BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PC #63

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

NOTICE OF FILING

TO: ALL COUNSEL OF RECORD
(Service List Attached)

PLEASE TAKE NOTICE that on September 23, 2005, filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of Additional Comments and Revised Regulations from CW^3M, Company, Inc. for the Illinois Pollution Control Board's First Notice of Amendments to 35 Ill. Adm. Code 734 and 35 Ill. Adm. Code 732 in the above-captioned matter.

Dated: September 23, 2005

Respectfully submitted,

CW^3M 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 Additional Comments and Revised Regulations from CW^{3}M, Company, Inc. for the Illinois Pollution Control Board's First 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 CW^{3}M Company, Inc., 701 West South Grand Avenue, Springfield, IL 62704 before the hour of 5:00 p.m., on this 26th Day of September, 2005.

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(35 ILL. ADM. CODE 734)	)	Consolidated
	)	

Proposed Rule. First Notice

ADDITIONAL COMMENTS & REVISED REGULATIONS FROM CW^{3}M 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

The following additional comments have been prepared by the CW^{3}M Company in response to testimony presented at the July 27, 2005 hearing.

During the July 27, 2005 hearing, considerable testimony was presented and subsequent follow up discussions occurred regarding the rates developed by the Agency and cost data extracted by United Science Industries (USI) from the LUST Program. On the basis of the July 27, 2005 hearing, the data presented and the flavor of the discussions, CW^{3}M has modified its proposed regulations, which are presented in Appendix A of this document.

CW^3M, CSD Environmental, and USI presented additional testimony and proposed regulations to the Board prior to the July 27, 2005 hearing. As a result, the Board requested that we either comment on each other's proposals or work together to develop one alternate proposal that could be presented the Board. During the hearing, we all indicated that we would attempt to consolidate our efforts into one proposal to simplify the consulting industry's concerns and streamline the proceedings for the Board.

Contrary to our intents, we were forced into separate submittals once again. Legal counsel for the consultants interpreted the Agency's August 11, 2005 Questions as veiled threats of anti-trust violations. Whether intended or not, such concerns derailed combined efforts of the consultants. The Agency questioned why alternate rates were not previously presented; ignoring the alternative proposal presented last summer by PIPE. While we believe that the July 27, 2005 hearing demonstrated that philosophically the consultants are clearly aligned as to the problems and solutions with the First Notice regulations, we have differing approaches as to how the regulations should be developed to correct rate deficiencies. Due to reasons discussed above, we cannot work together for one combined proposal, therefore, while we fundamentally agree on the best way to implement the cost portion of the rules, we have had to prepare and submit our own versions since we cannot corroborate on rates. Further, we believe that we are aligned on the technical portion of the proposed regulations. It is common practice for parties to unite or work

together in rulemaking proceedings, however, from the inception of PIPE, all parties involved have been careful not corroborate on rate setting.

On the basis of the testimony of USI and their considerable effort to extract real data from the LUST Program and properly evaluate the data, CW^3M has modified its proposal in a manner that would allow the proceedings to move forward while ensuring the long-term rate establishment by the LUST Program is fair and reasonable and won't lead to the demise of those providing LUST remediation services in this State. CW^3M attempted to simplify Subpart H into a user-friendly, less complicated format while allowing for reimbursement of reasonable costs.

As a preface to further discussion regarding our proposal, we must qualify and acknowledge that we have not, nor has USI developed the perfect rule. However, either proposal is much closer to a fair and equitable rule as opposed to the ones presented by the Agency. The parties most active in this rulemaking process are engineers, geologists and scientists and are not professional rule makers. Our proposal requires polishing and some re-crafting to enable it to work completely within the entire framework of the regulations. We also believe that the concept of threshold or expedited and maximum rate development needs additional thought and input from the Board and the Agency to convert the concept into rules, however, we believe it is the solution that can satisfy all parties, and more importantly, the needs of the program.

