter.

Dated: May 4, 2005

Respectfully submitted,

CW³M Company

By: Carolyn S. Hesse
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, on oath state that I have served the attached Pre-Filed Questions from CW³M Company, Inc. for the Illinois Pollution Control Board's 1st Notice of Amendments to 35 Ill. Adm. Code 734 and 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 4th Day of May, 2005.

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Proposed Rule. First Notice

**PRE-FILED QUESTIONS FROM CW³M COMPANY, INC. FOR THE
ILLINOIS POLLUTION CONTROL BOARD'S 1st NOTICE OF AMENDMENTS
TO 35 ILL. ADM. CODE 734 AND 35 ILL. ADM. CODE 732**

In response to the Illinois Pollution Control Board's (IPCB) Hearing Officer Order dated April 20, 2005, CW³M responds that CW³M is unavailable for hearings on 6/3 through 6/9, 6/22 through 6/27, 7/1 though 7/4 and 7/19.

In addition, CW³M is filing the following questions in order to prepare for the next scheduled hearing on the proposed regulations. .

1. Will dollars approved in a budget prior to the enactment of the proposed rules be considered when making decisions on budgets following enactment of the rules? For example, a site investigation budget is approved prior to these rules for \$2,500 for a Stage 1 Site Investigation Report, because the current requirements are greater than they will be under the new rules. Then, after the new rules are enacted, the appropriate \$3,200 is requested for a Stage II plan. Will the Agency approve the \$3,200 listed in the proposed rules or will they approve some other amount?

2. How will the Agency review Part 731 reimbursement claim submittals, particularly for work in progress?

3. Have Agency personnel done any further research into rates since the last hearing? Is there anything that the Agency is willing to do to reduce the uncertainties surrounding the creation of the proposed rates?

4. Since the owners and operators and their consultants are being required to reduce expenditures from the fund, what is the IEPA going to do to reduce its expenditures from the fund?

5. Since the earlier hearings, are 90% of rates being submitted for budget approval or reimbursement at or below proposed Subpart H numbers? If not, what is the percentage at or below proposed Subpart H numbers?

6. What groundwater remediation will still be needed at locations where a groundwater ordinance is still in place? Must free product be removed? Must contamination that exceeds the soil saturation limit be removed? Must Class I or II, as applicable, groundwater quality standards be met at the edge of the area covered by the groundwater ordinance? Will modeling be required to demonstrate that groundwater quality standards will be met outside of the area subject to a groundwater ordinance? Will it be necessary to remediate groundwater to prevent vapor intrusion into buildings? Will any of these activities be reimbursable from the Fund?

7. Did the IEPA examine criteria similar to those 35 IAC 620.260 *Reclassification of Groundwater by Adjusted Standard* with regards to the Agency's proposal to disallow reimbursement of groundwater remediation costs within an area designated with a groundwater ordinance prohibiting potable water well installation? It is clear by 35 IAC 620.260 that the IEPA and the IPCB recognize that changing groundwater standards can affect, among other environmental and economic standards, property values. Specifically, did the IEPA consider the affect on both on-site and off-site property values for sites where IEPA forces owners to leave contamination in place by not reimbursing clean-up costs when a groundwater ordinance is in place?

8. The Agency has stated that the proposed Subpart H maximum amounts are consistent with current market rates. If this is the case and the proposed rates are adopted, how will use of the proposed rates result in a cost savings to the UST Fund?

9. No Further Remediation Letters typically include and the Illinois Environmental Protection Act lists at 58.10(e) a number of circumstances by which a NFR Letter may become void, including but not limited to previously undiscovered contamination that is above the remediation objectives. See the Act at 58.10(e)(6). If an NFR Letter becomes void, through no fault of the owner, because previously unknown contamination is discovered and if further remediation is required to reinstate the NFR Letter, can the site get back into the UST program and will the remediation costs be eligible for reimbursement from the Fund?

10. Will the Agency require the use of institutional controls and/or engineered barriers to meet Tier II or other remediation objectives?

