

1 A P P E A R A N C E S:

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3 ILLINOIS POLLUTION CONTROL BOARD,

4 100 West Randolph Street

5 Suite 11-500

6 Chicago, Illinois 60601

7 (312) 814-6983

8 BY: MR. TIMOTHY FOX,

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10

11 ILLINOIS POLLUTION CONTROL BOARD MEMBERS PRESENT:

12

13 Mr. Thomas E. Johnson, Board Member

14 Mr. G. Tanner Girard, Board Member

15 Ms. Andrea S. Moore, Board Member

16 Mr. Gary L. Blankenship, Board Member

17 Ms. Carrie Zalewski, Board Member

18

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20 ILLINOIS ENVIRONMENT PROTECTION AGENCY,

1021 North Grand Avenue East

21 P.O. Box 19276

Springfield, Illinois 62794-9276

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BY: MR. KYLE ROMINGER,

23

24

1 A P P E A R A N C E S: (Continued)

2 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY MEMBERS
PRESENT:

3

Mr. Hernando A. Albarracin

4 Mr. Gary P. King

5

6 ALSO PRESENT:

7 Mr. Russ Goodiel

Mr. Marvin Johnson

8 Ms. Carol Rowe

Ms. Jana Langnickel

9 Ms. Sara Terranova

Ms. Joanne Olson

10 Mr. Vince Smith

Mr. Kevin Corcoran

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HEARING OFFICER FOX: The time of 1:00 o'clock having come and just passed, it's time to convene this meeting. Good afternoon and welcome to the Illinois Pollution Control Board hearing.

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My name is Tim Fox and I am the hearing officer for this rulemaking, which is entitled, "Amendments Under Public Act 96-908 to Regulations of Underground Storage Tanks" or USTs, and "Petroleum Leaking Underground Storage Tanks," 35 Illinois Administrative Code Parts 731, 732 and 734.

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I want to address also -- or introduce also present from the Board today at my immediate left is Board Member Andrea S. Moore, who is the lead board member for this proceeding. At my immediate right is the Board's Acting Chairman Dr. G. Tanner Girard, and to his right is Board Member Thomas E. Johnson. To the left of Member Moore is Board Member Gary Blankenship and to his left is our Board Member Carrie Zalewski.

24

The board docket number for this

1 proceeding is R11-22. The Illinois Environmental
2 Protection Agency initiated this hearing by
3 filing a rulemaking proposal with the Board
4 on February 18, 2011, and in an order dated
5 March 17, 2011, the Board accepted the proposal
6 for hearing.

7 Today, we are, of course,
8 holding the first of two hearings in this
9 rulemaking. The second is now scheduled to
10 take place beginning on Thursday, June 16, 2011,
11 in Chicago.

12 In an order dated March 17,
13 2011, the hearing officer directed participants
14 wishing to pre-file testimony for this hearing
15 to do so no later than Tuesday, April 26, 2011.

16 On April 25th, the Board
17 received pre-filed testimony from Mr. Hernando
18 Albarracin on behalf of the IEPA. And on that
19 same date, the Board received pre-filed testimony
20 from Mr. Vince Smith on behalf of CW3M Company.
21 The Board promptly posted that to its clerk's
22 office online or pool where it can be viewed.

23 We will begin this hearing
24 with Mr. Albarracin's pre-filed testimony for

1 the Agency as the proponent here.

2 Section 10242(f) of the
3 Board's procedural rules provides that this
4 testimony will be entered into the record as
5 if read and the Agency's original proposal
6 did state that Mr. Gary King, who is with us
7 here today, will not offer specific testimony,
8 but may be available to assist in answering
9 any questions as needed.

10 After introducing and swearing
11 in Mr. Albarracin and Mr. King, we will go then,
12 after perhaps a brief summary or introduction
13 on the part of the Agency, to the questions that
14 any of the participants may have for the Agency
15 on the basis of that testimony.

16 Once we have completed that,
17 all of those questions, we will turn, Mr. Smith,
18 to you, and your pre-filed also entered into
19 the record, as if read, so that after perhaps
20 a brief introduction or summary, we can proceed
21 right to the questions that the participants
22 here may have for you on the basis of what you
23 have filed.

