

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )

PROPOSED AMENDMENTS TO: ) RO4-22  
REGULATION PETROLEUM LEAKING ) (Rulemaking – UST)  
UNDERGROUND STORAGE TANKS )  
35 ILL. ADM. CODE 732 )

IN THE MATTER OF: )

PROPOSED AMENDMENTS TO: ) RO4-23  
REGULATION PETROLEUM LEAKING ) (Rulemaking – UST)  
UNDERGROUND STORAGE TANKS )  
35 ILL. ADM. CODE 734 )

RE: WRITTEN COMMENTS TO JULY 2005 HEARING FROM CSD ENVIRONMENTAL SERVICES, INC. BY CINDY S. DAVIS, P.G. AND JOSEPH TRUESDALE, P.E., P.G.

During the July Hearing, Hearing Officer Marie Tipsord requested CSD provide written comments on the alternative proposals submitted by USI and CWM. USI, CWM and CSD agreed we would try to get together and agree on one proposal to be submitted to the Board. However, in the interim the IEPA presented their list of questions to USI regarding their proposal and questioned how the three companies could get together without having an antitrust issue. Council recommendation to CSD, CWM and USI was not to get together, but to each provide separate comments and/or proposals.

CSD has reviewed USI's revisions dated September 13, 2005 to the Board and CWM's revised proposal in Draft Form to the Board which was prepared after the last hearing. In general, both proposals have the same basic principals– establish expedited and maximum values based upon statistical review of future submittals, require submission of data to be in a format consistent with the tasks outlined in Subpart H, and require a scope of work for lump sum services. Both proposals are excellent and are far superior to the proposal contained in the Board's First Notice. The difference in proposals appears to be mainly semantics. USI's proposal contains a great deal of detail. CWM's proposal is more general in purpose. CSD can support either proposal if the Board chooses to adopt one particular or marry the two proposals together. CSD's comments are listed below:

**Expedited Threshold Values vs The Agency's Proposed Maximum Payments:**

USI provided at the hearing the results of the statistical analysis they conducted of 80 LUST sites obtained from the Agency via the Freedom of Information Act. USI's statistical analysis concluded that the Agency's proposed maximum payment numbers were significantly lower than the amount the IEPA has been historically paying. CSD also testified that for most of the numbers the IEPA proposed as

maximum's were 50% below what we had historically been reimbursed. IEPA itself stated many of the numbers were derived from averages. CSD feels it is inappropriate to apply average numbers to a maximum payment and expect the payment will cover 90% of the costs.

The concept of applying the maximum payment numbers proposed by the Agency as Expedited Threshold Values was discussed during the hearing. CSD supports this concept in that it provides an incentive to consultants and contractors to try to complete the work for the Expedited Threshold Value. In turn, the consultant is rewarded with a quicker turn around time for both review and payment. In fact, if the expedited value is determined from the average, the effect of implementing an expedited threshold value will serve to lower the average/expedited value each year resulting in potential cost savings to the UST Fund.

CSD believes a database will need to be established by the Agency in order to complete statistical analysis to determine reasonable costs such as expedited threshold/average costs, maximum costs, etc. CSD proposes as did USI and CWM, the Board adopt the Agency's maximum payment amounts as Expedited Threshold amounts during the interim while a database is developed.

USI and CWM's proposals both provided Expedited and Maximum Payment Amounts be established. USI provided the expedited numbers as part of Appendix E. CSD doesn't believe that actual numbers should be placed into regulation, but the regulations should refer to the method of how the numbers are derived. The numbers should be developed in accordance with the method in regulation by the Agency and presented to the LUST Advisory Committee to ensure the method was used appropriately and is error free. We propose the numbers be separate to allow for more flexibility in price adjustments. The numbers can be posted on the Agency's web site.

**Determination of Expedited and Maximum Payment Amounts** – CSD proposes the method for determining expedited and maximum payment amounts be included in regulation. The following wording (prepared by CWM) is endorsed by CSD:

Section 734.880 Determination of Expedited and Maximum Payment Amounts

The Agency shall establish maximum and expedited payment amounts for the specific tasks set forth in Subpart H in accordance with this section. In order to establish rates, the Agency must collect data in a format consistent with the tasks outlined in Subpart H and the Agency must scientifically calculate rates to a 95% confidence level.