11. When the Agency derived the number of \$57 per cubic yard as the allowable costs for excavation, transportation and disposal, what distance between a site and a landfill was used? Was this an average distance? What was the range of distances considered? If the distance between a site and the nearest landfill is greater than the reference distance, will the proposed rule for "atypical" situations (formerly 732.855/734.855, now 732.860/734.860) apply? What was the average volume of soil per site that was excavated, transported and disposed of when the \$57 per cubic yard of soil rate was derived? What was the range of soil volumes?

12. Who determines when there is an "atypical" situation? If a professional engineer/professional geologist submits a report which specifically details why a situation is unusual or extraordinary, how much weight will be given to the PE/PGs determination, or will the decision be made solely by the IEPA project manager assigned to the site? To what extent must bids be obtained in an "atypical" situation?

13. How did IEPA determine that a 5% "fluff factor" is appropriate? What is the technical basis for this number? Explain how the Agency then determined that this was the equivalent of a larger number, such as 20%?

14. The Agency met with various trade groups prior to proposing the rule, and used some of the input provided by these groups. Given the Agency's limited experience performing many of the activities for which rates have been proposed, and given the voluminous comments provided by participants whose cumulative experience far outweighs the Agency in conducting this work, has the Agency reconsidered any of the rates it submitted in its proposal? Did the IEPA re-examine the rates which were developed using the National Construction Cost Estimator after IEPA's interpretations of those rates were proven during hearing to be flawed? Did the IEPA consider revising the rates to match those derived when properly utilizing the guide?

15. Why does the IEPA believe that the use of RS Means is not an appropriate method of rate development? Does the IEPA recognize that, while RS Means has numbers that are national numbers, it also has factors which take into account the state in which the work is being performed? For what specific reason did the IEPA find that the National Construction Estimator was an appropriate reference and RS Means was not?

16. Has the IEPA recognized the discrepancy between using average costs as rates and stating that they will cover 90% of packages submitted. Please explain IEPA's understanding and provide examples.

17. Did the IEPA discuss or evaluate following the submittal by PIPE the concept of revising the average hourly rate of \$80.00 (used for setting maximum rates with a predetermined number of hours per task) to a rate properly weighted for the type of personnel conducting the work (i.e. technical v. support staff)?

18. Does the IEPA still maintain based on the record that the rates proposed are generally consistent with the current rates?

19. How and under what framework will consultants be reimbursed for the additional administrative expenses of securing, tracking and submitting proof of payment documentation? For example did the IEPA consider increasing rates for handling charges to cover this expense or consider adding this activity as another line item to be reimbursed.

20. The IPCB stated in its first notice proposal, that it was modifying the way Stage 3 *site investigations* would be paid to a time and materials basis. In the actual language of the proposed rules, the IPCB added to the section labeled "*Early Action and Free Product Removal*" a statement to that effect. However, in the section labeled "*Site Investigation*" on the following page, there is a line that indicated Stage 3 *site investigations* would be paid in lump sums. Will the IEPA propose modifications to correct the placement of the Stage 3 investigation budget and billing procedures?

21. The following questions pertain to the Section for travel reimbursement as described on page 80 of the first notice proposal:

- a. Why did the IEPA find that OSHA regulations requiring a buddy system were not applicable to LUST field work and not reimburseable?
- b. What specific reason did the IEPA feel that it would be appropriate when establishing rates for travel to include in the average rates of personnel who never leave the office?
- c. What specific reason did the IEPA believe that effectively limiting an owner/operator's choice of consultant to one within a specific distance was appropriate for purposes of reimbursement?

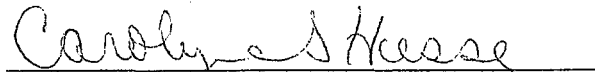
22. When the bidding process will be used because a subcontractor's cost will exceed Subpart H, related professional services should automatically qualify for the extraordinary circumstances clause. Does the IEPA find this proposal to be appropriate or inappropriate and what are IEPA's reasons?

Dated: May 4, 2005

Respectfully submitted,

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