

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

RECEIVED  
CLERK'S OFFICE

JUN 15 2005

STATE OF ILLINOIS  
Pollution Control Board

IN THE MATTER OF: )  
)  
PROPOSED AMENDMENTS TO: REGULATION ) R 04-22  
OF PETROLEUM LEAKING UNDERGROUND ) (Rulemaking - Land)  
STORAGE TANKS (35 ILL.ADM.CODE 732) )

IN THE MATTER OF: ) R 04-23  
) (Rulemaking - Land)  
PROPOSED AMENDMENTS TO: REGULATION )  
OF PETROLEUM LEAKING UNDERGROUND )  
STORAGE TANKS (35 ILL.ADM.CODE 734) )

N O T I C E

Dorothy Gunn, Clerk  
Pollution Control Board  
James R. Thompson Center  
100 W. Randolph, Ste. 11-500  
Chicago, Illinois 60601

Marie Tipsord, Hearing Officer  
Pollution Control Board  
James R. Thompson Center  
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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 Illinois Environmental Protection  
Agency's Response To Pre-Filed Questions on behalf of the Illinois  
Environmental Protection Agency, a copy of which is herewith served  
upon you.

ENVIRONMENTAL PROTECTION AGENCY  
OF THE STATE OF ILLINOIS

By: \_\_\_\_\_

Kyle Rominger  
Assistant Counsel

DATE June 14, 2005  
Agency File #:  
Illinois Environmental  
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R04-22  
(Rulemaking – Land)

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IN THE MATTER OF: )  
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R04-23  
(Rulemaking – Land)

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S  
RESPONSE TO PRE-FILED QUESTIONS

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through one of its attorneys, Kyle Rominger, and submits the following responses to the pre-filed questions of United Science Industries, Inc. ("USI"), CW3M Company, Inc. ("CW3M"), and CSD Environmental Services, Inc. ("CSD") for the July 27, 2005, hearing. The Illinois EPA would like to thank the Hearing Officer for granting an extension for the filing of these responses.

The responses are divided into four sections: the first contains responses to Daniel King's questions, the second contains responses to Jay Koch's questions, the third contains responses to CW3M's questions, and the fourth contains responses to CSD's questions. The number of each response corresponds to the numbers of the pre-filed questions. To minimize the number of citations, most responses refer only to the provisions of Part 734. Where appropriate, however, the responses would also apply to

the corresponding provisions of Part 732 unless the context of the response indicates otherwise.

**Answers to the Pre-Filed Questions of Daniel King of USI**

1. The maximum payment amounts for activities required under Section 734.210(a) are found throughout Subpart H and depend upon the activities being performed. For example, amounts for tank removal activities are addressed in Section 734.810, amounts for free product removal activities and groundwater removal and disposal activities are addressed in Section 734.815, amounts for soil removal and disposal activities are addressed in Section 734.825, and amounts for professional consulting services are addressed in Section 734.845. As alternatives to the amounts set forth in these Sections, owners and operators can determine maximum payment amounts via bidding under Section 734.855. Owners and operators can also seek alternative maximum payment amounts for unusual and extraordinary circumstances under Section 734.860.

2. The maximum payment amounts for activities required under Section 734.210(b) are found throughout Subpart H and depend upon the activities being performed. Examples of activities that might be performed to comply with Section 734.210(b) and the Sections containing the maximum payment amounts for those activities are set forth in question 1 above. As alternatives to the maximum payment amounts, owners and operators can also bid costs Section 734.855 and seek alternative maximum payment amounts for unusual and extraordinary circumstances under Section 734.860.

3. An extension granted under Section 734.210(g) does not extend the deadline under Section 734.210(d) for the filing of a 45-Day Report. Please note that the submission of an amended 45-Day Report at the conclusion of early action activities would not result in unnecessary duplicated effort. The information submitted in the amended report would be information that was not submitted in the initial 45-Day Report. The Illinois EPA included costs associated with the preparation and submission of amended 45-Day Reports in the maximum payment amounts it proposed for the preparation and submission of 20-Day and 45-Day Reports (Section 734.845(a)(3)).

4. The Illinois EPA included costs associated with requesting an extension under Section 734.210(g) in the maximum payment amount it proposed for the preparation and submission of 20-Day and 45-Day Reports (Section 734.845(a)(3)).

5. The Illinois EPA included the costs for abandonment slurry in the maximum payment amounts it proposed for tank removal or abandonment (Section 734.810).

6. The maximum payment amounts for tank abandonment are set forth in Section 734.810. The Illinois EPA does not envision the unusual or extraordinary circumstances provisions (Section 734.860) applying to a tank abandonment merely because the Office of the State Fire Marshal has determined that an unusual situation makes removal of the tank infeasible.

7. The Illinois EPA included costs associated with field personnel and mobilization in the maximum payment amounts it proposed to the Board for specific field activities. For example, the maximum payment amounts proposed for drilling (Section

734.820) include all costs associated with the field personnel, mobilization, and equipment needed to perform the drilling.

8. The Illinois EPA included professional consulting services costs associated with the preparation for early action soil abatement in the maximum payment amount it proposed for preparation for the abandonment or removal of USTs (Section 734.845(a)(1)). The Illinois EPA included professional consulting services costs associated with preparation for the implementation of conventional corrective action technologies in the maximum payment amount it proposed for the preparation and submission of conventional technology corrective action plans (Section 734.845(c)(1)). The Illinois EPA included professional consulting services costs associated with preparation for drilling events in the maximum payment amounts it proposed for site investigation plans (Section 734.845(b)). Finally, for professional consulting services costs associated with preparation for the implementation of alternative technologies, the Illinois EPA proposed that costs associated with alternative technologies be determined on a time and materials basis (Section 734.845(c)(1)).

9. The Illinois EPA included costs associated with applications for payment in the maximum payment amounts it proposed for professional consulting services (Section 734.845).

10. The Illinois EPA included costs associated with professional oversight of release confirmation, the immediate actions taken to prevent any further release, and the identification and mitigation of fire, explosion, and vapor hazards in the maximum payment amounts it proposed under Section 734.845(a).

11. The Illinois EPA included costs associated with obtaining an eligibility and deductibility letter in the maximum payment amounts it proposed for professional consulting services (Section 734.845).

