ILLINOIS POLLUTION CONTROL BOARD
March 17, 2011

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| IN THE MATTER OF: | ) | |
| | ) | |
| UNDERGROUND STORAGE TANKS (35 | ) | R11-22 |
| ILL.ADM. CODE 731) AND PETROLEUM | ) | (Rulemaking – Land) |
| LEAKING UNDERGROUND STORAGE | ) | |
| TANKS (35 ILL. ADM. CODE 732 AND 734)) | | |

**PRE-FILED TESTIMONY & REVISED REGULATIONS FROM CW$^3$M COMPANY, INC. FOR THE ILLINOIS POLLUTION CONTROL BOARD's 1st NOTICE OF AMENDMENTS TO 35 ILL. ADM. CODE 732 AND 734**

My name is Vince Smith. I am employed with the CW$^3$M Company as the senior environmental engineer. I have been in my current position since June 2000. I am a Registered Professional Engineer in the State of Illinois.

The testimony was prepared with the assistance of Carol L. Rowe and Kevin M. Corcoran of CW$^3$M Company who are available to assist with providing information will be available for the May 10, 2011 Hearing. Ms. Rowe is an Illinois Licensed Professional Geologist and Mr. Corcoran has a Bachelor of Science degree in Integrative Biology from the University of Illinois.

Firstly, CW$^3$M Company would like to thank the Illinois Pollution Control Board for the opportunity to present our input on the proposed changes to these regulations. These regulations, which govern the majority of the work which our company produces, are vital to our livelihood. Secondly, we also thank the Illinois Pollution Control Board for alerting us to these proposed changes, since the Illinois Environmental Protection Agency (IEPA), the author of the proposed changes and a governmental unit which we are in contact with on a daily basis, has elected thus far not to reveal to CW$^3$M Company that these changes were even proposed. There is nothing on their website, nothing in any written correspondence, no email, or even the courtesy of a phone call to alert the regulated community that changes are even proposed.

When people think of the IEPA, they think of a group of professional individuals whose mission and focus is to protect the environment. This is a correct assumption for the IEPA, with the apparent exception of the Leaking Underground Storage Tank (LUST) program. The LUST program is essentially an unregulated insurance provider, whose primary mission is to minimize claim payouts. They write their own rules, and enforce them as they see fit.

As an example why we chose the term unregulated, in response to the contentiousness of the original rulemaking for 35 IAC 734, the Pollution Control Board added Section 734.150, which created a LUST Advisory Committee. The purpose and intent of this committee was to negotiate how the rules were to be applied, in order to reduce or eliminate disagreements between the LUST program and the owner / operators and their consultants. This committee was not involved in the legislation which lead to Public

Act 96-908, or more importantly, in these proposed regulations. In our industry and based on our experiences, even with parties that do not agree, usually a compromise can be reached when both parties understand the needs of the other. The LUST Advisory Committee could have been a useful vehicle to reach consensus prior to filing the proposed rules.

It is important to remember when reviewing either legislation or regulations which come from the LUST program that their primary mission is that of an insurance provider, not a protector of the environment.

Section 734.100 (b)

This Part, as amended by Public Act 96-908, *applies to all* releases subject to Title XVI of the Act *for which a No Further Remediation Letter is issued on or after* June 8, 2010, *provided that (i) costs incurred prior to* June 8, 2010, *shall be payable from the UST Fund in the same manner as allowed under the law in effect at the time the costs were incurred and (ii) releases for which corrective action was completed prior to June 8, 2010, shall be eligible for a No Further Remediation Letter in the same manner as allowed under the law in effect at the time the corrective action was completed.* [415 ILCS 5/57.13] Costs incurred pursuant to a plan approved by the Agency prior to June 8, 2010, must be reviewed in accordance with the law in effect at the time the plan was approved. Any budget associated with such a plan must also be reviewed in accordance with the law in effect at the time the plan was approved. ~~Owners or operators of any underground storage tank system used to contain petroleum and for which a release was reported to the proper State authority prior to June 24, 2002, may elect to proceed in accordance with this Part pursuant to Section 734.105 of this Part.~~

While CW$^3$M Company does, in fact, concur with Section 734.100, we remain confused as to why this information was withheld until this rulemaking. When the Act was signed into law, many questions were raised as to whether previously approved Plans & Budgets would still stand as approved, or whether a new Plan & Budget must be submitted in accordance with the Act. Where has the guidance been since June 8, 2010? How does the IEPA expect consultants to carry out a project not knowing how or if they will be reimbursed for the work? It is CW$^3$M's opinion that this is an example of the IEPA's unwillingness to communicate or work with consultants, and the owner/operators.

Section 734.115 Definitions

~~"Half day" means four hours, or a fraction thereof, of billable work time. Half days must be based upon the total number of hours worked in one calendar day. The total number of half days per calendar day may exceed two.~~

CW$^3$M recognizes that the removal of "Half days" is a clean-up from previous rulemakings.

