

ILLINOIS POLLUTION CONTROL BOARD
June 1, 2006

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

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

Proposed Rule. Dismissal.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

This rulemaking began in January 2004, when the Illinois Environmental Protection Agency (Agency) filed with the Board amendments and a new part to the Board's regulations governing cleanup and reimbursement of leaking underground storage tanks. The Board adopted certain parts of the proposal (Proposed Amendments to Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (Subdocket A) (Feb. 16, 2006)) and opened this Subdocket B. The Board held an additional hearing in this proceeding and received several more comments. However, the Board today finds that the record does not support proceeding with a rule defining the scope of work and setting maximum lump sum payment amounts. The Board therefore dismisses the proposal and closes the docket. This opinion summarizes the procedural background and proposal for public comment in this subdocket. Next the Board discusses the decision not to proceed with this rulemaking.

PROCEDURAL BACKGROUND

On January 13, 2004, the Agency filed two proposals for rulemaking, which amend the Board's regulations governing the underground storage tank (UST) program. On January 22, 2004, the Board accepted and consolidated the proposals for hearing. The Board proceeded to first notice on February 17, 2005. On December 1, 2005, the Board adopted a proposal for second notice and opened this Subdocket B. In the Board's December 1, 2005 opinion, the Board stated that the issues pertaining to the professional consulting services provisions would be addressed in this subdocket. Specifically, the Board was to address issues concerning the scope of work associated with maximum lump sum payments as well as the maximum lump sum payment amounts proposed at first notice in Subdocket A.

On December 13, 2005, the Board received notice that the Joint Committee on Administrative Rules (JCAR) accepted the second notice in Subdocket A on December 9, 2005. JCAR considered the rule at the January 18, 2006 JCAR meeting. JCAR issued a recommendation to the Board and a certificate of no objection to the rule. JCAR's recommendation was that the Board continue to examine certain issues in the Subdocket B proceeding. JCAR specifically recommended that "the Board add to the issues it is addressing in its dockets R04-22(B) and R04-23(B) the costs that are ineligible for payment from the Underground Storage Tank Fund stated in" 35 Ill. Adm. Code 732.606(ddd) and (eee) and 734.630(aaa) and (bbb).

On February 16, 2006, the Board adopted Subdocket A for final notice. *See 30 Ill. Reg. 4928*. The rules became effective on March 1, 2006. *Id.* The Board directed the hearing officer to include the issues identified by JCAR as topics for the hearing to be held in Subdocket B.

On January 5, 2006, the Board adopted a proposal for public comment, which included proposed language on scope of work associated with maximum lump sum payments as well as the maximum lump sum payment amounts proposed at first notice in Subdocket A.

On March 23, 2006, a hearing was held before Board Hearing Officer Marie Tipsord (Tr.9).¹ At the close of hearing, a May 8, 2006 deadline was set for public comments to be filed. The Board received additional public comments from CW³M Company (CW³M) (PC 73), United Science Industries (USI) (PC 74), CSD Environmental Services, Inc. (CSD) (PC 75), Rapps Engineering & Applied Science (Rapps) (PC 76), the Agency (PC 77), and Professionals of Illinois for the Protection of the Environment (PIPE) (PC 78).

PROPOSED LANGUAGE

In the January 5, 2006 opinion and order, the Board developed a proposal for public comment, which included language for scopes of work and maximum lump sum payments. The following paragraphs briefly summarize the Board's action and the issues the Board sought additional comment on during this proceeding.

Scope of Work

The Board received alternate proposals addressing scope of work and maximum lump sum payments from American Consulting Engineers Council of Illinois (ACECI), PIPE, CW³M, and USI. Exh. 74, Attach. B; PC 6; PC 63; and Exh. 109. The Board used those alternative proposals as a basis to develop language for a proposal for public comment. Specifically, the Board used the proposal from the *Ad Hoc* Work Group² as a starting point for developing scopes of work for professional consulting services.

¹ This was the seventh group of hearings to be held in this proceeding and the ninth day of hearings.

² ACECI and Illinois Petroleum Marketer's Association at the request of the Agency formed the *Ad Hoc* Work Group on LUST Reimbursement Reform. The *Ad Hoc* Group was comprised of

The Board proposed the inclusion of scopes of work for all the tasks for which the *Ad Hoc* Work Group or PIPE developed a scope of work. In doing so, the Board noted that the main purpose of the proposed revisions was to seek additional comments and testimony from all the participants, including the Agency to develop a workable rule. In this regard, the Board noted that a few issues concerning scope of work still need to be resolved before the Board could finalize a rule that include scopes of work. These included adequacy of the proposed scope of work and whether scope of work should be part of the Board rules or the Agency's implementation rules.

