

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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

**PRE-FILED TESTIMONY OF THE PROFESSIONALS
OF ILLINOIS FOR THE PROTECTION OF THE ENVIRONMENT**

NOW COMES Professionals of Illinois for the Protection of the Environment (PIPE), by and through its attorney, Claire A. Manning, Brown, Hay & Stephens LLP, and offers the following attached pre-filed testimony in this proceeding. Various members of PIPE have contributed to this joint document, and will be available at hearing to answer any questions related to it. Additionally, some PIPE member companies will file and provide testimony individually on behalf of their respective companies.

The Professionals of Illinois for the Protection of the Environment (PIPE) would like to thank the Pollution Control Board for the opportunity to appear before it and present this position, in Docket B of this proceeding. PIPE appreciates the opportunity to provide further input regarding the regulation of professional consulting services, and the interwoven issues of scopes of work and lump sum payment amounts that are proposed in this rulemaking.

This joint testimony, attached as Exhibit A, can be considered as association testimony offered for three essential purposes:

- To outline the standards that PIPE believes are imperative to the development of an effective rule pertaining to the management of professional consulting service costs under the Illinois UST Program;
- To chart the fundamental approach and implementation steps that PIPE's membership believes are imperative to achieving these critical and necessary standards; and
- To provide responses to the questions posed by the IPCB in its January 5, 2006 Opinion and Order.

On page 8 of the Board's January 5, 2006 opinion, the question was posed: "Should Professional Consulting Services be Reimbursed on a Time and Materials Basis?" PIPE's position is that a time and materials basis for billing professional services is the most logical and appropriate means for several reasons. Consulting services are not typically commodity-based. The lump sum payment method is only appropriate for a very limited number of the tasks performed by professionals because the deliverables for each task may be widely varied. Development of fair and reasonable lump sum rates may be impossible and if implemented improperly, the results are devastating to PIPE's membership and, accordingly, UST environmental remediation. Moreover, the determination that lump sum payments are appropriate reimbursement for professional services necessarily implies that a "one size fits all" approach is "reasonable" reimbursement for UST remediation. It is not. The Board should reject this approach in favor of payment for hours worked..

The attached policy and position statement was developed with the intention that it could be utilized under two scenarios. If the Board is compelled to attempt to develop lump sum rates for tasks where the data indicates a rate may be appropriate, the policy outlines the steps necessary to do so fairly and responsibly. Should the Board concur with PIPE and other professionals, such as the American Society for Professional Engineers, that payment for professional services is more logically based upon a time worked basis, portions of the policy

can be utilized to collect meaningful data that the Agency could utilize as a tool for determining reasonableness for future submittals. If a given submittal proposes reimbursement well beyond what the data suggests is typical, in terms of time, the Agency would have guidance indicating additional justification is warranted by the professional. As a final note regarding payment on an hourly basis, PIPE would like the Board to consider that the actual hourly rates that the Agency is proposing was based upon data from 2002, which is now well outdated.

Accordingly, PIPE asks the Board to strongly consider the merits of time and materials billing and utilize the attached joint testimony as it was intended to provide a framework for either direction.

Although as an organization PIPE is not offering detailed alternative proposals, its membership is unified in support of the standards, approach and implementation steps presented in this attached Policy & Position Statement. Additionally, some individual PIPE companies will testify. This testimony may include specific proposals and/or concepts for the Board to consider. PIPE has not specifically endorsed the individual testimony of any of its members. However, PIPE requests that the Board carefully consider and evaluate the testimony of each PIPE Member as well as other credible participants. PIPE hopes that the Board will glean from each testimony those concepts and proposals that most fully and efficiently achieve the standards, approach and implementation steps presented herein by PIPE.

Most importantly, PIPE seeks the Board's recognition, in moving forward with this rulemaking, that the methodology, standards, approach and implementation steps offered by PIPE are reasonable and appropriate. PIPE is prepared to work with the Illinois Pollution Control Board, the Illinois Environmental Protection Agency and others, perhaps through the

designated LUST Advisory group, as appropriate, to develop the specific details of a rule that is consistent with the appropriate standards, approach and implementation steps.

PIPE believes that if the Board intends to develop lump sum payments for professional services the Board can best demonstrate its prudence and leadership in this rulemaking by identifying what it believes are the best ideas, concepts and proposals from the individual participants, and apply (or order the application of) those elements to a draft rule that is consistent with the standards, approach and implementation steps set forth below. This draft rule would be the focal point for the remainder of this rulemaking process – and would represent a substantial positive step forward in this rulemaking. Most importantly, this approach would assure the sanctity and credibility of the Illinois UST.