12. "Best efforts" to obtain off-site access would be conducted as a part of the Stage 3 site investigation. Under the Board's First Notice Proposal, costs associated with Stage 3 site investigations are to be reimbursed on a time and materials basis. See First Notice Proposal Opinion and Order, p. 80.

13. Yes.

14. "Conventional technology" is by definition the removal and disposal of contaminated soil. See Section 734.115. There is no "conventional technology" for the ex-situ treatment of contaminated fill material.

15. The Illinois EPA believes the maximum payment amounts set forth in the Board's First Notice proposal adequately account for the different types of equipment needed to remove different sizes of tanks.

16. Reimbursement of personnel on a time and materials basis is not based solely on the educational degree and experience of the person performing the task. Under Section 734.850(b), personnel costs must be based upon the work performed, regardless of the title of the person performing the work. The Illinois EPA proposed Appendix E in part to establish the minimum education and experience levels a person must have in order to be billed under a particular title. Please refer to page 34 of Exhibit 13 (Draft Budget and Billing Forms) submitted at the March 15, 2004, hearing for descriptions and duties of each personnel title as envisioned by the Illinois EPA.

17. The Illinois EPA envisions that the costs of remotely monitoring alternative technologies will be subject to reimbursement on a time and materials basis.

18. The Illinois EPA included costs associated with performing and analyzing hydraulic conductivity tests in the maximum payment amounts it proposed for professional consulting services for site investigation (Section 734.845(b)).

19. The Illinois EPA included costs associated with performing water supply well surveys under Section 734.445(a) in the maximum payment amount it proposed for the preparation and submission of 20-Day and 45-Day Reports (Section 734.845(a)(3)).

20. The \$160 maximum payment amount for well surveys applies only to well surveys conducted pursuant to Section 734.445(b). See Section 734.845(b)(7). The maximum payment for well surveys conducted pursuant to Section 734.445(c) is determined on a time and materials basis. See Section 734.845(b)(7). The Illinois EPA included the "external costs" of completing a well survey under Section 734.445(b) in the maximum payment amount it proposed for the preparation and submission of 20-Day and 45-Day Reports (Section 734.845(a)(3)). It proposed the \$160 maximum payment amount in Section 734.845(b)(7) to cover labor costs associated with the well survey.

The Illinois EPA included costs associated with a professional engineer's review and certification of the well surveys in the maximum payment amounts it proposed for professional consulting services related to site investigation and corrective action reports. See Sections 734.845(b) and (c)(5).

21. It appears that in most cases a properly drawn and scaled site map showing the dimensions of an excavation will be sufficient in a corrective action plan to show the volume of soil to be removed and disposed. Copies of weight tickets and

special waste manifests may be included in corrective action completion reports to help document the soil actually removed and disposed. Copies of landfill invoices are needed in reimbursement requests to document the costs incurred, and for the calculation of handling charges.

The Illinois EPA included costs associated with determining the dimensions of an excavation in the maximum payment amounts it proposed for professional consulting services (Section 734.845).

22. The Illinois EPA believes the maximum payment amount it proposed for the preparation and submission of site investigation completion reports is appropriate. Please note that the Board decided that costs associated with the preparation and submission of Stage 3 site investigation plans and costs associated with Stage 3 site investigation field work and field oversight will be reimbursed on a time and materials basis. See First Notice Proposal Opinion and Order, p. 80.

23. The Illinois EPA included costs associated with completing a survey of groundwater flow direction and gradient in the maximum payment amounts it proposed for site investigation field work and field oversight under Section 734.845(b).

24. The Illinois EPA included costs associated with well development, well surveying, and well sampling in the maximum payment amounts it proposed for site investigation field work and field oversight under Section 734.845(b).

25. Please see the response to CW3M's question 20.

26. The Illinois EPA believes the maximum payment amount it proposed for direct push injections is appropriate.



27. The depth of material being replaced (e.g., 12 inches of concrete) may be greater than the depth of the same material when it is used to create an engineered barrier. For material being installed solely as an engineered barrier and not as replacement material, the Illinois EPA proposed maximum payment amounts for the depths needed to create an engineered barrier. In cases where replacement material is also used as an engineered barrier, the Illinois EPA envisions the replacement material falling under the maximum payment amounts for replacement material (Section 734.840(b)).

28. "Conventional technology" is by definition the removal and disposal of contaminated soil. See Section 734.115. There is no "conventional technology" for groundwater remediation.

Please refer to question 1 above for a discussion of the maximum payment amounts the Illinois EPA proposed for activities required under Section 734.210(a).

29. Cleanup strategies utilizing both conventional and alternative technologies can be submitted in a single corrective action plan. If soil contamination is addressed solely through conventional technology, costs associated with the preparation and submission of the soil remediation portion of the plan are subject to the maximum payment amounts for conventional technology plans and costs associated with the preparation and submission of the groundwater remediation portion of the plan are subject to reimbursement on a time and materials basis. See Section 734.845(c)(1). If soil contamination is addressed through both conventional technology and alternative technology, the Illinois EPA envisions costs related to the soil remediation portion of the plan that exceed the maximum payment amount for the preparation and submission of conventional technology corrective action plans being reimbursable on a time and

materials basis. In this last example the costs associated with the groundwater remediation portion of the plan are subject to reimbursement on a time and materials basis. See Section 734.845(c)(1).

30. If the soil is addressed through an alternative technology, costs associated with the preparation and submission of both the soil and the groundwater portions of the plan would be subject to reimbursement on a time and materials basis. See Section 734.845(c)(1). If soil is addressed through conventional technology, costs associated with the preparation and submission of the soil remediation portion of the plan are subject to the maximum payment amounts for conventional technology plans, and costs associated with the preparation and submission of the groundwater remediation portion of the plan are subject to reimbursement on a time and materials basis. See Section 734.845(c)(1).

31. A revision to Section 734.355(c) does not appear necessary. Under Section 734.355(b), the Illinois EPA can only require the submission of a revised corrective action plan. Therefore, the only Illinois EPA decision to appeal under Section 734.355(c) would be a decision to require a revised corrective action plan.