24 After those questions, we

1 can see whether there's anyone else who wishes
2 to testify, but did not pre-file under Section
3 102424(g) of the Board's regulations. The
4 testimony that's not pre-filed is allowed as
5 time permits after dealing with addressing
6 all of the pre-filed testimony.

7 I do want to stress that just
8 inside the door, as I mentioned off the record
9 before, there is a sheet at which you can sign
10 to signal your intent that you would like to
11 testify in spite of the fact that you did not
12 pre-file.

13 Very quickly, this proceeding
14 is governed by the Board's procedural rules and
15 all information that is relevant and that is
16 not repetitious or privileged will be admitted
17 into the record.

18 I would ask you to note, please,
19 that to the extent the Board members or the Board
20 staff have any questions, they are intended solely
21 to develop a clear and complete record and not
22 intended to reveal any prejudgment or
23 predetermination on the proposal.

24 I would ask for the benefit

1 of our court reporter if you would speak as
2 clearly as possible. I don't think we will
3 have any issues with the acoustics in this
4 room, but if you would speak as loudly as you
5 can and avoid speaking at the same time as
6 any other person, I think we will have a clear
7 record and it will simplify her task.

8 Do we have any questions
9 about procedures before we get underway? Very
10 good.

11 Mr. Rominger, it sounds like
12 we are all set to turn to the Agency and any
13 quick introduction or summary that you would
14 like to offer before going to questions of your
15 witnesses.

16 MR. ROMINGER: Okay. Hernando
17 is going to present just a brief overview. We
18 thought maybe a little more background as far
19 as the statutory background for this was in order.
20 So he is going to go through that, to the task
21 force that led up to the public act.

22 And then we also had two
23 additional exhibits to submit along with that,
24 one is House Joint Resolution 39, which I

1 provided a copy to the members and there are
2 copies over here on the board. Then a second
3 one is a table showing the members of the
4 task force that was created by the joint
5 resolution. So we would ask that those be
6 entered into the record as exhibits.

7 HEARING OFFICER FOX: Very good.
8 Why don't we deal, first, with swearing in
9 Mr. Albarracin and Mr. King as then we can
10 proceed to those housekeeping matters that
11 you have mentioned.

12 (Mr. Albarracin and
13 Mr. King were sworn.)

14 HEARING OFFICER FOX: Mr. Rominger,
15 you had referred to three, and please correct me
16 if I'm mistaken, three documents that you would
17 like to admit into the record at this proceeding.
18 I believe that one was the pre-filed testimony of
19 Mr. Albarracin. Do I -- can I construe that as
20 a motion to admit that as an exhibit at this
21 proceeding?

22 MR. ROMINGER: Yes.

23 HEARING OFFICER FOX: All right.

24 Mr. Rominger, on behalf of the Agency, has moved

1 to admit into the record of this hearing a copy
2 of Mr. Albarracin's pre-filed testimony that was
3 filed on April 25, 2011.

4 Is there any objection to
5 admitting that as a hearing exhibit here today?

6 Neither seeing nor hearing any,
7 Mr. Rominger, I will mark that as Exhibit No. 1
8 and admit that into the record at this proceeding.

9 (Document marked as
10 Hearing Exhibit No. 1
11 for identification,
12 5/10/11.)
13 (Hearing Exhibit No. 1
14 admitted as evidence.)

15 HEARING OFFICER FOX: You had as
16 well referred to a copy of House Joint Resolution
17 39 from the 96th General Assembly. Have I
18 characterized that document correctly?

19 MR. ROMINGER: Yes.

20 HEARING OFFICER FOX: And can I
21 construe that as a motion to admit the joint
22 resolution into the record as a hearing exhibit
23 here today?

24 MR. ROMINGER: Yes.

1 HEARING OFFICER FOX: Very good.
2 Mr. Rominger has asked to admit a copy of House
3 Joint Resolution No. 39 from the 96th General
4 Assembly into the record of this hearing today.
5 He has referred to additional copies that he
6 has available and I'm certain he would make
7 those available right across the room from
8 me in front of that chair.

9 Is there, in the meantime,
10 any objection to marking and admitting House
11 Joint Resolution as a hearing exhibit today?

12 Mr. Rominger, neither hearing
13 nor seeing any, it will be marked naturally as
14 Exhibit No. 2 in this proceeding and admitted
15 into the record as a hearing exhibit.