Respectfully Submitted,

PROFESSIONALS OF ILLINOIS FOR THE
PROTECTION OF THE ENVIRONMENT

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Attachment A

**POLICY AND POSITION OF THE PROFESSIONALS OF ILLINOIS FOR THE
PROTECTION OF THE ENVIRONMENT**

I. STANDARDS NECESSARY FOR AN EFFECTIVE RULE

If the Board chooses to adopt a rule which establishes lump sum values for time spent by professionals, instead of on a preferred hours worked basis, costs for professional services should be based upon the following standards.

A. GENERAL STANDARDS:

The rule should be:

1. Fair and objective;
2. Well defined and easily understood so that it can be uniformly and consistently applied without bias;
3. Transparent; and
4. Clearly and convincingly evident that its implementation will readily achieve the goals of streamlining and expediting the technical compliance and reimbursement processes.

B. STANDARDS FOR DEVELOPING SCOPES OF WORK

Scopes of Work developed as part of the rule should be:

1. *Task Based*
 - a. Task conventions should be based upon common standards which are widely known, recognized and accepted in the industry; and
 - b. The list of tasks should be comprehensive in that every provision of the UST regulations should be accounted for somewhere within the standardized task list or the scopes of work associated with the individual tasks contained in the list of standard tasks.
2. *Clearly Defined*
 - a. The scope of work requirements and deliverable(s) for each task should be clearly defined from a qualitative perspective; and

- b. The deliverable(s) for each task should be clearly defined and quantified whenever possible. (Due to the inherently uncertain nature of certain aspects of environmental consulting work, it may not be possible to list a specific quantifiable deliverable for each task).

3. Standardized

- a. For purposes of cost comparison and analysis, the list of tasks and the scope of work and deliverable(s) for each task should be standardized.

4. Appropriately Delineated:

- a. Task conventions should not be too detailed or too broad;
- b. Scopes of Work for each Task convention should be broad enough to reduce complexity and assure efficiency and streamlining of processes yet narrow enough to yield a full understanding of the task's deliverable(s) and the typical level of effort and costs necessary to complete the task's deliverable(s); and
- c. Task conventions and their associated scope of work should avoid the use of repetitive activities, means and methods of performing the work, and/or other intricacies of the performance of the task.

5. Published

- a. The list of tasks, along with the accompanying scope of work for each task, the deliverable(s) associated with each task, and any associated regulatory guidance, standards, notes, directives, etc. should be published and readily available to the public.

6. Flexible

- a. The rules should be flexible so that tasks can be added or deleted and scopes of work and deliverable(s) can be modified as regulatory requirements change over time.

C. STANDARDS FOR DEVELOPING LUMP SUM PAYMENT AMOUNTS:

Lump sum payment amounts developed for any task pursuant to the rule should be:

- 1. Based upon statistically sound facts and not estimations;
- 2. Derived from actual costs incurred at Illinois LUST sites.

3. Applied only to those tasks where:
 - a. the qualitative component of the scope of work and deliverable are well defined;
 - b. the deliverable(s) is/are able to be quantified; and
 - c. Statistically valid costs data shows a normalized distribution of professional service costs.

II. APPROACH & IMPLEMENTATION STEPS

Based upon its vast collective experience in the industry, and in working with the Illinois EPA's UST program, PIPE is confident that the approach and implementation steps presented in this Section is the most feasible way to implement a professional services cost management rule.

A. BACKGROUND INFORMATION

PIPE members include professional consultants, whose primary line of business is serving the UST consulting and remediation needs of Illinois underground storage tank owners/operators. Many of these firms have been in business since the inception of the UST program and most have more than a decade of experience in dealing with the Illinois EPA's LUST Section. Over the years, on behalf of their clients, PIPE member firms and their employees have submitted literally hundreds of thousands of man-hours of professional service costs to the Agency for reimbursement. Over this same time period, the Agency has reimbursed tens, if not hundreds of millions of dollars of professional service costs charged by PIPE members.

Having a thorough working knowledge of the IEPA's reimbursement applications and process, PIPE's member firms are completely confident of the following:

- 1) the Agency has never required reporting pursuant to any standardized structure;
- 2) thus, the Agency's data files and reimbursement records are not adequate to provide accurate, reliable or statistically sound information as to the costs of the professional services on a per task basis.