USI's review and analyses of the data also confirmed the Agency's earlier testimony that extracting exact task costs from the historical data is not practical or even possible, given the wide variety of task names and breakdowns by the various consultants. For these reasons, USI could not further breakdown costs beyond "early action", "site classification or investigation" and "corrective action".

During the July 27, 2005 hearing, there was discussion of creating both "threshold" and "maximum" rates. The threshold rate would be a lower rate. To entice a consultant or owner/operator to attempt to reach those rates, the program needs a carrot. The most favorable carrot that could be offered would be speeding up the review process so that the project and reimbursement could move at a quicker pace. Our proposed regulations present language allowing the Agency to develop an expedited review process for budget requests that can meet the threshold or expedited values. While the Agency has testified it has a right to 120 days for review, the truth of the matter is that it has a mandate of 120 days, and a mandate can be shortened. The expedited review would be compatible with the Agency's current process of screening or auditing reports for a full review rather than conducting a full review on each and every submittal.

In the spirit of negotiation, we are suggesting that the Agency's initially proposed rates be used as interim threshold or expedited values until a process is in place to collect and evaluate program cost data. It has been clear throughout these proceedings, and confirmed by USI's statistical analysis, that the Agency's rates are

seriously flawed and do not represent true costs, and we are not endorsing the rates, however, they could be used on an interim basis as being somewhere near or below the 50% threshold proposed for the expedited rates. USI's statistical analysis of the Agency's files clearly demonstrates that the Agency's rates are not consistent with the rates historically and currently being deemed reasonable by the Agency, which was the stated justification of those rates but not supportable or defensible.

The Board stated in the First Notice *"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.* " The phase totals presented by USI's statistically defensible data, taken from actual LUST reimbursement applications in Illinois, indicate a deficit exceeding 60%, for consultant services, over the life of a project. This exercise invalidates the credibility of the entire Agency rate structure and "experience", as CW^3M, and every other entity that has offered an opinion on Subpart H, has tried to point out throughout these proceedings. The "experience" of the

Agency is also brought into question when proposing rates based on the assumption that OSHA regulations will have to be violated. While bidding is an option in some cases, it adds unnecessary time delays and expense to the program through the bid procedure itself. Setting realistic rates would not require bidding on a regular basis (over 10% of the time), thereby reducing overall costs. Bidding for consulting services, especially for each phase of the project, is not practical, nor is a turnkey consultant's ability to obtain competitive bids when they are capable of doing the work themselves.

If the proposed rates were reflective of the market and consistent with rates previously deemed reasonable by the Agency, there is little doubt that these proceedings would have been less controversial and the Agency might have secured the support of industry. To move these proceedings forward in a positive manner, and remove the animosity from between the regulated and regulators, it is essential to develop real and reasonable rates. Further, the Act requires that all reasonable costs be reimbursable.

During the July 27, 2005 hearing, another interesting point was raised; developing lump sum payments may be in violation of the Act. For this reason and to properly collect data, we believe that payment requests, particularly for the more variable personnel costs, should be submitted on a time and material basis. If consultants are required to cap their submittals at a maximum but submit costs less that the maximum lump sum rate, they are clearly on the losing side of the lump sum

"win some, lose some" rationale. On the flip side, payment of lump sum maximums when the costs incurred don't reach or exceed the maximum pay more than reasonable costs, as defined by the Act.