32. As explained at hearing, the Illinois EPA envisioned the scope of work for each maximum payment amount to be all of the activities associated with the identified task. Therefore, bids for an identified task should include all costs associated with the task. For example, the scope of work for the \$3,150 maximum payment amount allowed for the removal of a 1,000 gallon tank would be all of the activities associated with the tank's removal, including, but not limited to, its excavation, removal, and disposal. See Section 734.810. Therefore, under Section 734.855 a bid for the removal

of a 1,000 tank should include all costs associated with the removal of the tank, including, but not limited to, its excavation, removal, and disposal.

33. The Illinois EPA did not envision Section 734.860 being utilized merely because costs exceed a maximum payment amount. It envisioned Section 734.860 being utilized when the costs for an identified task exceed the maximum payment amount for the task due to unusual or extraordinary circumstances. Please see the demonstration that must be made under Section 734.860 in order to seek reimbursement under that Section.

34. Prevailing market rates may be determined from a number of sources. One example would be the bids the Illinois EPA receives under Section 734.855. Another example would be information brought to the attention of the Illinois EPA through LUST Advisory Committee meetings. The Illinois EPA does not have a definitive list of resources that it will consult for all costs when conducting reviews under Section 734.875. Rather, it will use the resources that it believes provide an accurate assessment of the reasonable prevailing market rate for a particular cost. If the Illinois EPA determines that a maximum payment amount needs to be adjusted, that adjustment must be proposed to the Board through a rulemaking. Therefore, the public will have an opportunity to provide testimony and submit comments about the methods the Illinois EPA used to determine whether the proposed adjustment is needed and the appropriate amount of the adjustment.

35. Please see the response to question 34 above.

36. The annual Implicit Price Deflator for Gross National Product on which the annual inflation factor is based is published each year in the April issue of the United States Department of Commerce's Survey of Current Business. Therefore, adjusting the

maximum payments amounts on January 1 would delay the adjustments by an additional six months (e.g., adjustments based on the April 2006 publication would not be made until January 1, 2007, instead of July 1, 2006). The Illinois EPA believes the earlier July 1 adjustment date set forth in the Board's First Notice Proposal is more appropriate.

37. The annual increase based on the annual Implicit Price Deflator for Gross National Product is applied across the board to all maximum payment amounts, even though all of the individual costs included in a particular maximum payment amount may have not risen by the same rate. The 5% cap ensures that the maximum payment amounts do not rise too quickly based solely upon the annual inflation factor. If all of the costs included in a maximum payment amount do happen to increase at an annual inflation rate of greater than 5%, owners and operators can exceed the maximum payment amount via bidding. The Illinois EPA or anyone else could also propose an appropriate adjustment to the maximum payment amount through a Board rulemaking. A change to the 5% cap could also be proposed through a Board rulemaking should it prove to be inappropriate.

38. The Illinois EPA does not agree with the premise that an owner's or operator's decision to continue operating a station during remediation makes conventional technology infeasible. In such a case, the owner or operator is making a business decision to continue operating the station during remediation and to remediate using an alternative technology instead of a conventional technology. The Illinois EPA does not envision that an owner's or operator's decision to continue operating a station and conduct remediation using an alternative technology would, by itself, constitute an unusual or extraordinary circumstance for purposes of Section 734.860.

39. Section 734.340(c) is not new language proposed by the Illinois EPA. The Section merely repeats language that already exists in Section 732.407(c).

40. The Illinois EPA included costs associated with the preparation of maps in the maximum payment amounts it proposed for the preparation and submission of plans and reports (Section 734.845). In many cases, the preparation of a map requires only the updating of an existing map from an earlier plan or report. As with other costs, if the maximum payment amounts set forth in the rules are insufficient for a particular site, they can be exceeded through the bidding or the unusual or extraordinary circumstances provisions.

41. Sections 734.835 and 734.Appendix D merely set forth the maximum payment amounts owners and operators may be reimbursed for costs associated with sample handling and analysis. Please note that an individual maximum payment amount for shipping is included at the bottom of Section 734.Appendix D. The Board's proposed rules do not address, and the Illinois EPA did not envision the rules addressing, how the amounts reimbursed to an owner or operator are divided among the parties performing the work.

42. The installation of monitoring wells, including their depths, should comply with Section 734.430 and generally accepted engineering practices.

43. Some maximum payment amounts are applicable through all phases of work. For example, the maximum payment amounts for sample handling and analysis (Section 734.Appendix D) are applicable during the early action phase, the site investigation phase, and the corrective action phase.

44. Sections 734.315, 734.320, and 734.325 contain general requirements regarding the depths of borings. The Board's rules do not mandate the use of a specific tool for borings.

45. The owner or operator should propose the most cost-effective method of disposal.

46. The Illinois EPA included all submittals of plans, budgets, reports, applications for payment, and other documentation in the maximum payment amounts it proposed for professional consulting services under Section 734.845. For example, the Illinois EPA proposed \$4,800 as the maximum payment amount for the preparation and submission of all 20-Day and 45-Day Reports, regardless of how many 20-Day and 45-Day reports are submitted.

47. The maximum payment amounts the Illinois EPA proposed to the Board were either evaluated against actual reimbursement submittals directly or developed using costs that were evaluated against actual reimbursement submittals.

**Answers to the Pre-Filed Questions of Jay Koch of USI**

1. Please refer to the response to Daniel King's question 29.
2. If an alternative technology corrective action plan is rejected one or more times, but is eventually approved, the Illinois EPA envisions that reasonable and justified professional service hours that do not exceed the maximum payment amounts set forth in Section 734.Appendix E would be reimbursed. If an alternative technology corrective action plan is rejected one or more times and as a result is never approved and implemented, and then a conventional technology corrective action plan is submitted, approved, and implemented, the Illinois EPA does not envision that costs associated the

preparation and submission of the alternative technology corrective action plan would be eligible for reimbursement. The Illinois EPA envisions that the costs associated with the preparation and submission of the conventional technology corrective action plan would be subject to the maximum payment amount set forth in Section 734.845(c)(1).

3. The Illinois EPA envisions that the determination of whether an unusual or extraordinary circumstance exists at a particular site will be based upon site-specific circumstances. What may be an unusual or extraordinary circumstance at one site may not be an unusual or extraordinary circumstance at another site. During previous hearings the Illinois EPA gave some examples of what might be considered an unusual or extraordinary circumstance. However, developing a list of unusual or extraordinary circumstances that could be applied prior to knowing the specific circumstances of a particular site would be impossible. Furthermore, the Administrative Procedures Act prohibits the Illinois EPA from publishing the requested lists of specific examples unless they are adopted in rules.