- a) The maximum payment amount shall be set at a rate where 90% of submittals fall below that rate.

- b) The expedited payment amount shall be set at a rate where 50% of submittals fall below that rate. For submittals which are below the expedited payment amount, the Agency shall complete its review in 60 days.
- c) Once the Agency has calculated rates, the rates must be posted on their website with an effective date, equaling the date of their posting.
- d) The rates shall be calculated no sooner than following the collection of 6 months of reimbursement submittals to the Agency. The second calculation shall be following six more months of data collection. Thereafter, the Agency must update the rates on an annual basis and no more frequently.
- e) All requests for payment must be submitted in accordance with 734.850.

**Scope of Work or definition of Typical-** During the hearing many different scenerios were presented by the consulting community to the Agency in an attempt to show the Board that without a clear definition of typical site it is difficult for the consultants to make a demonstration to the Agency that their site or situation is not typical and therefore unusual or extraordinary circumstances of 734.860 apply. At the last hearing it was clear the Agency has adopted a “we will know an extraordinary condition when we see it” type of mentality. This type of mentality is totally arbitrary and capricious. CSD proposes this rulemaking establish the correct procedure to define typical. USI’s proposal included an Appendix D which lists Standard Tasks and Appendix F a detailed Scope of Services and Reasonable Quantity Guidance. CWM’s proposal included Appendix G – Scope of Work for Lump Sum Items. CSD suggests combining USI’s Appendix D with CWM’s Appendix G. The combined Appendix would include a generic task such as Prepare and Submit a 45 Day Report and under the generic task, the details of what is included in a 45 Day Report. CSD further suggests that the scope of work could be referred in regulation to be developed by the LUST Advisory Committee and posted on the Agency’s web site. In addition, we suggest the Board direct the LUST Advisory Committee to continue to refine the scope of work for each lump sum pay item.

**Lust Advisory Committee** – the LUST Advisory Committee pursuant to 734.150 is to be comprised of one individual each from the Illinois Petroleum Marketers, Illinois Petroleum Council, ACEC, Illinois Society of Engineers, American Institute of Professional Geologists, PIPE, Illinois Association of Environmental Laboratories, Illinois Environmental Regulatory Group, Office of State Fire Marshal, and IDOT for a total of 10 positions. CSD proposes the Committee number be an odd number for voting purposes. CSD proposes since the members of PIPE has been the most concerned party through out these regulations that PIPE be allowed two seats on the Committee.

CSD proposes that the LUST Advisory Committee be tasked with the responsibility of developing standardized forms for submittal, guidance documents, evaluation of expedited and maximum rates to ensure the rates reflect prevailing market rates, review statistical calculations for determining the expedited and maximum rates and propose appropriate amendments to regulations. Requiring the LUST Advisory Committee to be an active arm of the LUST program forces the Agency and the Consultants to repair the strained relationship resulting from this rulemaking.

**Due Process** – CSD believes the regulations as proposed at First Notice continue to deny due process to owners/operators who cannot afford to take an appeal to the IPCB (Board). CSD on behalf of our client, Illinois Ayers (Ayers), took an appeal before the Board in 2004. The attorney fees for this appeal exceeded \$45,000. These expenses are typical for taking cases to the Board. The Board did award Ayers attorney fees in the amount of \$44,456.49 on August 5, 2004. However, it took until June 16, 2005 for the Comptroller to issue a check for the attorney fees awarded in the case. In fact, Ayers incurred additional attorney fees of \$14,732.32 attempting to prompt the Agency to comply with the August 5, 2004 order. Most owners/operators cannot afford to spend an average of \$50,000 to take a case to the Board, even if the Board does award fees which take almost a year to receive. Additionally, most cuts issued by the Agency are less than \$50,000 making it uneconomical to take an appeal of less than \$50,000 to the Board.