It is CW^{3}M's opinion that IEPA wants to realize a cost savings by forcing industry to accept substantially less reimbursement than prevailing market rates or rates previously deemed reasonable as well as forcing industry to now comply with secret or undefined scopes of work. The impetus to include rates was that the secret "Rate Sheets" used by the Agency were about to be invalidated, and the Agency needed a replacement system for review. Now that the rate structure has been made public and the Agency and Board are unwilling to develop detailed scopes of work for the lump sum payment amounts, the Agency will try to force fit additional tasks into the lump sum rates. Now instead of secret "Rate Sheets" we will have secret scopes of work, which will have the same negative impact on the industry as the secret "Rate Sheets" did, higher rates of appeals, and increased animosity between the Agency and the consultants. The Agency has refused to disclose what tasks it included when developing the rates or what tasks should be inclusive within the lump sum payment amounts. Either the Agency is unable to list specific tasks to include in a lump sum rate because IEPA does not have adequate experience to know what tasks to list or, based on the IEPA's Responses to Pre-Filed Questions, June 14, 2005, the Agency intends that any task that may come up or that was not previously addressed as being part of the lump sum payment amounts will later be deemed as part of the rate.

CW^3M is proposing task lists and scopes of work as part of the attached regulation, however, we feel that the final task lists and scopes of work would best be developed jointly by the Agency and the LUST Advisory Committee, but be published periodically by the Agency outside of the confines of the rules. This allows modifications without the cost and time necessitated by rulemaking proceedings. Similarly, the rate structure should also be managed in the same way. As the entire country is aware and intimately affected by Hurricane Katrina and skyrocketing fuel prices, the Agency and Board should be made aware of how these rising costs affect remediation work. Mobilization, travel, equipment operation, materials (including PVC piping), shipping, utilities, etc. have all increased for all of us conducting the work. Rate structures should be established in ways that allow for what are sometimes higher but maybe only temporary costs increases. However, mirroring the Agency's structure of Subpart H, we have presented the rates and scopes of work as appendices to the proposed rule.

Our interpretation of the Board's opinion is that even though the rates may be flawed, with the bidding and unusual circumstances contingencies the Agency's proposed rates, where too low, should be adjusted to market conditions. This could be plausible and possibly even acceptable, however, the Agency has testified that there will be very few reasons for them to accept or approve unusual or extraordinary circumstances. This is at the heart of our concerns over the rate structure IEPA proposed. For the reasons outlined in USI's testimony, the bidding of professional

services is not practical, nor is bidding by turnkey consultants. For these reasons, alternatives other than the bidding need to be provided.

Failure to adequately and fairly adopt rates will have little impact on how the Agency does business. However, a poorly designed system of determining maximum rates can have a serious impact on owners, operators and those of us providing the services. The futures of our businesses are at stake. The tyrannical monarchy that the Agency has become collects the money, makes the laws, then spends the money lavishly upon itself, while giving the taxed the leftovers. Consultants, who have no standing in the eyes of Agency, are now proposed to be regulated by them as well, through the auditing language. If any fees as a result of this new self-appointed authority are due, we are sure they will be in a "whatever it takes to do the job" lump sum already created. The LUST fund was established to protect the environment and to assist owners and operators, not to create a bureaucratic regime which answers to no one. The Board, through the invalidation of the illegal "rate sheets" has stood up to them once, and we are asking them to do it again, on behalf of the taxpayers and the owner / operators, sooner rather than later. The concept of taxation without representation was the impetus for the revolutionary war. An uncooperative Agency, coupled with an expensive and untimely appeal process has not provided the owner / operators with a voice. We are asking that the Board be that voice.

The Agency testified that the proposed rates were developed with the input of industry and are generally consistent with the rates the Agency currently approves.

Significant testimony was presented during last year's proceedings that only limited rates were developed with industry's input and when industry's input was used for professional consulting services, the Agency misused the information it obtained from industry because the Agency only used only portions of the information rather than the whole and skewed the number of hours industry suggested for certain tasks. Testimony presented during the July 27, 2005 hearing confirmed that the proposed rates were not consistent with rates the Agency is currently or had historically approved; the Agency's proposed rates are considerably less. Again, this suggests that the Agency's proposed rates cannot allow for reimbursement of reasonable costs, clearly in violation of the Act.