16 (Document marked as
17 Hearing Exhibit No. 2
18 for identification,
19 5/10/11.)
20 (Hearing Exhibit No. 2
21 admitted as evidence.)

22 HEARING OFFICER FOX: Finally, you
23 had prepared and copied, again right across from
24 me in front of the chair, a document entitled,

1 "Underground Storage Task Force Member Information,"
2 dated October 2009.

3 Was it your wish to move that
4 into the record as a hearing exhibit?

5 MR. ROMINGER: Yes.

6 HEARING OFFICER FOX: Very good.

7 Mr. Rominger has moved that document that I just
8 described be moved -- added into the record as
9 Hearing Exhibit No. 3. Is there any objection
10 to do so here today?

11 Neither seeing nor hearing any,
12 Mr. Rominger, it will be admitted as naturally
13 Exhibit No. 3.

14 (Document marked as
15 Hearing Exhibit No. 3
16 for identification,
17 5/10/11.)

18 (Hearing Exhibit No. 3
19 admitted as evidence.)

20 HEARING OFFICER FOX: And that, I
21 believe, takes care of the documents and materials
22 you wish to admit into our record here today; is
23 that correct?

24 MR. ROMINGER: Yes.

1 HEARING OFFICER FOX: Very good.
2 And forgive my lack of memory, have we sworn in
3 Mr. Albarracin and Mr. King?

4 THE COURT REPORTER: Yes.

5 HEARING OFFICER FOX: We had?
6 Why don't you proceed with Mr. Albarracin? You
7 mentioned he may have a quick introduction and
8 if it's in order for him to do so now, let's
9 turn to that.

10 MR. ALBARRACIN: Thank you.
11 Today's proposal is submitted pursuant to
12 Public Act 96-908, which amended several of
13 the statutory provisions in the LUST program.

14 It is also submitted to make
15 our rules consistent with the Office of the
16 State Fire Marshal rules, which were amended
17 late last year. So in a way, we are submitting
18 this proposal to clean up our rules, if you will,
19 in order to make them consistent with the public
20 act and the fire marshal's rules.

21 The public act was a result
22 of work done by the Underground Storage Tank Task
23 Force. The task force was created by House Joint
24 Resolution 39 in 2009. The task force met four

1 different times in late 2009 and early 2010 and
2 although the work was supposed to be done by the
3 end of 2009, the task force continued to meet
4 in early 2010 and the report basically took form
5 of the legislation that was passed and signed
6 into law in June -- on June 8, 2010. The
7 legislation was passed in both the Senate and
8 the House unanimously.

9 A little background on the
10 task force. The task force was given certain
11 tasks, to be redundant. Under the current system
12 that we have in the program, the existing funding
13 sources are not sufficient to keep up with the
14 cost of cleanup.

15 In addition, current law does
16 not contain adequate methods for monitoring and
17 controlling costs in the program and that's the
18 two main issues that we were facing in the program
19 at the time the task force was created.

20 So the task force was given --
21 looked at several approaches to addressing these
22 issues. One of them basically -- one of the main
23 ones was to require that the costs reimbursed
24 on the fund be minimized to the greatest extent

1 practicable. That included the use of the Illinois
2 Pollution Control Board's risk-based rules, or
3 TACO rules, to the greatest extent practicable.
4 That was one of the main outcomes that are
5 included in the legislation, the Public Act
6 96-908.

7 The task force was composed
8 of 11 members; one person appointed by the
9 Speaker of the House, one person appointed by
10 the Minority Leader of the House, one person
11 appointed by the President of the Senate who
12 shall serve as co-chairman of the task force.
13 The co-chairman was the Speaker of the House
14 representative. One person was appointed by the
15 Minority Leader of the Senate, the director of
16 the Illinois EPA or his or her representative,
17 one person representing the office of the State
18 Fire Marshal, one person designated by the president
19 of the Petroleum Marketers Association of Illinois,
20 one person designated by the director of the
21 Illinois Environmental Protection Agency or the
22 Petroleum Council of Illinois, one person designated
23 by the director of the Illinois EPA -- of the
24 Association of Petroleum and Environmental Engineers

1 of Illinois, one person designated by the director
2 of the EPA, of the Association of Convenience
3 Stores of Illinois, and one person designated by
4 the director of the Illinois EPA of the Council
5 of Engineering Companies of Illinois.