Section 734.120 Incorporations by Reference

**a) The Board incorporates the following material by reference:**

**ASTM. American Society for Testing and Materials, 100 Barr Harbor Drive, P.O. Box C700, West Conchohocken, PA 19428.2959 (610) 832-9585**

ASTM D2487-10, Standard Practive for Classification of Soils for Engineering Purposes (Unified Soil Classification System) (January 1, 2010)

~~ASTM D 2487-93, Standard Test Method for Classification of Soils for Engineering Purposes, approved September 15, 1993.~~

CW$^3$M Company agrees with the change from the 1993 version of the D2487 Method to the 2010 version of the D2487 Method. CW$^3$M would like to propose that instead of changing the rules each time a new version of the D2487 Method, or other methods listed in the regulations, becomes available, the newest version should be accepted.

**Section 734.210 Early Action**

**a) (1) Immediately report the release in accordance with OSFM rules; ~~Report the release to IEMA (e.g., by telephone or electronic mail)~~**

**BOARD NOTE: The OSFM rules for the reporting of UST releases are found at 41 Ill. Adm. Code 176.320(a)**

CW$^3$M notes that the referenced literature requires that several additional agencies must be notified as proposed by the rules. If the reportable quantities are met as described in 41 Ill. Adm. Code 176.320(a)(1), four agencies must be notified of the release (911 Emergency/IEMA/Local Emergency Planning Committee (LEPC)/National Response Center). If the spill/leak/overfill do not meet the excessive reportable quantities, the OSFM requires that two agencies be notified. In this case, IEMA and "the local authority having jurisdiction". In rural towns, such an agency may not exist, or may not be known to exist. CW$^3$M requests that the Agency recognize that the reporting requirements have doubled. When we are required to notify a "local authority having jurisdiction", much more time will be spent by consulting personnel explaining the situation to the "local authority" in rural communities. CW$^3$M does not believe the extra reporting is necessary, but the rule has already been promulgated. However, with more requirements comes more required reporting hours.

**c) Within 20 days after initial notification to IEMA of a release plus 7 ~~14~~ days, the owner or operator must submit a report to the Agency summarizing the initial abatement steps taken under subsection (b) of this Section and any resulting information or data.**

CW$^3$M would like to point out that there has been no legislative change that justifies the need for a rule change in this Section 734.120(c), but as a good faith gesture, CW$^3$M proposes that if an owner/operator's "plus 14" is cut in half to seven, the IEPA should reduce its review time for submittals from 120 days to 60. This change is arbitrary on the surface and requests explanation from the Agency. Presently, we can barely complete field requirements, assuming no weather or OSFM scheduling delays occur. We have yet to have the analytical results back within that timeframe. If anything, the timeframe should be extended.

**d) Within 45 days after initial notification to IEMA of a release plus 7 ~~14~~ days, the owner or operator must assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measure in subsections (a) and (b) of this Section. This information must include, but is not limited to, the following:**

**1) Data on the nature and estimated quantity of release;**

**2) Data from available source or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions and land use;**

**3) Results of the site check required at subsection (b)(5) of this Section; and**

**4) Results of the free product investigations required at subsection (b)(6) of this Section, to be used by owners or operators to determine whether free product must be recovered under Section 734.215 of this Part.**

**e) Within 45 days after initial notification to IEMA of a release plus 7 ~~14~~ days, the owner or operator must submit to the Agency the information collected in compliance with subsection (d) of this Section in a manner that demonstrates its applicability and technical adequacy.**

**g) For purposes or payment from the Fund, the activities set forth in subsection (f) of this Section (f) of this Section must be performed within 45 days after initial notification to IEMA or a release plus 7 ~~14~~ days, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days plus 7 ~~14~~ days. The owner or operator must notify the Agency in writing of such circumstances within 45 days after initial notification to IEMA of a release plus 7 ~~14~~ days. Costs incurred beyond 45 days plus 7 ~~14~~ days must be eligible if the Agency determines that they are consistent with early action.**

> **BOARD NOTE: Owners or operators seeking payment from the Fund are to first notify IEMA of a suspected release and then confirm the release within 7 ~~14~~ days to IEMA pursuant to regulations promulgated by the OSFM. See 41 Ill. Adm. Code 176.300 through 176.320~~170.560 and 1760.580~~. The Board is setting the beginning of the payment period at subsection (g) to correspond to the notification and confirmation to IEMA.**