PIPE recommended earlier in these proceedings an alternative dispute resolution mechanism be derived to settle reimbursement issues. PIPE suggested the Agency issue Draft Denial Letters prior to final decision letters to allow the owner/operator the opportunity to discuss the cuts issued prior to a final decision being made. This suggestion was rejected by the IEPA. PIPE also suggested an alternative process prior to formal appeal to the Board, but the Agency again was opposed to agreeing to any alternative which was less costly to the owner/operator.

CSD recommends the Board adopt an alternative formal procedure for decisions regarding reimbursement other than filing a formal appeal to the Board. If the Board does not adopt an alternate procedure, a proposal to the State Legislature may be necessary to address the due process issue.

**Costs incurred after receipt of an NFR Letters** – CWM's proposal added 4 items to 734.630(gg) of which CSD supports:

- 6) Incremental costs incurred by a highway authority through maintenance or improvement of the Right of Way covered by a Highway Authority Agreement;
- 7) Costs to investigate and remediate threats to human health and the environment caused by a previously unknown migration pathway;

- 8) Costs to investigate and remediate contamination found beyond the previously defined contamination plumes which threatens human health and the environment; and
- 9) Costs to investigate and remediate contamination which is discovered on properties whose owner or operator or their agent were previously denied access and the requirements of Section 734.350 were met.

**Mobilization Charges for Drill Rigs** – the regulation as proposed under 734.820 Drilling, Well Installation, and Well Abandonment includes mobilization/demobilization of the drill rig and supply trailer as part of the per foot drilling price. CSD believes the price per foot is not adequate to allow for mobilization of two pieces of equipment to the job site, especially in light of the current price of fuel. Both USI and CWMs' proposals added mobilization as a separate item to the drilling charge which CSD supports.

**Proof of Payment**- the Board in the First Notice included the Agency's proposal to require proof of payment from subcontractors. In order for a consultant to submit a proof of payment or lien waiver from subcontractors the subcontractors must be paid. If the consultant is financing the project often the subcontractor such as the landfill will agree to wait for payment. Requiring proof of payment requires the owner (or consultant if financing) to borrow money to complete remediation or to place the remediation on hold until the owner or consultant has the resources. We don't understand how proof of payment is applicable under the context of the suggested reasons for this rulemaking. There is no readily apparent means of streamlining the last process or saving fund resources via the proposed proof of payment provisions. Both USI and CWM deleted reference to proof of payment from their proposals which CSD supports.

CSD has spent numerous hours attending hearings, preparing testimony and writing comments. We feel we have stated over and over our concerns to no avail. We and other consultants have provided testimony showing the Agency's numbers are absolutely incorrect and threaten to put us out of business. The Board stated in the First Notice that an alternate proposal was not presented. It seems unfair to require consultants to provide an alternative proposal that addresses all issues and is rule ready. We understand this is not our job, but the Agency's. We can't express how frustrating the rulemaking has been for us. We don't understand how the Board can proceed to second notice with a rulemaking that has not had *any, and we mean any*, support from the regulated community. The Agency has refused to listen and even consider our arguments when they know they have inappropriately established numbers. They have adopted a smug attitude that makes it clear they have no intention of listening now or in the future to correct the inadequacies of this rule. They feel empowered by the Board because their

proposal was adopted pretty much as is for first notice. If the Board adopts this rule, we will have no course of action except to seek help from the State Legislature and file any and all appeals necessary to stop this madness. Currently 50% of the LUST sites are not being actively remediated. This rulemaking will ensure the total demise of the LUST reimbursement program and we can guarantee the Board that the number will significantly rise to higher levels. Only those cleanups being funded by large corporations or by owners in the Chicago area where property has value will be cleaned up. Downstate Illinois will suffer because our property values are low and many times the property is not worth the money it will take to clean it up. How is this rulemaking as adopted at First Notice expected to help the State of Illinois, except to guarantee more money will be available in the LUST Fund because no one will be able to afford to complete work for the established prices. Maybe this is the directive and objective of this rulemaking.

CSD asks the Board to provide a directive to the Agency to work with the consultants to prepare a rule that is more widely supported by the regulated community and start over with First Notice.