6 If we refer to that table,
7 I believe it's Exhibit 3, the names are listed
8 of the members of the task force. So the Speaker
9 of the House, Representative Thomas "Tom" Holbrook,
10 Minority Leader of the House, John D. Cavaletto,
11 the President of the Senate, William R. "Bill"
12 Haine, Minority Leader of the Senate, Senator John
13 Jones, Illinois EPA, Lisa Bonnett, Office of the
14 State Fire Marshal was Scott Johnson, Illinois
15 Petroleum Marketers Association is Mark Bayley and
16 the Illinois Association of Convenience Stores, they
17 had four representatives that were rotated. So
18 two of them were present at any given meeting.

19 So Mark Bayley, Jon Stewart,
20 Carl Adams, Jerry Huot. I'm not sure how to
21 pronounce that. Illinois Petroleum Council was
22 Dan Eichholz. Professionals of Illinois for the
23 Protection of the Environment, these are the group
24 representing environmental engineers or consultants

1 in Illinois, Carol Rowe. And American Council of
2 Engineering Companies of Illinois, Andrew Rathsack,
3 president of Andrews Engineering.

4 So again, to summarize the goal
5 of the task force was to submit a report by the
6 end of 2009, but the task force continued to meet
7 one more time in March of 2010. And as a result
8 of that meeting, the report basically took form
9 of the legislation that was passed in both houses
10 last year.

11 That concludes my summary.

12 HEARING OFFICER FOX: Thank you,
13 Mr. Albarracin. It looks like you are done with
14 your summary at least.

15 MR. ROMINGER: I would like to ask
16 just some questions just for clarification.

17 HEARING OFFICER FOX: Mr. Rominger,
18 please go ahead.

19 MR. ROMINGER: Hernando, you made
20 three statements. One was that existing funding
21 sources will not be sufficient to keep up with
22 the costs of the fund.

23 The second one, current law
24 does not contain adequate methods for monitoring

1 and controlling of costs being reimbursed from
2 the fund.

3 And I believe the third one
4 was the task force purpose was to -- so that costs
5 reimbursed from the fund would be minimized to the
6 greatest extent practicable including the use of
7 TACO.

8 Were those -- I just want
9 to clarify that those were statements out of
10 the joint resolution and not your conclusions
11 or conclusions of the Agency?

12 MR. ALBARRACIN: That's correct.

13 MR. ROMINGER: Okay.

14 HEARING OFFICER FOX: And
15 Mr. Rominger, to clarify, the resolution you've
16 referred to has been introduced as Hearing Exhibit
17 No. 2 in this proceeding?

18 MR. ROMINGER: Yes.

19 HEARING OFFICER FOX: Great.

20 Thank you.

21 Any further questions for
22 Mr. Albarracin, Mr. Rominger?

23 MR. ROMINGER: No. That's all.

24 HEARING OFFICER FOX: Very good.

1 Mr. Albarracin, we've come to the point where we
2 can open this up to questions that the participants
3 here may have for you on the basis of your pre-filed
4 testimony and the testimony you have offered today
5 specifically about the house joint resolution and
6 the public acts, which were adopted.

7 I would just ask, for my own
8 benefit, frankly, if you have a question and
9 would raise your hand to be recognized and if
10 the first time you're recognized, you would,
11 for the benefit of the record, please pronounce
12 your name clearly and spell your last name, and
13 for the court reporter, name any organization
14 or business you are representing, that will help
15 streamline things.

16 So we will open it up. Is
17 there anyone who wishes to ask questions of
18 Mr. Albarracin of the Agency on behalf of
19 their testimony here today?

20 Ms Rowe, please go ahead.

21 MS. ROWE: Yes. Carol Rowe with
22 David Graham Company.

23 Hernando, there was a lot
24 of questions during the task force about cause

1 and the effects of the 2006 rates and so forth.
2 Do we have transcripts available from those
3 task force meetings?