This change is completely arbitrary and adds undue pressure on the contractor and consultants to complete the substantial amount of work required for a complete 45-Day Report. The IEPA does not appear to understand that there are a number of factors that can delay the completion of all Early Action requirements. We have not had a site yet where the entire Early Action analytical reports have been available for submittal with the 45-Day Report. At the least, if USTs are being removed, a drill rig must be available, permits must be obtained, equipment must be mobilized, the OSFM Tank Specialist must be scheduled, and the lab is not rushed because rush charges are not viewed as eligible costs. Furthermore, office personnel will be rushed in obtaining the necessary information for the report, ultimately resulting in a sacrifice in quality and an increased chance for mistakes. Additionally, weather has a major impact in the rate at which Early Action is able to progress. A hard rain or high winds can immediately stop a quickly moving project. After a heavy rain, landfills can close for one, if not several, days. Incidents do not just occur in optimal weather. In years previous, the IEPA did not have problems with granting extensions for the Early Action period. Reportedly, the extensions became commonplace or over used. The Agency should just tighten the reins instead of making it nearly impossible to obtain. Within the last 12-15 months, the IEPA has been unwilling to grant extensions. When questioned, reportedly, their response was that "extension privileges were being over-used or abused". $CW^3M$ has no control over what the Agency grants, and to whom, but everyone should not be punished. Once the emergency has been averted after the tanks have been removed, and any imposing hazards have been secured, owner/operators should be allowed a more reasonable time frame to complete the remaining work. This rule has no basis, and the extra 7 days is vital to prevent errors and present the most

accurate information available. There is no legislation that provides backing for this rule. It has become just another attempt by the IEPA to push costs onto the owner/operator by letting the 45-Day clock expire.

**SUBPART C: SITE INVESTIGATION AND CORRECTIVE ACTION**

**Section 734.360 Application of Certain TACO Provisions**

***For purposes of payment from the Fund, corrective action activities required to meet the minimum requirements of this* Part *shall include, but not be limited to, the following use of the Board's Tiered Approach to Corrective Action Objectives rules adopted under Title XVII of the Act:* [415 ILCS 5/57.7(c)(3)(A)]**

a) **For the site where the release occurred, the use of Tier 2 remediation objectives that are no more stringent than Tier 1 remediation objectives [415 ILCS 5/57.7(c)(3)(A)(i)]**

b) **The use of industrial/commercial property remediation objectives, unless the owner or operator demonstrates that the property being remediated is residential property or is being developed into residential property. [415 ILCS 5/57.7(c)(3)(A)(ii)]**

c) **If a groundwater ordinance already approved by the Agency for use as an institutional control in accordance with 35 Ill. Adm. Code 742 can be used as and institutional control for the release being remediated, the groundwater ordinance must be used as an institutional control, *unless a demonstration is made that on-site soil remediation below these objectives is necessary to remediate or prevent contamination to an off-site property.***

d) **If the use of a groundwater ordinance as an institutional control is not required pursuant to subsection (c) of this Section, another institutional control must be used in accordance with 35 Ill. Adm. Code 742 to address groundwater contamination at the site where the release occurred, *unless a demonstration is made that on-site remediation is needed to address off-site contamination which is not subject to an ordinance or the owner will not accept an institutional control.* Institutional controls used to comply with this subsection (d) include, but are not limited to, the following:**

1) **Groundwater ordinances that are not required to be used at institutional controls pursuant to subsection (c) of this Section.**

2) **No Further Remediation Letters that prohibit the use and installation of potable water supply wells at the site.**

Please see the proposed language by CW$^3$M Company under Section 734.360 subsection (c) and Section 734.360 subsection (d). We ask that it be noted that a meeting was scheduled by CW$^3$M personnel and subsequently cancelled by the IEPA, to find a solution to the following problem. One of our clients is currently being sued due to the contamination of groundwater of a property off-site. This off-site property owner has every right to a clean piece of property, and we sympathize with him. The property is being used as a farm field. Water table fluctuation is extreme, as the off-site property is situated down gradient. Often, groundwater is just below the surface during heavy spring rains, compared to several feet below the surface during dry weeks. The crops grown in the off-site farm field are for

animal and human consumption. However, as a result of the Act, our client is trapped. He is unable to remediate the contaminated soil on-site, which is causing the contamination off-site. Due to the modeling, the off-site property will never be fully remediated unless the contaminated soil is removed from the subject site. When a meeting was requested with the IEPA personnel, they declined due to the possibility of our case setting precedent for similar situations which could arise in the future. The IEPA must realize that there are certain situations where soil must be remediated to below the CUO's set by the Act.

**SUBPART F: PAYMENT FROM THE FUND**

**Section 734.630 Ineligible Corrective Action Costs**

**Costs ineligible for payment from the Fund include but are not limited to:**

**gg) Costs incurred after receipt of a No Further Remediation Letter for the occurrence for which the No Further Remediation Letter was received. This subsection (gg) does not apply to the following**

**1) Costs incurred for MTBE remediation pursuant to Section 734.405(i)(2) of this Part;**

**2) Monitoring well abandonment costs;**

**3) County recorder or registrar of title fees for recording the No Further Remediation Letter;**

**4) Costs associated with seeking payment from the Fund; ~~and~~**

**5) Costs associated with remediation to Tier 1 Remediation objectives on-site if a court of law voids or invalidates a No Further Remediation Letter and orders the owner or operator to achieve Tier 1 remediation objectives in response to the release; and;**

**6) Costs associated with activities conducted under Section 734.632 of this Part;**

CW$^3$M Company concurs with subsection (gg) of this Section.