4. The Illinois EPA would not object to the addition of one or more representatives to the LUST Advisory Committee if the Board determines that the Committee's current composition does not provide adequate representation of interested parties.

5. Please see the response to Daniel King's question 17.

6. The Illinois EPA included all costs associated with sample handling and analysis, regardless of the number of parties involved, in the maximum payment amounts it proposed under Sections 734.835 and 734.Appendix D. Please note that an individual maximum payment amount for shipping is included at the bottom of Section

734.Appendix D. This amount was proposed for costs associated with the shipping of samples to the laboratory. The Illinois EPA included costs associated with transporting samples from the collection site back to the office for shipping in the maximum payment amounts it proposed for travel (Section 734.845(e)).

7. One of the goals the Illinois EPA hopes to achieve through this rulemaking is a reduction in the time it spends reviewing plans, budgets, reports, and applications for payment.

8. The Illinois EPA believes that such an audit would be costly and time consuming and is unnecessary. The Illinois EPA has explained how it developed the rates it proposed to the Board, and the Board determined that those rates, as amended in the Board's First Notice Proposal, will provide reimbursement of reasonable remediation costs. Any party that believes the proposed amendments will not provide reimbursement of reasonable remediation costs has the opportunity to present testimony and comments to the Board.

9. This question is addressed to the Board.

10. The provision proposed by the Illinois EPA that would make "costs an owner or operator is required to pay to a governmental entity or other person in order to conduct corrective action" ineligible for reimbursement is not included in the Board's First Notice Proposal. Pursuant to the Board's First Notice Opinion and Order, such costs should be reviewed on a site-specific basis. Because a site-specific determination is necessary, and because the Administrative Procedures Act requires the Illinois EPA to adopt the requested lists as rules, the Illinois EPA cannot provide the requested lists in these responses.



11. This question is addressed to the Board.

12. The Illinois EPA does not track the requested information. However, the Illinois EPA was able to review the incidents for which some type of plan or report was submitted between January 1, 2003, and May 31, 2005, and compile the following table based upon the current consultants for those incidents. The consultants are listed based upon the number of incidents, in descending order. These consultants represent 50.43% of the total 5,761 incidents identified. The Illinois EPA stopped compiling this list once the "Percent of Total" column exceeded 50%.

Consultant	Percent of Total	Number of Incidents
United Science Industries	7.36	424
Delta Environmental	6.41	369
Groundwater & Environmental Services, Inc.	4.06	234
Practical Environmental Consultants	3.71	214
Marlin Environmental	3.40	196
Environmental Management, Inc.	2.99	172
CW3M	2.67	154
Handex	2.60	150
LandTech, Inc.	1.79	103
Environmental Protection Industries	1.77	102
Midwest Environmental Consulting & Remediation	1.58	91
NESA & Associates	1.51	87
Applied Environmental Technologies	1.44	83
Herlacher Angleton Associates	1.33	77
American Environmental	1.00	58
CSD	.97	56
GEOCON	.97	56
Superior Environmental Corp.	.91	53
Gabriel Environmental	.90	52
EPS Environmental Services, Inc.	.78	45
Integrity Environmental Services	.78	45
Laicon, Inc.	.75	43
Wendler Engineering Services, Inc.	.71	41
Total:	50.43%	

13. The Administrative Procedures Act prohibits the Illinois EPA from publishing the requested guidelines unless they are adopted as rules. Please note that the unusual or extraordinary circumstances provisions focus on the circumstances present at a site, not particular tasks.

14. The Illinois EPA will reimburse corrective action costs in accordance with the Environmental Protection Act and the Board's rules.

15. An owner's or operator's liability for a release is independent from the ability to obtain payment from the Underground Storage Tank ("UST") Fund. Liability is not impacted in any way by UST Fund eligibility or non-eligibility, the amount of any payments received from the Fund, or the balance of the UST Fund.

16. The Illinois EPA has the statutory duty to enforce violations of the Environmental Protection Act and Board regulations.

17. The Illinois EPA has no opinion on the issue.

18. The statutory provision for joint payment was repealed. See P.A. 87-1088 and P.A. 87-1171 (amendments to 415 ILCS 5/22.18b(d)(4)(C)).

19. Questions about the development of information provided to the Illinois EPA by ACECI should be directed to ACECI. Regarding information received from ACECI, the Illinois EPA made modifications to the information as it deemed appropriate. The modifications and the reasons for the modifications are reflected in the Illinois EPA's testimony in prior hearings. ACECI provided its information to the Illinois EPA on April 16, 2003.

20. The Illinois EPA is aware of TRIAD. TRIAD was not used to develop the rules the Illinois EPA proposed to the Board.

21. The Illinois EPA envisioned that Section 734. Appendix E would be used only to establish billing rates based on objective qualifications. It did not envision a person being "grandfathered in" based on his or her current billing rate. Nor did it envision the Section being used as a basis for laying off employees that do not meet the qualifications for a particular billing rate. Anyone can meet the qualifications for several of the titles in Section 734. Appendix E.

22. A person can only be billed under the rates for which he or she meets the qualifications.

23. Please refer to page 34 of Exhibit 13 (Draft Budget and Billing Forms) submitted at the March 15, 2004, hearing for the descriptions and duties of each personnel title as envisioned by the Illinois EPA.

24. The Illinois EPA envisions professional consulting services being subject to the bidding provisions of Section 734.855.

25. Please refer to the response to Daniel King's question 32.

26. Section 734.855 does not specify the means by which bids must be obtained, nor does it specify how many rounds of solicitations are required if a single bid solicitation results in the submission of less than three bids.

27. The owner or operator could submit a budget amendment to address costs associated with the water removal.

28. Under Section 734.845(c)(1), payment for costs associated with the preparation and submission of alternative technology corrective action plans, which include groundwater remediation plans, must be determined on a time and materials basis.

29. The Illinois EPA envisions that the maximum payment amounts will encourage the submission of complete plans and reports that can be approved in one submission, without the need for amendments or additional information.