PIPE's members, as well as a great many underground storage tank owners/operators in this state, are small businesses. PIPE is confident that these small businesses simply cannot tolerate the huge financial risks that would be thrust upon them if lump sum payment amounts included in this rule were to be based upon estimations. The use of

estimations puts both the environmental consultant and the tank owner/operator and the employees and the families of both at unnecessary peril.

As a good engineer would not put the public at peril by using an untested and unproven bridge design, so too should the Illinois Pollution Control Board not permit gambling with environmental remediation by crafting a rule that does not provide reasonable reimbursement for the costs associated with such remediation because it establishes lump sums based upon guesses and estimates – not real costs.

The undue risks associated with the use of estimations are soundly mitigated by the logical, appropriate and practical approach and implementation steps outlined below.

B. APPROACH & IMPLEMENTATION STEPS:

The approach and implementation steps presented below are consistent with standards presented in Section I above and are the foundation for developing an effective and credible cost management program for professional consulting services.

1. APPROACH

The approach is to implement a factually based and statistically reliable method of determining reasonableness for professional consulting services. The rule should be implemented in three distinct phases. The milestones related to each phase are generally as follows:

- *Phase One- Establish Task-Based Cost Reporting Standards.*
- *Phase Two- Gather Statistically Reliable Task-Based Cost Information*
- *Phase Three- Analyze Cost Information & Determine if Lump Sum Payment Amounts are Appropriate*

2. IMPLEMENTATION STEPS

The general implementation steps associated with each phase of the rule will be sequenced and executed as are described below.

a. *Phase One- Establish Task-Based Cost Reporting Standards*

This phase would generally consist of the following steps.

Step 1- Develop a Standardized List of Task

- This step entails developing a comprehensive list of tasks that require professional services and are necessary pursuant to the LUST regulations.

Step 2- Establish a Clearly Defined Standardized Scope of Work for Each Task

- This step entails defining the specific regulatory requirements included in each task along with qualitatively defining the deliverable(s), and setting forth the standard deliverable quantity, when possible.

All professional consulting service work required in order to comply with the UST regulations should be accounted for in the tasks and scopes work set forth as a result of steps 1 and 2 above.

Step 3- Establish & Implement Standard Cost Reporting Procedures

- This step entails a requirement that all owners/operators across the state report professional service costs on a consistent task-by-task basis pursuant to the standardized task list and scopes of work implemented in steps 1 and 2 above.
- This step does not implement the use of lump sum payment amounts, but only standardized reporting of professional consulting costs. Professional service costs for all tasks would continue to be billed on a time and materials basis during Phase One.

The three steps described above are akin to a business establishing a standard chart of accounts to track and better understand its operating costs. In the three steps above, the Agency is literally developing a standardized chart of accounts so that it can track, on a uniform, accurate and reliable basis, professional consulting costs that are incurred by task at each Illinois UST site. The Agency's accounts are its standardized tasks.

b. Phase Two- Gather Statistically Reliable Task-Based Cost Information

This phase would initiate upon completion of phase one and would generally consist of the following steps.

Step 1- Collection of statistically reliable professional service cost information on a per task basis.

- During this phase, as a condition precedent to reimbursement, the Agency would require the owner/operator to report all professional service costs to the appropriate standardized tasks.
- This step requires clearly defined standards that require professionals across the state to post their charges in a uniform and consistent manner for each task. Professional services would continue to be billed on a time and materials basis during Phase Two.
- During this phase, in order to be eligible for reimbursement, all professional service costs posted to a task would need to be documented in detail and the activities being performed must be reasonable and necessary in order to complete the task. This is the same approach that has been used by the Agency for the past fifteen years, with the significant exception that under this program the tasks would be standardized.
- During this phase, the owner/operator would also be required to report professional service and field service deliverables that were completed in association with each task. For example, if the professional consulting service deliverable was oversight, documentation and quality control of drilling activities, the owner/operator would be required to report the number of hours of professional service time spent on drilling oversight, documentation and quality control as well as the number of borings, feet of borehole and number of samples collected. If the professional consulting service was for field oversight, documentation and quality control of remedial activities, the owner/operator would be required to report the number of professional service hours spent on field oversight, documentation and quality control as well as the volume of soil moved or treated during each day that field oversight services were rendered and the number of soil samples taken each day. These deliverables would be tracked to determine if there is any statistically valid correlation between field service deliverables and professional oversight, documentation and quality control deliverables. (NOTE: the level of detailed tracking listed in this bullet item is only necessary if the Agency desires to correlate the costs for professional field oversight and documentation services with the productivity for contractor services. [i.e. validation of half-day rates]) This data would also be utilized to define typical and atypical situations based on deliverables correlated to costs.