**(nn) Costs submitted more than one year after the date the Agency issues a No Further Remediation Letter pursuant to Subpart G of this Part. This subsection (nn) does not apply to costs associated with activities conducted under Section 734.632 of this Part.**

CW$^3$M Company concurs with subsection (nn) of this Section.

**xx) (Reserved) ~~For sites electing under Section 734.105 of this Part to proceed in accordance with this Part, costs incurred pursuant to Section 734.210 of this Part;~~**

**ccc) Costs associated with on-site corrective action to achieve Tier 2 remediation objectives that are more stringent than Tier 1 remediation objectives.**

CW$^3$M Company concurs with subsection (nn) of this Section.

**ddd] Costs associated with corrective action to achieve remediation objectives other than industrial/commercial remediation objectives, unless the owner or operator demonstrates that the property being remediated is residential property or is being developed into residential property, *unless a demonstration is made that on-site soil remediation below these objectives is necessary to remediate or prevent contamination to an off-site property.***

**eee) Costs associated with groundwater remediation if a groundwater ordinance must be used as an institutional control under subsection (c) of Section 734.360 of this Part.**

**fff] Costs associated with on-site groundwater remediation if an institutional control is required to address on-site groundwater remediation under subsection (d] of Section 734.360 of this Part, *unless a demonstration is made that on-site remediation is needed to address off-site contamination which is not subject to an ordinance or the owner will not accept an institutional control.***

While this subsection has the appearance of a provision that could possibly reduce demand on the Fund, this subsection has the potential to increase demand on the Fund. As it was earlier noted, there are certain circumstances that *require* on-site remediation that is more stringent than the Tier 2 Industrial/Commercial objectives. In Section 734.630 subsection (ddd) and subsection (fff), CW$^3$M Company proposes that language double underscored be added to the rules to take into account facilities that will have recurring off-site issues unless on-site remediation is completed where off-site properties need remediation or are unwilling to accept an Environmental Land Use Control (ELUC). The IEPA has approved, on a limited basis, plans that would eliminate the recurrence of off-site issues; however, the process should be inserted in the rules for clarity purposes and for the protection of tank owners/operators.

**Section 734.632 Eligible Corrective Action Costs Incurred After NFR Letter**

**Notwhithstanding subsections (gg] and (nn) of Section 734.630 of this Part, *[t] following shall be considered corrective action activities eligible for payment from the Fund even when an owner or operator conducts these activities after the issuance of a No Further Remediotion Letter. Corrective action conducted under this Section and costs incurred under this Section must comply with the requirements of* Title XVI of the Act and this Part, including, but not limited to, requirements for the submission and Agency approval of corrective action plans and budgets, corrective action completion reports, and applications for payment.**

***a) Corrective action to achieve residentiol property remediation objectives if the owner or operator demonstrates that property remediated to industrial/commercial property remediation objectives pursuant to subdivision c(3)(a)(ii) of Section 57.7 of* the *Act* and subsection (b] of Section 734.360 of this Part *is being developed into residential property.***

*b) Corrective action to address groundwater contamination if the owner or operator demonstrates that such action is necessary because a groundwater ordinance used as an institutional control pursuant to subsection (c)(3)(A)(iii) of Section 57.7 of* the Act and subsection (c) of Section 734.360 of this Part *can no longer be used as an institutional control.*

*c) Corrective action to address groundwater contamination if the owner or operator demonstrates that such action is necessary because an on-site groundwater use restriction used as an institutional control pursuant to subdivision (c)(3)(A)(iv) of Section 57.7 of* the Act and subsection (d) of Section 734.360 of this Part *must be lifted in order to allow the installation of a potable water supply well due to public water supply service no longer being available for reasons other than an act or omission of the owner or operator.*

*d) The disposal of soil that does not exceed industrial/commercial property remediation objectives, but that does exceed residential property remediation objectives, if industrial/commercial property remediation objectives were used pursuant to subdivision (c)(3)(A)(ii) of Section 57.7 of* the Act and subsection (b) of Section 734.360 of this Part *and the owner or operator demonstrates that (i) the contamination is the result of the release for which the owner or operator is eligible to seek payment from the Fund and (ii) disposal of the soil is necessary as a result of construction activities conducted after the issuance of a No Further Remediation Letter on the site where the release occurred, including, but not limited to, the following: tank, line, or canopy repair, replacement, or removal; building upgrades: sign installation; and water or sewer line replacement.*

*e) The disposal of water exceeding groundwater remediation objectives that is removed from an excavation on the site where the release occurred if a groundwater ordinance is used as an institutional control pursuant to subdivision (c)(3)(A)(iii) of Section 57.7 of* the Act and subsection (c) of Section 734.360 of this Part, *or if an on-site groundwater use restriction is used as an institutional control pursuant to subdivision (c)(3)(A)(iv) of Section 57.7* of the Act and subsection (d) of Section 734.360 of this Part, *and the owner or operator demonstrates that (i) the excavation is located within the measured or modeled extent of groundwater contamination resulting from the release for which the owner or operator is eligible to seek payment from the Fund and (ii) disposal of the groundwater is necessary as a result of construction activities conducted after the issuance of a No Further Remediation Letter on the site where the release occurred, including, but not limited to, the following: tank, line, or canopy repair, replacement, or removal; building upgrades; sign installation, and water or sewer line replacement.* [415 ILCS 5/57.19].