From the comments made by the Board in its presentation of First Notice, we interpreted their use of the Agency's rates not as an endorsement of those rates but as the only alternative they felt had been made available. Although an alternate proposal was submitted by PIPE, it went unnoticed. It has been our intention to provide the Board with alternative rates. However, following several attempts to develop rates, several factors make the task impossible to extract enough representative data to accurately quantify personnel costs on a per task basis.

The testimony and data presented by USI at the July 27, 2005 hearing confirm that the Agency's proposed rates are inadequate as well as severely flawed. Extraction of data in the format by which the Agency framed Subpart H cannot be accomplished and converted into rates and defended by any acceptable statistical

analysis. USI encountered the same difficulty that the Agency did; the data is not easily sorted due to differing job classifications and billing structures by consultants preparing reimbursement claims. USI did, however, successfully extract relevant and defensible data for the phases of LUST remediation. We attempted to develop a rate structure utilizing this information, however, without all of the data, we could not develop the normal technical situation to correspond to the each of the phases. For example, personnel services for site investigation are roughly represented by two categories: report preparation/data evaluation and field activities (drilling/sample). Was the normal situation reflective of five wells and three borings per site/phase or something altogether different, such as twenty-five wells and fifteen borings? Hence, the importance of a scope of work. Without knowledge of the amount or level of work, the rates are meaningless. It doesn't require much thought to conclude that a site requiring more extensive work will have higher personnel costs.

We believe our proposal utilizes the basic framework that the Agency proposed, however, it offers an opportunity to create a rule that meets the requirements of the Act, allows owners and operators to be fairly reimbursed and established a forum for the Agency and outside affected parties to work together to refine the process of reasonable determinations for the long-term viability of the Program. The wide gap between the Agency and the owner/operators and consultants has been apparent at every stage of the rulemaking proceedings. The gap represents the same gap in payment of reasonable costs. The Agency's rates will force many consultants out of business in that we cannot operate at a significant loss year after

year. Owners and operators cannot or will not assume financial; liability for costs that the Act guarantees payment of. The Agency has nothing to lose.

One concern voiced by the Agency was that if consultants submit proposal or claim during a data collection period, they would intentionally drive up the costs so that the resulting rates would favor them. This notion attacks the character of those of us who strive to work efficiently and only bill for quality work as costs are incurred. For this reason, we have proposed that professional service charges be billed and submitted for reimbursement in a time and materials format. Only charges that were actually and legitimately incurred would be submitted for payment.

To adopt a rule that is fundamentally bad because the alternatives are not in the same format or alternative rates are not presented in the exact format as initially presented by the Agency or have yet to evolve into the perfect rule is wrong. Just because the Agency presented a proposal, there is nothing that requires the Board to adopt it if it cannot realistically work to the betterment of the program.

Although this program was intended to treat all owners / operators equally, the result of this particular rule is discrimination against small business, especially one located in an area without high property values. In desirable urban areas, the land beneath a LUST site can still be quite valuable, making out of pocket expenses for a particular owner / operator much easier to absorb. For an ongoing business, especially a large one, out of pocket expenses can also be absorbed, but, for a single

station owner in small-town downstate Illinois, the land is almost worthless, and the income ended when the station closed. There is no way to absorb increased out of pocket expenses, which is a by-product of a deficient reimbursement process. This is part of the reason why there are so many inactive open LUST incidents in Illinois, and the proposed rule only makes it more difficult to remediate them by increasing the out of pocket costs to the owner / operator.