Step 2- Compilation and reporting of task-based professional consulting services cost trends.

- At the completion of this phase, reports documenting the professional consulting cost data and statistics per task will be reported as will the deliverable information.

c. Phase Three- Analyze Cost Information & Establish Lump Sum Payment Amounts

This phase would be initiated upon the completion of Phase Two. One purpose of this phase is to establish and implement any appropriate lump sum payment amounts for those professional consulting tasks that are suitable for conversion from time and materials billing to lump sum payment amounts. The other purpose is to identify those tasks that are not suitable for conversion.

Step 1- Determine which professional consulting tasks are candidates for conversion to lump sum payment amounts.

- This step entails using the data collected in Phase Two to determine which tasks have a normalized costs distribution.
- In general, a task that has a deliverable(s) that is well defined both qualitatively and quantitatively would be expected to have a normalized cost distribution.
- Tasks that have a normalized costs distribution would be candidates for conversion.
- Tasks that have abnormal distributions of costs or deliverables that are not well defined would not be candidates for conversion and would continue to be billed on a time and material basis subsequent to Phase Three.

Step 2- Determine the appropriate cost percentile that should be covered by the lump sum payment amount and the definition of "typical".

- This step requires that a percentile of costs be chosen that will allow the maximum payment amount selected to cover the desired portion of the population of UST sites in the state.
- The deliverables and professional service cost information accumulated during Phase Two for sites falling within the selected percentile of costs will serve to establish and define what is considered to be "typical".

Step 3- Utilize statistical data outliers to establish and define “atypical” situations.

- For those task selected for conversion to lump sum payment amounts, the statistical data outliers falling outside the “typical” range should be evaluated for “atypical” situations.
- “Atypical” situations found to be associated with the data outliers should be defined, published and used as guidance in determining if an “atypical” situation exists at a particular site. An “atypical” situation may warrant an amount in excess of the lump sum payment amount.

Step 4- Implement Reimbursement by Maximum Lump Sum Payment Amounts

- After the appropriate percentile of costs is selected for each task that will be subject to a lump sum payment amount, the maximum lump sum payment amount will be published as part of the rule.
- This step consists of implementing maximum lump sum payment amounts for the specified tasks.
- After implementation of Phase Three of the rule, the reimbursement of professional consulting costs for typical situations would be limited to the maximum lump sum payment amount for the task.
- Tasks that were not converted to maximum lump sum payment amounts and those tasks that involve “atypical” situations would continue to be reimbursed on a time and materials basis subsequent to Phase Three.

III. RESPONSES TO QUESTIONS POSED IN THE BOARD'S JANUARY 5, 2006 OPINION & ORDER

The following is a paraphrased list of the questions asked by the Board in its January 5, 2006 Opinion and Order, and PIPE's responses to those questions:

Question 1: *Should Statement of Work (SOW) be part of the Board's rules or part of the Agency's implementation of those rules? See Opinion & Order Pages 6 & 7.*

Response: PIPE believes that it is imperative that the SOW be part of the Board's rules, if the Board intends to adopt lump sums for professional services. The consulting community has consistently held this position since the original discussions it had with

the Agency concerning this rule prior to its filing. Lump sum payment amounts simply cannot be adopted in a vacuum. Thus, standardized scopes of work are crucial.

Question 2: *What is the adequacy of the SOW proposed by the Board to address the specific tasks? See Opinion & Order Pages 6 & 7.*

Response: PIPE believes the SOW proposed by the Board to be a necessary and positive step. Proposed changes to the SOW included in the January 5, 2006 Opinion & Order and associated formatting will be submitted individually by some PIPE member companies. PIPE asks that the Board consider these individual proposals in light of the standards, approach and implementation steps recommended above by PIPE.

Question 3: *Is adequate information available in the Agency's database to determine lump sum payments for tasks that represent reasonable costs incurred? If not, the Board would like the Agency to comment on whether or not it could all be collected over a period of time. Opinion & Order Page 8.*

Response: As discussed earlier in this document, based upon its member's years of experience in working with the IEPA LUST Program, PIPE is extremely confident that adequate and reliable information *is not available* in the Agency's database to determine lump sum payment amounts on a per task basis. PIPE believes that the research conducted by United Science Industries (USI) and reported at the last round of hearings demonstrated that adequate information is not available in the Agency's database to determine lump sum payments for tasks. The information in the Agency's database is only adequate enough to separate the reimbursed amounts for professional services into phases (i.e. early action, site classification and corrective action). It is not possible to extract adequate information at the task level. PIPE realizes that the Board has requested the Agency's opinion on whether appropriate task-based cost data can be collected over-time. PIPE re-emphasizes its confidence that, with standardized reporting mechanisms, the data can be collected over an established period of time and that the collection of such data is a relatively simple process that is of paramount importance to the feasibility and credibility of this rule.