*f) Consulting fees for additional Site Investigation and Corrective Action including, but not limited to, field activities, plans, budgets, payment, and all time and materials necessary that are dedicated to the final product of the aforementioned activities. Consulting fees for the Corrective Action Completion Report, subsequent to the additional remediation activities required after the issuance of a No Further Remediation Letter shall be subject to the rates of Subpart H.*

It is CW$^3$M's opinion that this subsection (d) of Section 734.632 must be clarified. The words "Tier 1" should be inserted in between exceed and residential in line 2, and "including the groundwater pathway" should be inserted between objectives and the comma on line 3. It is necessary to clarify that any soil contamination above Tier 1 Residential CUO's including the GW pathway should be reimbursable so long that the owner or operator is eligible to seek payment from the Fund. In the

instance that a sign would be installed and a footing would need to be placed, the possibility arises of finding soil that was not excavated during corrective action, but is contaminated above the Tier 1 Residential CUO's. This material cannot be stored for use as backfill soil nor can it be accepted by a landfill as demolition debris, and it is not clear in subsection (d) of Section 734.632 if it will be reimbursable under the new rules. CW$^3$M has proposed a Section 734.632(f) that illustrates the need for clarity in the reimbursable costs if additional remediation is necessary after the issuance of a No Further Remediation Letter. If a site has been closed for an extended period of time and additional site investigation is necessary to determine the current extent of the soil plume, it should be made clear that consulting fees will be reimbursed to the owner/operator, as well as consulting fees for Corrective Action activities and the Corrective Action Completion Report, in accordance with the maximum payment amounts established by Subpart H.

**Section 734.810 UST Removal ~~or Abandonment Costs~~**

**Payment for the Costs associated with ~~UST~~ removal ~~or abandonment~~ of each UST must not exceed the amounts set forth in this Section. Such costs must include, but not be limited to, those associated with the excavation, removal, and disposal, ~~and abandonment~~ of UST systems.**

CW$^3$M believes that there is absolutely no basis to change the rules on this Section. No legislation was passed in the Act that removes the option of tank abandonment by owner/operators. This rule has been put in place by the IEPA to take more freedom away and add more ineligible costs to tank owner/operators. In light of the entire Public Act 96-908, more contamination and engineered barriers are likely to be used, so it seems reasonable that UST abandonment follows that same line of thought. Underground Storage Tank abandonment, as approved by the OSFM is typically for sites with restrictions preventing UST removals and requires rendering them clean and posing no continuing threats.

**Section 734.810 Bidding**

**As an alternative to the maximum payment amounts set forth in this Subpart H, one or more maximum payment amounts may be determined via bidding in accordance with this Section. Each bid must cover all costs included in the maximum payment amount that the bid is replacing. Bidding is optional. Bidding is allowed *only if the owner or operator demonstrates that corrective action cannot be performed for amounts less than or equal to maximum payment* set forth in this Part [415 ILCS 5/57.7 (c)(3)(C)].**

**a) Bidding must be *publicly-noticed, competitive, and sealed bidding that includes, at a minimum, the following:***

**1) *The owner or operator must issue invitations for bids that include, at a minimum, a description of the work being bid and applicable contractual terms and conditions. The criteria on which the bids will be evaluated must be set forth in the invitation for bids. The criteria may include, but shall not be limited to, criteria for determining acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose.***

*Criteria that will affect the bid price and be considered in the evaluation of a bid, such as discounts, shall be objectively measurable.*

The invitation for bids must include instructions and information concerning bid submission requirements, including but not limited to the time during which bids may be submitted, the address to which bids must be submitted, and the time and date set for opening of the bids. The time during which bids may be submitted must begin on the date the invitation for bids is issued and must end at the time and date set for opening of the bids. In no case shall the time for bid submission be less than 14 days.

Each bid must be stamped with the date and time of receipt and stored unopened in a secure place until the time and date set for opening the bids. Bids must not be accepted from persons in which the owner or operator, or the owner or operator's primary contractor, has a financial interest.

2) *At least 14 days prior to the date set in the invitation for the opening of bids, public notice of the invitation for bids must be published* by the owner or operator *in a local paper of general circulation for the area in which the site is located.* The owner or operator must also provide a copy of the public notice to the Agency. The notice must be received by the Agency at least 14 days prior to the date set in the invitation for the opening of bids.