4 MR. ALBARRACIN: Yes. The first --
5 I do know that the first three meetings, the
6 minutes, I believe, were posted on the website
7 after each --

8 MS. ROWE: On the web?

9 MR. ALBARRACIN: -- after each
10 meeting. The last meeting, we actually -- the
11 minutes did not make it on the website, but we
12 do have those minutes --

13 MS. ROWE: Okay.

14 MR. ALBARRACIN: -- of the
15 March meeting, the March 2010 meeting.

16 MS. ROWE: Was that minutes or
17 summaries?

18 MR. ALBARRACIN: Minutes. We
19 call them minutes. I mean, minutes, summary.
20 I mean, it's not a transcript.

21 MS. ROWE: Okay. I think that's
22 what I was asking.

23 HEARING OFFICER FOX: Ms. Rowe,
24 do you have any additional questions or anything

1 else you would like to ask?

2 MS. ROWE: We have probably several
3 technical questions on the proposed rules. The
4 first one is has the Agency received any bids
5 since June of 2010?

6 Has anyone gone through that
7 process prior to having the rules in place?

8 MR. ALBARRACIN: I don't think
9 anyone has gone through that process successfully.
10 I believe a couple of people tried. Right up
11 front, we determined that it was not complete
12 or it was not adequate, but nobody has gone
13 through it successfully. Those bids would have
14 to come before the manager's meeting that we have
15 every week. That's how I know.

16 MS. ROWE: Okay. The second
17 question is technical. What prompted the Agency
18 to remove tank abandonment as an eligible cost?

19 MR. ALBARRACIN: First of all,
20 even though it looks like it's been removed --
21 I mean, it's in proposed rules that we are allowing
22 that on a time and materials basis. We determined
23 that the cost that we -- the maximum payment
24 amounts that we have in there are not sufficient

1 to cover those costs.

2 So instead of trying to insert
3 an amount -- the proper amount, we took it out
4 and now we pay it on a time and materials basis.

5 Ms. ROWE: Oh, okay.

6 MR. ALBARRACIN: So it's in the
7 proposal.

8 MS. ROWE: The next one is -- it may
9 come out better with our testimony and it relates
10 to an issue that we're having with, I guess, the
11 law as it is today.

12 If we need to take care of
13 an off-site property and to do so, we need to
14 do something with on-site, does the Agency have
15 a structure in place today that is set where a
16 project manager will take a proposed plan
17 through a procedure, a committee or whatever,
18 to get it approved or is it by project manager?

19 Is there anything set to do
20 that? I may not be phrasing that correctly.

21 MR. ALBARRACIN: To address an
22 off-site issue?

23 MS. ROWE: Well, if I need to
24 do remediation on-site in order to take care

1 of an off-site issue, is there a procedure or
2 mechanism in place for the project manager to
3 handle that?

4 MR. ALBARRACIN: Yes.

5 MS. ROWE: Okay. Could you
6 explain how that works?

7 MR. ALBARRACIN: I don't know
8 that I would call it a procedure, but we have
9 definitely talked about it internally about
10 how, when a plan is submitted and you need to
11 do some remediation on-site in order to prevent
12 the migration of this contamination off-site,
13 for example, assuming that the off-site property
14 owner does not want any institution of controls,
15 we've talked about that internally.

16 Each project manager has the
17 discretion to review that plan and any questions
18 that come before our weekly meeting that we have
19 where all the managers are present. So I wouldn't
20 call it a procedure. It's more about -- I mean,
21 nothing written down. It's just more that we've
22 talked about it internally and this is how we're
23 going to carry this forward.

24 MS. ROWE: Okay. I think that is

1 something maybe we would like to discuss,
2 which is a good way to handle that because we
3 are bouncing between project managers and
4 with some things that works and some things it
5 doesn't. So we've got a few projects that are
6 stuck. So maybe this is a good place to try to
7 address that.

8 On the early action time frame
9 of the clock, could you explain or tell us what
10 prompted the Agency to shorten that window?

11 MR. ALBARRACIN: The fire marshal
12 went through rulemaking late last year. In that
13 rulemaking, they shortened the time -- they
14 reduced the time to confirm a release from 14 days
15 to seven days.

16 Our rules prior to that were
17 consistent with the fire marshal. That's why we
18 had 45 days plus 14 --

19 MS. ROWE: Fourteen.

20 MR. ALBARRACIN: -- fourteen, 20
21 days plus 14 in our early action provisions. In
22 order to be consistent with the fire marshal,
23 that's where our change is coming from.

24 In addition, the federal rules

1 have this seven-day time frame for confirming a
2 release. Seven days or a time frame at the
3 discretion of the regulatory agency, something
4 like -- to that effect.