30. The Illinois EPA believes the maximum payment amount set forth in the Board's First Notice Proposal is appropriate. Please note that Section 734.845(f) only applies to the amendments of plans due to unforeseen circumstances.

31. Because of the design and interaction of Subpart H's provisions, the Illinois EPA does not foresee the omission of any costs typically incurred on a leaking underground storage tank ("LUST") project. If a party believes that a cost has been omitted from Subpart H, they can bring the omission to the Board's attention in this rulemaking or at a later date and request that Subpart H be amended to address the omitted cost.

32. Section 734.860 does not specify when an owner or operator must seek reimbursement under the unusual or extraordinary circumstances provisions. An owner or operator may seek reimbursement under Section 734.860 at any time as long as they can make the demonstration required under that Section.

33. The Illinois EPA has always strived to maintain uniformity, consistency, and objectivity in its reviews, and will continue to do so in the future.

34. Please see the response to Daniel King's question 9.

35. The Illinois EPA does not envision a well survey being an unusual or extraordinary circumstance based solely on the fact that the Illinois EPA requires the well survey under Section 734.445(c). Please note that payment for costs associated with such

a well survey must be determined on a time and materials basis. See Section 734.845(b)(7)

36. The Illinois EPA does not believe that individual time and materials rates are necessary for all of the field instrumentation, equipment, materials, and supplies that may be used in the remediation of a release. When payment is made on a time and materials basis, the costs associated with field instrumentation, equipment, etc., will either (i) be included as a part of the maximum payment amounts applicable under Section 734.850(a), or (ii) determined on a site-specific basis under Section 734.850(b).

**Answers to the Pre-Filed Questions of CW3M**

1. If some but not all of the Stage II site investigation activities are completed under an investigation plan approved prior to the effective date of the Board's amendments, the Illinois EPA envisions that the maximum payment amount for costs associated with the preparation and submission of a Stage II site investigation plan approved after the effective date of the amendments will be determined on a site-specific basis and will depend upon the Stage II site investigation activities that still need to be completed.

2. Sites subject to Part 731 will continue to be reviewed on a site-specific basis, unless the owner or operator elects to proceed under Part 734 in which case the owner or operator will be subject to Part 734. See Section 734.105.

3. Since the last hearing the Illinois EPA has not conducted further research into the maximum payment amounts it proposed to the Board. Regarding any uncertainties raised about the maximum payment amounts, the Board stated the following in its First Notice Opinion and Order:

The Board is cognizant that the methods used to develop the rates by the Agency were not scientifically or statistically recognized methods. However, the Agency's experience in the UST program is also an element to be taken into consideration. In addition, the first-notice proposal will include provisions for bidding, extraordinary circumstances, and an annual inflation adjustment. The Board is convinced that the first-notice proposal, as a whole, will allow for reimbursement of reasonable remediation costs.

First Notice Opinion and Order, p. 1 (emphasis added).

Although the Agency's methodology for determining the maximum rates is not statistically defensible, the Agency's data is from actual applications for reimbursement for sites in Illinois. The Agency's testimony is that the rates as developed will be inclusive of ninety percent of the sites remediated in Illinois (see Tr.3 at 52) and based on the Agency's experience the rates are reasonable (see Tr.3 at 54-56). Therefore, the Board finds that the Agency's method for developing the maximum payment amounts is primarily based on the Agency's experience administering the UST program in Illinois. The Board further finds that the rates are reasonable. Any deficiencies in the maximum rates are obviated by the language dealing with extraordinary circumstances and the addition of the bidding process.

General Discussion of Maximum Payment Amounts. The Board will not discuss each and every proposed lump sum maximum payment amount; however, the Board has carefully reviewed all the rates proposed by the Agency. Other than the rates discussed in more detail in this opinion, the Board finds the rates are reasonable and supported by the record. Furthermore, given the Agency's inclusion in the third errata sheet of a bidding process, provisions for triennial review of the maximum payment amounts, and provisions for the annual adjustment of the maximum payment amounts based on inflation, the Board finds that the proposal will allow for reimbursement of reasonable costs for remediation of UST sites in Illinois. Therefore, the Board will proceed to first notice with the rates proposed by the Agency unless the Board specifically indicates a different rate in this opinion.

First Notice and Opinion and Order, pp. 78-79 (emphasis added).

4. This question is irrelevant to whether the Board's First Notice Proposal contains technical requirements consistent with the Environmental Protection Act and provides owners and operators with reimbursement of reasonable remediation costs.
5. The Illinois EPA does not track the requested information.

6. Groundwater must be remediated in accordance with the Tiered Approach to Corrective Action Objectives ("TACO") regulations (35 Ill. Adm. Code 742).

Groundwater remediation required as a part of corrective action is eligible for reimbursement from the UST Fund.

7. The Illinois EPA did not consider any effect on property values in cases where groundwater ordinances are used as institutional controls. Groundwater ordinances have always been available as an institutional control under TACO and have been used at hundreds, if not thousands, of sites.

8. *Inter alia*, use of the proposed rules will help reduce costs to the UST Fund by helping to streamline the LUST Program. The proposed rules will allow a greater standardization of information submitted to the Illinois EPA, which in turn will allow for shorter document preparation time and shorter document review time, thereby reducing per-project costs for the owner's or operator's consultant and the Illinois EPA. Use of the proposed rules will also help reduce per-project costs by simplifying the reimbursement process. Setting forth rates in the rules will allow owners, operators, and consultants to know the amounts considered reasonable for purposes of reimbursement from the UST Fund, and the Illinois EPA can easily review and approve costs as long as they do not exceed the applicable maximum payment amounts. Finally, maximum payment amounts for the preparation and submission of various documents will reduce costs by encouraging the submission of complete documents that can be approved in one submission, without the need for the preparation, submission, and review of amendments or additional information.

9. With the exception of costs relating to the remediation of MTBE contamination, costs incurred after the issuance of a No Further Remediation Letter are currently ineligible for reimbursement. See Section 732.606(kk). Please note that Board's First Notice Proposal includes the addition of several new exceptions to this rule. See Id.

10. The Illinois EPA will not require the use of institutional controls or engineered barriers unless the owner or operator proposes their use as a part of remediation, in which case the Illinois EPA will require their continued use until they are removed in accordance with Board regulations. See Section 732.703(e).