Question 4: *Comment on the implications of "one size fits all" maximum lump sum payments. See Opinion & Order Page 10.*

Response: PIPE believes it is virtually impossible to adopt a "one size fits all" approach to maximum lump sum payments for professional services. Only if maximum lump sum payments are properly determined in accordance with the standards, approach and steps presented above they will be an effective tool for expediting the reimbursement process and managing costs. However, if they are prematurely set, based upon simple estimates or guesses, they will be counter-productive and may seriously damage the credibility, integrity and financial well-being of the Illinois UST program. While lump sums may be appropriate for materials, based upon good data, lump sums are generally not a reasonable method of reimbursement for the cost of professional services.

Question 5: *Provide reasonable personnel time estimates for all tasks which the Board proposed a SOW. See Opinion & Order Page 10.*

Response: Maximum lump sum payment amounts for professional services should not be based on estimates. Estimates are, by their very nature, inaccurate. The damage that could be done by using an estimate as the basis for this rule was clearly demonstrated by USI at the July 27, 2005 hearing. PIPE believes that the only appropriate way to set rates is through the collection and review of actual market data – either by the Agency, based upon real data gathered statistically over time, or through an independent third party market-based review. PIPE therefore respectfully declines to provide estimates as part of this rulemaking. We further highly discourage the Board from considering the estimates of other participants in this proceeding as estimates are inherently inaccurate and dangerous.

Question 6: *Discuss the feasibility of the multi-rate approach (differentiating clerical and professional hours). And if so, propose the personnel in this manner. See Opinion & Order Page 10.*

Response: As stated in the response to question 5 above, the only accurate way to determine reasonable rates is through the collection and review of actual market data. The feasibility of a multi-rate or single rate approach will be easily determined upon the collection of appropriate data.

Question 7: *Discuss whether or not SOW is needed for Early Action closure reports, ELUCs, HAAs, well surveys, and TACO calculations. And if so, define it. See Opinion & Order Page 6.*

Response: PIPE believes that all professional consulting work required by the UST regulations should be included in the standardized task list and that a scope of work should be developed for each task. As mentioned above, individual PIPE member companies will present specific proposals with regard to a list of standardized tasks and scopes of work for each.

Question 8: *Should time and materials continue to be the basis for reimbursement until adequate data is available?*

Response: PIPE strongly believes that, until reasonable and accurate data is available for application, reimbursement for consulting services should be made on a time and materials basis.

V. JCAR ISSUES

PIPE continues to assert that it is inappropriate to automatically disallow reimbursement for the costs of remediation to Tier I or for any groundwater remediation where a groundwater

ordinance is in place. PIPE is disappointed that, despite JCAR's admonition that the Board review these two issues again, that the Board nonetheless adopted these provisions in Docket A. PIPE believes that the IPCB needs to more fully explore and evaluate the environmental implications of this decision, including other potential exposure pathways typical of petroleum contamination, such as inhalation. Specific examples will be given in individual PIPE member testimony.

VI. CONCLUSION

PIPE again thanks the IPCB for the opportunity to provide constructive input as part of this rulemaking. Along with the IPCB and IEPA, PIPE remains committed to seeing the process through to completion.

Our organization is fully prepared to participate and labor as necessary in the development and/or editing of a draft rule consistent with the standards, approach and implementation steps described in this Policy & Position Statement.

In order to move this rule along to a successful conclusion at minimal inconvenience to the Board, PIPE hereby requests the Board to order the parties to work to achieve a result consistent with the standards, approach and implementation steps set forth above. PIPE is confident that the approach outlined above is the most sensible and only feasible means of defining reasonableness in terms of reimbursement and budget submittals. Without the Board embracing such a systematic approach to the establishment of lump sums, and ordering the Agency to achieve a result and proposal consistent with that approach, fair lump sums can not be established.

PROOF OF SERVICE

The undersigned states that a true and correct copy of the foregoing Pre-Filed Testimony, was filed with the Illinois Pollution Control Board, electronically, on March 1, 2006, and a true and accurate copy of the filing was served upon the individuals listed on the Board's Service List for R04-22 and R04-23, as reflected on the Board's website on that same day, as reflected below, by mailing the same via the United States postal service, Springfield, Illinois on the 1st day of March, 2006.

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