Maximum Lump Sum Payments

Because of the copious number of issues that needed to be resolved before maximum lump sum payment amounts could be developed, the Board's proposed language repeated the maximum lump sum payment amounts first proposed by the Agency. The Board also identified three issues for further discussion concerning the maximum lump sum payment amounts. Those issues are:

1. Should professional consulting services be reimbursed on a time and material basis;
2. How much personnel time is required to complete maximum lump sum payment tasks; and
3. What should be the average hourly rates for professional consulting services.

The Board specifically sought additional information from the participants on these issues.

DISCUSSION

The following discussion will first address maximum lump sum payment and scopes of work for professional consulting. Next the Board will briefly discuss the JCAR recommendation.

Professional Consulting Services

The Board received prefiled testimony for the March 23, 2006 hearing from several participants in this rulemaking. Specifically, the Board received testimony from: (1) Agency, (2) PIPE, (3) CW³M, (4) CSD, (5) USI. As noted above, the Board also received comments from all these participants as well as from Rapps. The record in this proceeding includes hundreds of pages of testimony, comments and exhibits focusing on the issues surrounding

member firms from the two organizations having substantial working experience with the UST program, including reimbursement, as the UST program has actually been implemented over the last ten years. Exh. 74 at 3.

reimbursement of professional consulting fees. In Subdocket B, the participants have added hundreds more.

The Board has reviewed the comments and testimony from all the participants. Unfortunately, the additional information is often repetitive, with very little new information added to the record. In essence, the Agency continues to support use of maximum lump sum payment amounts for reimbursement of professional services, while the industry participants argue that more information must be gathered before maximum lump sum payments can be developed.

The Board has extensively addressed the issues surrounding reimbursement for professional services in each of the opinions and orders issued in this rulemaking. *See e.g.*, Proposed Amendments to Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (Feb. 17, 2005) (Subdocket A); Subdocket A (Feb. 16, 2006); and Proposed Amendments to Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23B (Jan. 5, 2006). The Board specifically opened this subdocket to continue to examine the issue of reimbursement on a maximum lump sum basis for professional consulting fees. The Board found that by opening the subdocket “any negative economic impact [of the rules adopted in Subdocket A] has been minimized by removal of the professional service lump sum payments to Subdocket B.” R04-22A slip op at 18 (Feb. 16, 2006).

After careful review of the additional testimony and comments, the Board finds that there is insufficient information in the record to demonstrate that the proposed maximum lump sum payments are economically reasonable. Furthermore, the record does not include adequate information to allow the Board to develop scopes of work and maximum lump sum payments that are economically reasonable. Therefore, at this time, the Board finds that the record is insufficient to proceed with a rulemaking establishing scopes of work and maximum lump sum payment amounts for professional consulting fees.

The Board does not believe that additional hearings or comment periods will cure the deficiencies in the record at this time. Thus, the Board finds that this subdocket should be dismissed and the record closed. The Board encourages the participants to continue to examine this issue through the LUST Advisory Committee.

JCAR Recommendation

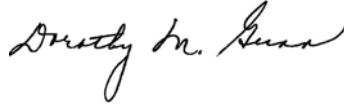
In response to the recommendation of JCAR, the Board asked the participants for additional comment on including the following as ineligible costs: (1) the onsite cleanup above Tier 2 remediation objectives developed in accordance with 35 Ill. Adm. Code 742; and, (2) remediation of groundwater if a groundwater ordinance already exists as an institutional control. In addition to asking the participants to discuss this in prefiled testimony (*see* hearing officer order of February 16, 2006), the hearing officer asked several participants the questions at hearing (*see e.g.* Tr.9 at 94, 99, 141). The Board appreciates the additional comments; however, the Board finds nothing in the additional information, which supports a change to the rule.

CONCLUSION

The Board finds that the record does not support proceeding with maximum lump sum payment amounts for professional consulting fees associated with the cleanup of sites with leaking underground storage tanks. The Board further finds that the record lacks support for proceeding with scopes of work. Therefore, the Board dismisses this proceeding and closes the docket.

ORDER

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 1, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board