11. Please refer to the Illinois EPA's previous testimony regarding the development of the maximum payment amount it proposed to the Board for excavation, transportation, and disposal.

12. The Illinois EPA envisions that an internal committee of managers will review demonstrations of unusual or extraordinary circumstances under Section 734.860. Bids are not expressly required under Section 734.860, but the Illinois EPA envisions that owners and operators will be able to submit bids as a part of their demonstration that costs exceed the maximum payment amounts of Subpart H.

13. Please refer to the Illinois EPA's previous testimony regarding the development of the fluff factor it proposed to the Board.

14. The Illinois EPA has not considered any changes to the rates it proposed to the Board beyond those it incorporated into its proposal during last year's hearings.

15. The Illinois EPA felt that actual historical data from the Illinois LUST Program was more appropriate to use in developing the rates it proposed to the Board



than information from RS Means. In addition, RS Means would be more difficult to apply to the Illinois LUST Program than the proposed rules. The Illinois EPA used the National Construction Estimator instead of RS Means because the information for which it was used was easier to interpret.

16. Parties have argued that the Illinois EPA's use of average rates in developing the maximum payment amounts it proposed to the Board would result in 50% of the costs submitted for reimbursement falling above, and 50% falling below, the proposed maximum payment amounts. Please note that an amount that 50% of costs would fall above and 50% of costs would fall below would be the median of the costs, not the average. Although the Illinois EPA used average costs in the development of some of the maximum payment amounts it proposed to the Board, the use of average costs did not result in maximum payment amounts equal to the median of the costs. For example, the maximum payment amount proposed for the excavation, transportation, and disposal of soil is greater than the excavation, transportation, and disposal costs at 88% of the sites surveyed. Also, the maximum payment amount proposed for backfill is greater than backfill costs at 86% of the sites surveyed. For additional information please see Harry Chappel's written testimony submitted as Exhibits 11 and 12 at the March 15, 2004, hearing and his oral testimony at the first few hearings.

17. The Illinois EPA considered all alternatives brought to its attention.

18. Yes.

19. The Illinois EPA included costs associated with applications for payment in the maximum payment amounts it proposed for professional consulting services (Section 734.845).

20. The Illinois EPA requests that the Board take note of the issue raised by CW3M in this question. It appears that the new Section 734.845(b)(5) that was intended to replace Sections 734.845(b)(5) and (6) was instead inserted at Section 734.845(a)(5) and replaced Sections 734.845(a)(5) and (6).

21. a. CW3M has yet to identify the specific OSHA regulation requiring the use of a "buddy system" at petroleum LUST sites. The Illinois EPA reviewed Part 1926 of the OSHA regulations (29 CFR 1926), cited by CW3M as containing the buddy system requirement, and the buddy system required in that Part appears to apply only to hazardous substance remediations. Because petroleum is not included in the definition of "hazardous substance," the buddy system requirement does not appear to apply to petroleum LUST releases. Even if the regulations cited by CW3M did apply to petroleum LUST releases, it is not clear that the buddy system requires the presence of two consulting firm personnel at a site.

b. The average personnel rate used to develop travel rates includes personnel from both ends of the billing rate spectrum who do not leave the office. The Illinois EPA believes the average personnel rate used to develop the travel rate is appropriate.

c. The amendments the Illinois EPA proposed to the Board provide reimbursement of reasonable remediation costs, as required by the Act. The maximum payment amounts set forth in the amendments apply equally to all consultants, regardless of where they are located. An owner's or operator's decision to incur greater costs by hiring a consultant located a greater distance

from a site, as opposed to incurring lesser costs by hiring a consultant located closer to a site, is a business decision made by the owner or operator.

22. The Illinois EPA disagrees with the conclusion drawn by CW3M in this question. A demonstration that a subcontractor's cost exceeds the applicable maximum payment amount when properly bid does not make the unusual or extraordinary circumstances provision automatically applicable to related professional services. In order for the unusual or extraordinary circumstances provision to apply to related professional services the owner or operator must make the demonstration required in Section 734.860 (i.e., that the professional services costs are eligible for payment from the UST Fund, exceed the applicable maximum payment amounts set forth in Subpart H, are the result of unusual or extraordinary circumstances, are unavoidable, are reasonable, and are necessary to satisfy the requirements of the Board's rules).

#### Answers to the Pre-Filed Questions of CSD

A.

1. This question has become moot. The Board held in its First Notice Opinion and Order that, while "the Agency's methodology for determining the maximum rates is not statistically defensible, . . . the rates are reasonable. Any deficiencies in the maximum rates are obviated by the language dealing with extraordinary circumstances and the addition of the bidding process." First Notice Opinion and Order, p. 1.

2. The Illinois EPA has explained how it developed the rates it proposed to the Board, and the Board has determined that those rates, as amended in the Board's First Notice Proposal, will provide reimbursement of reasonable remediation costs. Please see, for example, the excerpts from the Board's First Notice Opinion and Order included in

the response to CW3M's question 3 above. Any party that believes the proposed amendments will not provide reimbursement of reasonable remediation costs has the opportunity to present their testimony and comments to the Board.

3. An owner or operator who feels that the proposed maximum payment amounts will not provide reimbursement of reasonable remediation costs could bid costs in accordance with the bidding provisions of the rules, seek payment under the unusual or extraordinary circumstances provisions of the rules if those provisions apply, bring the issue to the attention of the Illinois EPA through the LUST Advisory Committee, seek a site specific variance of Subpart H provisions, or propose amendments to Subpart H to the Board. Please note that an owner or operator may have other options. This response should not be taken as an exclusive list of options available to an owner or operator.

4. The Illinois EPA has not yet decided exactly how it will review the maximum payment amounts to determine whether they are consistent with prevailing market rates. As stated at prior hearings, however, the Illinois EPA envisions that a part of its review will include comparing the maximum payment amounts to bids submitted under the bidding provisions of the rules.

5. The Illinois EPA will reimburse owners' and operators' costs in accordance with the Board's rules.

6. The Illinois EPA will be keeping track of current market rates through various means, including bids received in reimbursement requests and information submitted through the LUST Advisory Committee. If the Illinois EPA believes a change to the maximum payment amount is warranted it can propose appropriate changes to the

Board. In addition, the maximum payment amounts are automatically increased each year by a prescribed inflation factor. See Section 734.870.