5 MS. ROWE: That was a matching --

6 MR. ALBARRACIN: For matching, to
7 make our rules match, to be consistent with the
8 fire marshal's rules.

9 MS. ROWE: Okay. The other one I
10 had, I think, related to the bid situation and
11 that was the ability to get a bid approved during
12 the early action time frame, but you said we're
13 going to kind of look at the bids -- bidding
14 procedures differently anyway so we'll move on
15 from that one.

16 MR. ALBARRACIN: Okay.

17 MS. ROWE: Anymore, Vince?

18 MR. SMITH: No.

19 HEARING OFFICER FOX: Ms. Rowe,
20 had you completed your questions or would you like
21 us to hang on?

22 MS. ROWE: I think for now. I may
23 have -- I'm good for right now.

24 HEARING OFFICER FOX: We can

1 certainly get back to you. We won't cut you
2 off before you've exhausted your questions,
3 but, sir, if you have a question, please give
4 your name to the court reporter.

5 MR. GOODIEL: It's Russ Goodiel,
6 Chase Environmental. I'd like to revisit the
7 UST abandonment. You said you're going to go to
8 time and materials on that because the actual
9 Subpart A rates were not sufficient to cover
10 the actual costs of the UST abandonment; is
11 that correct?

12 MR. ALBARRACIN: That's correct.

13 MR. GOODIEL: Now, how will the
14 Agency determine what's an appropriate cost
15 for UST abandonment?

16 Are you going to look at
17 invoices and time sheets typical of the previous
18 time and materials and who is going to determine
19 what is acceptable and what's unacceptable to
20 abandon a UST?

21 MR. ALBARRACIN: We will look
22 at it, just as you described. We will look
23 at the invoices and time sheets and then these
24 are decisions that are made by the people who

1 reviewed the claims.

2 Any questions about an amount
3 that may not look appropriate, let's say, then
4 it goes to the manager's meeting, that weekly
5 manager's meeting. I haven't -- we haven't seen
6 one of -- any questions about this kind of thing
7 in a long, long time. So I trust that whatever
8 is being submitted -- whatever people have tried
9 to submit has been approved.

10 We do know that -- you
11 know, the reason for doing this is we do
12 know that the material is being used, for
13 example, flowable --

14 MR. GOODIEL: Flowable fill.

15 MR. ALBARRACIN: Flowable --

16 MR. GOODIEL: Fill.

17 MR. ALBARRACIN: Fill?

18 MR. GOODIEL: Yes.

19 MR. ALBARRACIN: -- is expensive
20 and, therefore, our rates were not enough to
21 cover that so we do know that and we don't have
22 anything written down. We don't have anything --
23 any cutoff amount or anything that we will go
24 by. We just look at them on a case-by-case basis.

1 Any questions, they bring it up.

2 Brian Bauer, who leads that
3 group, he brings it up to the manager's meeting
4 if there -- if there are any questions. We
5 haven't seen one in a long time.

6 MR. GOODIEL: Okay. I'm done for
7 now.

8 HEARING OFFICER FOX: Very good.
9 Thank you, sir.

10 Is there anyone that wishes
11 to pose questions to Mr. Albarracin on behalf
12 of the Agency?

13 Sir, if you also would state
14 your name for the record.

15 MR. MARVIN JOHNSON: Marvin Johnson
16 with Chase Environmental.

17 HEARING OFFICER FOX: Please go ahead.

18 MR. MARVIN JOHNSON: I guess the
19 question I have is with regards to remediation
20 after an NFR letter is approved and when we talked
21 about this before, I thought the intent of that
22 was if we had to go back and do something for new
23 waterline, a new gas line, that those costs would
24 be eligible for reimbursement, but in reading this,

1 it only appears that soil disposal was going to be
2 allowed to be eligible for reimbursement after the
3 NFR letter, correct?

4 MR. ALBARRACIN: That's correct.
5 Any soil that needs to be disposed of, those
6 costs are covered or any groundwater that needs
7 to be disposed of, that will be covered assuming
8 certain conditions --

9 MR. MARVIN JOHNSON: Uh-huh.

10 MR. ALBARRACIN: -- without going
11 into detail.

12 MR. MARVIN JOHNSON: I guess the
13 basic question is we're going to have to draft
14 a capital budget to get that approved for
15 reimbursement and we're going to have to get
16 landfill acceptance and we have to excavate
17 the soil and we have to transport it to a
18 landfill.