3) *Bids must be opened publicly* by the owner or operator *in the presence of one or more witnesses at the time and place designated in the invitation for bids. The name of each bidder, the amount of each bid, and other relevant information must be recorded and submitted to the Agency in the applicable budget* in accordance with subsection (b) of this Section. *After selection of the winning bid, the winning bid and the record of each unsuccessful bid shall be open to public inspection.*

The person opening the bids may not serve as a witness. The names of the person opening the bids and the names of all witnesses must be recorded and submitted to the Agency on the bid summary form required under subsection (b) of this Section.

4] *Bids must be unconditionally accepted by the owner or operator without altercation or correction. Bids must be evaluated based on the requirements set forth in the invitation for bids, which may include criteria for determining acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Criteria that will affect the bid price and be considered in the evaluation of a bid, such as discounts, shall be objectively measureable. The invitation for bids shall set forth the evaluation criteria to be used.*

5] *Correction or withdrawal of inadvertently erroneous bids before or after selection of the winning bid, or cancellation of winning bids base on bid mistakes, shall be allowed in accordance with* subsection (c) of this Section. *After bid opening, no changes in bid prices or other provisions of bids prejudicial to the owner or operator or fair competition shall be allowed. All*

*decisions to allow the correction or withdrawal of bids based on bid mistakes shall be supported by a written determination made by the owner or operator.*

6) *The owner or operator shall select the winning bid with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. The winning bid and other relevant information must be recorded and submitted to the Agency in the applicable budget* in accordance with subsection (b) of this Section.

7) *All bidding documentation must be retained by the owner or operator for a minimum of 3 years after the costs bid are submitted in an application for payment, except that documentation relating to an appeal, litigation, or other disputed claim must be maintained for at least 3 years after the date of the final disposition of the appeal, litigation, or other disputed claim. All bidding documentation must be made available to the Agency for inspection and copying during normal business hours.* [415 ILCS 5/57.7(c)(3)(B)]

~~a) A minimum of three written bids must be obtained. The bids must be based upon the same scope of work and must remain valid for a period of time that will allow the owner or operator to accept them upon the Agency's approval of the associated budget. Bids must be obtained only from persons qualified and able to perform the work being bid. Bids must not be obtained from persons in which the owner or operator, or the owner's or operator's primary contractor, has a financial interest.~~

b) All ~~The~~ bids must be summarized on forms prescribed and provided by the Agency. The bid summary forms ~~form~~, along with copies of the invitation for bids, the public notice required under subsection (a)(2) of this Section, proof of publication of the notice, and each bid received, ~~the bid requests and the bids obtained,~~ must be submitted to the Agency in the associated budget. ~~If more than the minimum three bids are obtained, summaries and copies of all bids must be submitted to the Agency.~~

c) Corrections of bids are allowed only to the extent the corrections are not contrary to the best interest of the owner or operator and the fair treatment of other bidders. If a bid is corrected, copies of both the original bid and the revised bid must be submitted in accordance with subsection (b) of this Section along with an explanation of the corrections made.

1) Mistakes discovered before opening. A bidder may correct mistakes discovered before the time and date set for opening of bids by withdrawing his or her bid and submitting a revised bid prior to the time and date set for opening of bids.

2) Mistakes discovered after opening of a bid but before award of the winning bid.

A) If the owner or operator knows or has reason to conclude that a mistake has been made, the owner or operator must request the bidder to confirm the information. Situations in which confirmation should be requested include obvious or apparent errors on the face of

the document or a price unreasonably lower than the others submitted.

B) If the mistake and the intended correct information are clearly evident on the face of the bid, the information shall be corrected and the bid may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid are typographical errors, errors extending price units, transportation errors, and mathematical errors.

C) If the mistake and the intended correct information are not clearly evident on the face of the bid, the low bid may be withdrawn if:

i) a mistake is clearly evident on the face of the bid but the intended correct bid is not similarly evident.

ii) there is proof of evidentiary value that clearly and convincingly demonstrates that a mistake was made.

3) Mistakes shall not be corrected after selection of the winning bid unless the Agency determines that it would be unconscionable not to allow the mistake to be corrected (e.g., the mistake would result in a windfall to the owner or operator).

4) Minor informalities. A minor informality or irregularity is one that is a matter of form or pertains to some immaterial or inconsequential defect or variation from the exact requirement of the invitation for bid, the correction of waiver of which would not be prejudicial to the owner or operator (i.e., the effect on price, quality, quantity, delivery, or contractual conditions is negligible). The owner or operator must waive such informalities or allow correction depending on which is in the owner's or operator's best interest.

d) For purposes of this Section, factors to be considered in determining whether a bidder is responsible include, but are not limited to, the following:

1) The bidder has available the appropriate financial, material, equipment, facility, and personnel resources and expertise (or the ability to obtain them) necessary to indicate its capability to meet all contractual requirements;

2) The bidder is able to comply with required or proposed delivery or performance schedules, taking into consideration all existing commercial and governmental commitments;