7. The Board's First Notice Proposal does not specify any penalties to the Illinois EPA or the State if the Illinois EPA fails to find or fix any deficiencies in a timely manner.

8. Adjustments to the maximum payment amounts by the Illinois EPA pursuant to Section 734.875 will be proposed to the Board in a rulemaking proposal, which like this one will include public notices, opportunities for public testimony and public comments, and the publication of amendments proposed and adopted by the Board.

9. The Illinois EPA chose the inflation factor it proposed to the Board because the inflation factor is nationally recognized and is determined by an objective third party. The Agency did not consider other inflation factors because it believes the one proposed will provide adequate adjustments for inflation.

B.

- |                               |  |
|-------------------------------|--|
| 1. Drillers:                  | Western Environmental<br>Advanced Environmental                    |
| Vacuum Trucks/Liquid Haulers: | Enviro-Vac<br>R.S. Used Oil<br>U.S. Waste                          |
| Tanks Removers:               | W.J. Scott<br>Accurate Tank<br>R.L. Hoerner<br>R. Carlson and Sons |

C.

1. As explained in prior testimony, the Illinois EPA believes that bids used to determine an alternative maximum payment amount should be true third party bids.

Once bids are obtained and an alternative maximum payment amount is established, the Illinois EPA believes that an owner or operator should not be limited to hiring the lowest bidder, but should instead be able to hire anyone the owner or operator chooses as long as that person is qualified and able to perform the work.

2. The Illinois EPA believes that an owner or operator, or a consultant on the owner's or operator's behalf, will be able to obtain bids in accordance with the bidding provisions of the Board's First Notice Proposal in cases where the consultant owns their own contracting firm.

3. The owner or operator could seek to have the maximum payment amount determined under the unusual or extraordinary circumstances provisions if the requirements of those provisions apply. Please note that the inability to obtain a minimum of three bids due to a limited number of persons providing the services needed is specifically listed as a circumstance that may be considered unusual or extraordinary under Section 734.860.

4. The Illinois EPA does not envision that information from only RS Means or another national cost data source would be sufficient to demonstrate that costs for a particular task exceed the applicable maximum payment amount. Information from such data sources would not reflect the actual costs for a specific site.

D.

1. The maximum payment amount of \$57 that the Illinois EPA proposed to the Board for costs associated with excavation, transportation, and disposal was intended to apply only to the total of the costs associated with excavation, transportation, and disposal. It was not intended to be used to deem individual costs as reasonable.

2. The Illinois EPA envisions that the supporting technical documentation will need to be sufficient to document that the work has been completed. Regarding supporting billing documentation, as stated in prior hearings, when maximum payment amount lump sums and unit rates are used the Illinois EPA envisions that the owner or operator will need to submit an invoice that at a minimum identifies the work that was performed, the party that performed the work, the date the work was performed, and the amount billed for the work. Additional documentation may be necessary where reimbursement is sought on a time and materials basis.

3. As is required now, the excavation, transportation, and disposal of the soil must be documented in a report. Please refer to the response to question D(2) above regarding billing documentation.

4. To utilize the unusual or extraordinary circumstances provisions of Section 734.860 the owner or operator must make the demonstration required under that Section. Yard tickets alone would not be sufficient to make the required demonstration.

E.

1. For each half-day, the Illinois EPA assumed one to four soil borings to a depth of 20 feet or one monitoring well to a depth of 20 feet.

2. Determinations of whether the circumstances at a site are unusual or extraordinary are to be made on a site-specific basis. See Section 734.860. Therefore, the Illinois EPA cannot provide a stated depth at which a soil boring or a monitoring well would be considered an unusual or extraordinary circumstance. Furthermore, the Administrative Procedures Act requires the Illinois EPA to adopt such a statement as a rule.

3. Please see response to question E(2) above.

F.

1. Under Section 732.845(d)(1), the Illinois EPA proposed a total of \$3,200 for all on-site investigation plans and a total of \$3,200 for all off-site investigation plans. Please see the response to question F(2) below regarding off-site investigation plans.

2. As a result of this question the Illinois EPA discovered a change that is needed to the Board's First Notice Proposal in order to maintain consistency between Parts 732 and 734. The off-site investigation phase in Part 732 corresponds to the Stage 3 site investigation in Part 734. Because the Board provided that costs associated with Stage 3 site investigations under Part 734 must be reimbursed on a time and materials basis, it should likewise make costs associated with off-site investigations under Part 732 (Sections 732.845(d)(1) and (2)) reimbursable on a time and materials basis. The Illinois EPA suggests the following amendments to Sections 732.845(d)(1) and (2) to make Part 732 consistent with Part 734 (amendments shown in double underlining and double strike-through). These amendments are consistent with the language for Stage 3 site investigations set forth on page 80 of the Board's First Notice Opinion and Order.

- 1) Payment for costs associated with the preparation and submission of investigation plans for sites classified pursuant to Section 732.307 of this Part shall not exceed the following:
  - A) A total of \$3,200.00 for plans to investigate on-site contamination.
  - B) Plans ~~A total of \$3,200.00 for plans~~ to investigate off-site contamination will be reimbursed pursuant to Section 732.850 of this Part.
- 2) Payment for costs associated with field work and field oversight to define the extent of on-site contamination resulting from the release shall not exceed a total of \$390.00 per half-day, plus travel



costs in accordance with subsection (e) of this Section. The number of half-days shall not exceed the following:

A) One half-day for every four soil borings, or fraction thereof, drilled as part of the investigation but not used for the installation of monitoring wells. Borings in which monitoring wells are installed shall be included in subsection (d)(2)(B) of this Section instead of this subsection (d)(2)(A); and

B) One half-day for each monitoring well installed as part of the investigation.

Payment for costs associated with field work and field oversight to define the extent of off-site contamination will be reimbursed pursuant to Section 732.850 of this Part.

G.

1. If the requirements of Section 734.330(b)(3) and (4) have not been met (i.e., the horizontal and vertical extent of soil and groundwater contamination exceeding the most stringent Tier 1 remediation objectives have not been defined), then additional work is needed to complete the Stage 3 site investigation. There is no Stage 4 site investigation.

H.

1. Please see the response to CW3M's question 20.

I.