Although CW^3M and USI independently submitted proposals, we believe this effort is a positive step toward flushing out ideas and concepts to develop a rule worth finalizing. We could support either proposal or a melding of the two. CW^3M proposed use of the Agency's rates as expedited interim rates. Although the rates are flawed and have no real merit, they may mirror the 50% target of the expedited rate structure and were proposed as a compromise to keep the process moving forward and give the Agency some sense of structure during data collection and provide a carrot for industry to attempt to meet lower rates where applicable. USI's proposed rates are, however, much closer to the real world and actual market conditions. We could support their rate structures and the appendices they have developed for rates and scopes of work. The rates presented by USI truly reflect unit rates historically and currently deemed reasonable by the Agency. Mountains of data, in the forms of reimbursement payments and approved budgets could be provided to the Board to undeniably defend the rates. We have no objections to any of the technical changes in 734 as proposed by USI. Many of the proposed modifications are the same as those proposed by CW^3M and commented on during these proceedings. A few of the

modifications have the same intent but variable proposed alternative language. The Board can evaluate those issues and determine which language is better suited to this rule.

In summary, we feel that the Board needs to exercise its authority and responsibility in these proceedings. This rule, as proposed, is not ready for Second Notice, unless the primary concern is to protect the LUST fund, at the expense of the protection of the environment. If environmental protection is a primary concern, and protection of the LUST fund is also desirable, then the rule needs to be significantly altered. If the needs of small owner / operators carry any weight, then the rule is not ready for Second Notice.

There has been no support of the Agency's proposal or the Board's First Notice. From among ~~the~~ numerous participants in these proceedings, no participant has stepped forward to defend the Agency's proposal or process of rate development. The Board needs to be more responsive to the numerous public testimony and comments.

The Board has the authority to direct the Agency to re-evaluate its proposed rates and the alternate rate structure utilizing threshold or expedited payment amounts in addition to maximum payment amounts and coordinate this effort with the participants to reconfigure Subpart H. The record clearly confirms that the Agency's proposed rates are flawed and are substantially less than rates historically and

previously determined as reasonable. Without proper evaluation of the LUST real data, maximum rates should not be established. To do so is unequivocally wrong, dangerous to the health of the program and Illinois businesses and has absolutely no support. The lump sum system proposed by the Agency allows for overpayment as well as underpayment, which appear to be a violation of the Act's requirement to reimburse reasonable costs. In the first public hearing, the Agency stated that there was not time to collect data, due an urgency caused by the LUST fund's diminishing balance. In the time that has passed since the first hearing, the data could have been collected, analyzed, and if necessary re-collected and re-analyzed. The Agency's unwillingness to cooperate, validated by the Board's near carte blanche acceptance of the Agency's proposed rule for First Notice, has not allowed for any opportunity to compromise. The main thing the consulting community, on behalf of the owner / operators, have asked for from the beginning of this rulemaking, and are still waiting for, is a fair system of reimbursement, based on statistically defendable methods, not out of date guestimates defended by improperly analyzed non-random data taken from a semi-randomly selected file drawer.

If the Board fails to respond to the testimony and the record, the only remaining option for owners / operators and service providers is to seek legislative intervention to correct the flaws of the proposed rule.

In the opinion of CW^3M, the only acceptable options are, for the Board, which is comprised of professionals with rulemaking expertise, to do one of the following:

a) Utilize the alternative proposals submitted by USI and CW^3M, along with information presented in hearing and the public comment period to reconfigure Subpart H, and bring the revised proposal through First Notice again, or

b) Utilize the alternative proposals submitted by USI and CW^3M to reconfigure Subpart H, remove all rates and present a method for which the rates can be developed using properly collected and analyzed data and bring this revision through First Notice again, or

c) Sever Subpart H and proceed with its redevelopment while finalizing the technical portions of 732 and 734 and redirect the participants to work together to come forward with a more appropriate rule, which has public support outside of the Agency.

On behalf of all of the owners and operators we represent and for the viability of our collective businesses, we hope that our efforts will not have been in vain and that the Board will recognize the serious flaws with the pending proposal. We will continue to offer our assistance and input as needed to the Board and the Agency to develop a rule that enhances the LUST program and ensures the long-term success and viability of the program.

Dated: September 23, 2005

Respectfully submitted,

CW³M Company

By: _____

PC 9-23-05