3) The bidder has a satisfactory record of performance. Bidders who are or have been deficient in current or recent contact performance in dealing with the owner or operator or other clients may be deemed "not responsible" unless the deficiency is shown to have been beyond the reasonable control of the bidder; and

4) The bidder has a satisfactory record of integrity and business ethics. Bidders who are under investigation or indictment for criminal or civil actions that bear on the subject of the bid, or that create a reasonable inference or appearance of a lack of

**integrity on the part of the bidder, may be declared not responsible for the particular subject of the bid.**

~~**d) The maximum payment amount for the work bid must be the amount of the lowest bid, unless the lowest bid is less than the maximum payment amount set forth in this Subpart H must be allowed. The owner or operator is not required to use the lowest bidder to perform the work, but instead may use another person qualified and able to perform the work, including, but not limited to, a person in which the owner or operator, or the owner's or operator's primary consultant, has a direct financial interest. However, regardless of who performs the work, the maximum payment amount will remain the amount of the lowest bid..**~~

CW$^3$M believes this rule is unreasonable and arbitrary. This rule leaves too much power and subjective judgment in the hands of the IEPA in determining the many factors involved in the preparation of bids. One of the top concerns is the sentence that has been inserted in the description of bidding under Section 734.855 "Bidding is allowed *only if the owner or operator demonstrates that corrective action cannot be performed for amounts less than or equal to maximum payment* set forth in this Part." We would like the IEPA to clarify how an owner/operator will be allowed to demonstrate this. There is entirely too much room in the proposed language for the IEPA to state that there was not enough evidence to demonstrate that bidding was needed, therefore the time and materials used for the bidding process may not be reimbursable. Under these rules, and with the subjectivity that will be donned by the IEPA during bid review, there is no possible way to guarantee that a successful bidding process would occur. Consultants and prospective bidders could be wasting their time and efforts, as well as money, in preparing and reviewing bids. CW$^3$M requests that the IEPA make known the number of successful bidding processes that have taken place since Public Act 96-908 went into effect. CW$^3$M advises that the language must be altered, or consultants will simply ignore the bidding process and the project will sit as no consultant or contractor would complete a project at a loss.

## CONCLUSION

We thank the Board for the opportunity to express our concerns and trust that they see this as our attempt to make this a better program. We deal with owner/operators daily. We are on site with equipment and understand what it takes to comply with the rules, existing and proposed. We look forward to a balanced approach to meet both the Agency's issues while recognizing the real world issues faced by those of us attempting to complete the work and report the results in a timely manner.

# APPENDIX A

# SERVICE AND NOTICE LISTS

**Service and Notice Lists**

The pre-filed comments were distributed to the attached Service and Notice Lists.

The hearing officer will establish and maintain both a Notice List and a Service List for this proceeding. *See* 35 Ill. Adm. Code 102.422(a), (b). The Notice List includes participants who wish to receive copies only of the Board's opinions and orders and hearing officer orders. 35 Ill. Adm. Code 102.422(a). The Service List for this rulemaking is the list of persons who wish to participate actively in this proceeding and receive no only the Board's opinions and orders but also other filings such as pre-filed testimony. *See* 35 Ill. Adm. Code 102.422(b).

The Board begins this rulemaking proceeding by including in the Service List and Notice List a number of persons and entities that have appeared on the corresponding lists in recent UST proceedings. While the Board will mail a copy of the Board's March 17, 2011, order and this hearing officer order to each of them, the Board will maintain on the Notice List or Service List only those entities requesting to be maintained on it. The Board requests that any entity wishing to remain on either the Notice List of Service List provide the information requested in the form attached to this order as Attachment A and return the form to the Board by Friday, April 1, 2011.

Not that interested persons may not request electronic notice of filings by providing their e-mail address through COOL under this docket number R11-22. This electronic notice includes notice of the filing of documents that are not typically provided to persons on the Notice List. In addition, COOL provides links to documents filed with the Board, and those documents can be viewed, downloaded, and printed free of charge as soon as they are posted to the Board's Web site. For more information about the option of electronic notice or COOL, please consult either the Board's Web site at www.ipcb.state.il.us or John Therriault, the Board's Assistant Clerk, at (312) 814-3629.

IT IS SO ORDERED.

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## View Case Details

**GENERAL INFORMATION**

| | | | |
|---|---|---|---|
| **Case No:** | R2011-022 | **Case Name:** | In the Matter of: Amendments Under P.A. 96-908 to Regulations of Underground Storage Tanks (UST) and Petroleum Leaking UST: 35 Ill. Adm. Code 731, 732, and 734 |
| **Case Type:** | Rulemaking | | |
| **Media Type:** | Land | **Board Member:** | Moore, A.S. |
| **County:** | Statewide | **Hearing Officer:** | Fox, T. |
| **Status:** | Board Order | | |