1. Please see the response to Daniel King's question 29.

2. The owner or operator will need to submit an amended corrective action plan if the approved plan does not address the additional remediation that must be conducted. The Illinois EPA included all costs associated with the preparation and submission of corrective action plans, including amended corrective action plans, in the

maximum payment amounts it proposed to the Board under Section 734.845(c)(1).

Please note that there is an additional maximum payment amount for corrective action plan amendments that are required due to unforeseen circumstances. See Section 734.845(f).

3. No.

4. The Illinois EPA will review costs associated with the preparation and submission of alternative technology corrective action plans to ensure that, *inter alia*, the costs are eligible for payment, are reasonable, and are for activities that are required as a part of corrective action and do not exceed the minimum requirements of the Environmental Protection Act and the Board's rules.

5. This question is unclear. The second phase the question refers to, implementation of the selected plan, is not a part of the plan's preparation and submission for approval. Furthermore, an alternative technology's design is an integral part of the remediation plan that is reviewed prior to the plans' implementation. The Illinois EPA will be happy to answer this question at hearing if additional clarification of the question is provided.

J.

1. The rules do not require the submission of individual corrective action completion reports for soil remediation and groundwater remediation. The Illinois EPA included costs associated with the submission of all corrective action completion reports in the maximum payment amounts it proposed to the Board under Sections 732.845(d)(8) and 734.845(c)(4).

K.

1. The question, as posed, makes the activities associated with the development of Tier 2 or Tier 3 remediation objectives sound daunting. However, the activities consist mainly of entering minimal data into computer software that automatically runs the required calculations. The Illinois EPA does not believe that payment on a time and material basis is necessary for this task.

2. The Illinois EPA does not track the requested information.

3. The Illinois EPA does not track the requested information.

L.

1. The Illinois EPA included costs associated with applications for payment from the UST Fund throughout the maximum payment amounts it proposed for professional consulting services under Section 734.845. The Illinois EPA did not include a particular number of applications for payment under any subsection of Section 734.845.

2. Yes.

3. The Illinois EPA used the rate of \$80 per hour multiplied by the total numbers of hours allocated to a particular task. Time associated with seeking reimbursement was included in the total number of hours allocated to each task.

4. Please see the response to question D(2) above.

5. Under the Board's First Notice Proposal costs are considered reasonable as long as they do not exceed the applicable maximum payment amount lump sums or unit rates.

6. The Illinois EPA multiplied eight hours of personnel time by the average rate of \$80 per hour.

7. An unforeseen circumstance that requires the amendment of a corrective action plan may or may not be an unusual or extraordinary circumstance. An owner or operator can seek reimbursement for the preparation and submission of the amended plan under Section 734.860 if he or she can make the demonstration required under that Section.

M.

1. The Illinois EPA does not know how the referenced statistics were generated and therefore declines to answer this question.

2. The Illinois EPA does not know how the referenced statistics were generated and therefore declines to answer this question.

3. The Illinois EPA believes the proposed rules will help improve review times and review consistency in the LUST Program. *Inter alia*, the proposed rules will help streamline the LUST Program by allowing for a greater standardization of information submitted to the Illinois EPA. Greater standardization will allow for shorter document preparation time, shorter document review time, and more consistent reviews. The rules will also help simplify the reimbursement process by setting forth the rates that are considered reasonable for reimbursement from the UST Fund. Owners and operators and consultants will know the amounts that will be considered reasonable for the activities being proposed, and the Illinois EPA can easily review and approve costs as long as they do not exceed the applicable maximum payment amounts.

4. The Illinois EPA will continue to review information submitted to it to determine whether the information demonstrates compliance with the Environmental Protection Act and the Board's regulations.

N.

1. The Illinois EPA will be revising its forms to reflect the more specific requirements of the Board's amended rules.

2. The "variability" referred to in this question is unclear. The Illinois EPA will be happy to answer this question at hearing if additional clarification of the question is provided.

3. This question has become moot. The Board stated the following in its First Notice Opinion and Order:

[T]he Board does not believe a defined scope of work is required for the lump sum maximum payment rates. The Board agrees with the Agency that the variability from site to site is accounted for in the rates. Furthermore, the proposal, as adopted for first notice, will include a bidding process for projects that cannot be undertaken for the maximum rate in Subpart H. The Board also feels that including a scope of work for every project would result in a cumbersome rule and a rule that could define almost all tasks out of the lump sum category. Therefore, the Board finds that defining the scope of work for lump sum payments is unnecessary and the Board will not propose such language.

First Notice Opinion and Order, p. 78.

O.

1. The frequency with which the unusual or extraordinary circumstances provisions will be utilized will depend upon site-specific circumstances and the number of owners and operators seeking to utilize the provisions.

2. Please see the response to Jay Koch's question 3 above.

3. Please see the response to Jay Koch's question 3 above.

4. Section 734.860 sets forth the demonstration that must be made to utilize the unusual or extraordinary circumstances provisions.

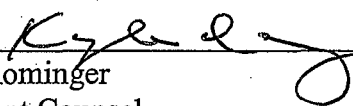
5. The type of information required will depend upon site-specific circumstances.

5.[sic] Yes. Final actions by the Illinois EPA on a proposed budget or an application for payment are subject to review by the Board. See Section 734.505(f) and 734.610(g).

6. The Illinois EPA is willing to consider posting information on its website, in an appropriate format and to the extent resources allow, regarding its determinations on requests to utilize the unusual or extraordinary circumstances provisions.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

  
\_\_\_\_\_  
Kyle Rominger  
Assistant Counsel

DATED: 6-14-85  
1021 North Grand Avenue East  
P.O. Box 19276  
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(217) 782-5544

STATE OF ILLINOIS )  
 )  
COUNTY OF SANGAMON )

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Illinois Environmental Protection Agency's Response To Pre-Filed Questions on behalf of the Illinois Environmental Protection Agency upon the person to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy M. Gunn, Clerk  
Pollution Control Board  
James R. Thompson Center  
100 West Randolph St., Ste 11-500  
Chicago, Illinois 60601

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

See Attached Service List

and mailing it from Springfield, Illinois on Cynthia Sims

6-14-05

SUBSCRIBED AND SWORN TO BEFORE ME

this 14<sup>th</sup> day of June, 2005  
Brenda Bochner  
Notary Public



**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

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