Notify Me when this case is updated
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## Case Activity

| Date | Activity Type | Activity Notes | View File |
|---|---|---|---|
| 3/18/2011 | Hearing Officer Order/Correspondence | *Notice of Hearing: Hearings scheduled: FIRST, May 10 and 11, 2011, at 1:00 pm at Illinois Pollution Control Board Conference Room, First Floor, 1021 N. Grand Avenue East (north Entrance), Springfield, IL AND SECOND, June 16 and 17, 2011 at 1:00 pm at Illinois Pollution Control Board Videoconference Room, 11-512, 100 W. Randolph St., Chicago, IL + + + + + *Hearing Officer Order: MAILBOX RULE DOES NOT APPLY, to remain on the service or notice list must return form attached to hearing officer order by April 1, 2011: FIRST, prefiled testimony due April 26, 2011; SECOND, prefiled testimony due June 2, 2011 | |
| 3/17/2011 | Order | Order of the Board by A. S. Moore: Accept for Hearing | |
| 3/17/2011 | DCEO / Sec. of State | *Request for DCEO Economic Impact Study | |
| 2/18/2011 | Initial Filing | Proposed Amendments (11.4 MB) | |
| 2/18/2011 | Initial Filing | Agency's Motion for Acceptance; Certification of Origination; Statement of Reasons; Synopsis of Testimony; Statement Regarding Material Incorporated by Reference; Appearance of Kyle Rominger; CD Version of Proposed Amendments | |

# Electronic Filing - Received, Clerk's Office, April 25, 2011s

**Service List**

| Party Name | Address | City/State/Zip | Phone/Fax |
|---|---|---|---|
| **Office of the Attorney General**<br>**Interested Party**<br>• Matthew J. Dunn | 69 West Washington Street, Suite 1800 | Chicago IL 60602 | 312-814-2634<br>312-814-2347 |
| **IEPA**<br>**Petitioner**<br>• Gary P. King - Assistant Counsel<br>• Kyle Rominger - Assistant Counsel<br>• Hernando Albarran | 1021 North Grand Avenue East P.O. Box 19276 | Springfield IL 62794-9276 | 217/782-5544<br>217/782-9807 |
| **Sidley Austin LLP**<br>**Interested Party**<br>• William G. Dickett | One South Dearborn Suite 900 | Chicago IL 60603 | 312/853-7000<br>312/853-7036 |
| **Illinois Petroleum Marketers Association**<br>**Interested Party**<br>• Bill Fleischi | 112 West Cook Street | Springfield IL 62704 | 217/793-1858 |
| **Illinois Environmental Regulatory Group**<br>**Interested Party**<br>• Alec Messina | 215 East Adams Street | Springfield IL 62701 | 217/522-5512<br>217/522-5518 |
| **Chemical Industry Council of Illinois**<br>**Interested Party**<br>• Lisa Frede | 1400 East Touhy Avenue Suite 110 | DesPlaines IL 60019-3338 | |
| **Rapps Engineering & Applied Science**<br>**Interested Party**<br>• Michael W. Rapps | 821 South Durkin Drive P.O. Box 7349 | Springfield IL 62791-7349 | 217/787-2118<br>217/787-6641 |
| **Illinois Pollution Control Board**<br>**Interested Party**<br>• - Clerk of the Board<br>• Tim Fox - Hearing Officer | 100 W. Randolph St. Suite 11-500 | Chicago IL 60601 | 312/814-3620<br>312/814-3669 |
| **Illinois Department of Natural Resources**<br>**Interested Party**<br>• Virginia Yang - Deputy Legal Counsel | One Natural Resources Way | Springfield IL 62702-1271 | 217/782-1809<br>217/524-9640 |
| **Illinois Society of Professional Engineers**<br>**Interested Party**<br>• Kim Robinson<br>• Brittan Bolin | 100 East Washington | Springfield IL 62704 | 217-544-7424<br>217-525-6545 |
| **Village of Niles**<br>**Interested Person**<br>• Joseph J. Annunzio | 1000 Civic Center Drive | Niles IL 60714 | |

Total number of participants: 11

**Notice List**

| Party Name | Address | City/State/Zip | Phone/Fax |
|---|---|---|---|
| **Deuchler Environmental, Inc.**<br>**Interested Party**<br>• Carrie Carter | 230 Woodlawn Avenue | Aurora<br>IL 60506 | 630-897-8380 |
| **Illinois Petroleum Council**<br>**Interested Party**<br>• Dave Sykuta | 400 W. Monroe | Springfield<br>IL 62704 | |

Total number of participants: 2

**Scheduled Hearings**

| Hearing Date/Time | Location | City & State |
|---|---|---|
| 6/17/2011 9:00 AM | Illinois Pollution Control Board Videoconference Room, 11-512 | Chicago, IL |
| 6/16/2011 1:00 PM | Illinois Pollution Control Board Videoconference Room, 11-512 | Chicago, IL |
| 5/11/2011 9:00 AM | Illinois Pollution Control Board Conference Room, First Floor | Springfield, IL |
| 5/10/2011 1:00 PM | Illinois Pollution Control Board Conference Room, First Floor | Springfield, IL |

**Appeals on File**

No appeals on file