19 So those costs are not
20 eligible, just the disposal, is what I have
21 understood from you?

22 MR. ALBARRACIN: You know, this
23 can't -- let's go into the conditions that set
24 this up, this type of situation. We're looking

1 at a site that received a no further remediation
2 letter on June 8, 2010, or later. So that's number
3 one.

4 In addition, the NFR letter
5 contains the conditions that industrial commercial
6 land use were relied upon, Tier 2 objectives were
7 relied upon, an on-site groundwater use restriction
8 was relied upon.

9 BOARD MEMBER MOORE: Excuse me.
10 could you address the Board? I'm having trouble --

11 MR. ALBARRACIN: Okay. The NFR
12 letter would have conditions such as industrial
13 commercial land use, Tier 2 objectives for soil,
14 on-site groundwater use restrictions or groundwater
15 ordinance, whichever the case may be.

16 So those are the conditions
17 under which we're -- he's asking his question.
18 So let's say they -- the owner/operator needs to
19 go back and do some sort of construction activity,
20 install a waterline, remove a waterline, a sewer
21 line, something like that, and they run into some
22 contamination, which it wouldn't be surprising
23 since they relied on certain conditions.

24 This is a very narrow window.

1 They would have to -- if they encountered soil
2 that is contaminated above residential numbers,
3 but below industrial commercial numbers, it was
4 tested, those are the parameters, and this soil
5 cannot be put back into the excavation where it
6 came from, it needs to be taken somewhere else,
7 disposed of, that's what those other costs are that
8 we're talking about.

9 BOARD MEMBER MOORE: They would
10 be covered?

11 MR. ALBARRACIN: They would be
12 covered. Now, Mr. Johnson is asking about we
13 need to prepare a cap or some other report, get
14 approval from the Agency, that would not be
15 the case.

16 We're looking at a site that
17 already received an NFR letter. They're
18 operating outside the -- let's say the LUST
19 program, in that regard. We're not dealing
20 with a new release where we would need reports
21 and plans and budgets.

22 So we're looking at a very
23 specific situation here where some soil or
24 water needs to be taken off-site because it

1 cannot go back to where it came from.

2 So that is the situation that
3 we're talking about, a very narrow situation
4 where -- it's called a re-opener. So either
5 soil cannot go back into the excavation and
6 needs to be disposed of or groundwater under
7 the conditions that I described earlier.

8 MR. MARVIN JOHNSON: So I -- I'm
9 not sure that I really understood what you said
10 with all of that. Is it only soil disposal
11 costs or is it digging it up and getting it
12 there also?

13 MR. ALBARRACIN: Only soil disposal.
14 That's what we have -- that's what the public act
15 has.

16 MR. GOODIEL: So then the rest of
17 those costs are out of the owner's pockets for
18 the reporting to the Agency, the acceptance of
19 the landfill, transporting the soil, and all of
20 the other state and federal regulations associated
21 with dis- -- proper disposal of that soil? All
22 of those other costs would be the responsibility
23 of the owner?

24 MR. ALBARRACIN: Yes. You know,

1 the only thing that the Agency will need to see
2 is the request for payment in order to get paid
3 for these -- whatever documentation goes with
4 that.

5 Any pre-approval, like, you
6 know, as we do with any other type of corrective
7 action where we need a plan and you show where
8 you're going to dig or how much, we don't -- we
9 don't need to -- we only need to -- in this case,
10 we only need to see that request for payment
11 saying this is what we did and here are the
12 invoices and other justification in order to
13 get payment.

14 MR. GOODIEL: For soil disposal
15 only or water?

16 MR. ALBARRACIN: For soil or
17 water, yes.

18 HEARING OFFICER FOX: Mr. Johnson,
19 did you have any followups or additional
20 questions?

21 MR. MARVIN JOHNSON: No, not for
22 this question.

23 HEARING OFFICER FOX: Very good.
24 Mr. Goodiel, did you have any questions?

1 MR. GOODIEL: I did want to go back
2 and revisit your pre-filed testimony where you say
3 in order to prevent the recurrence of backlogged
4 and unpaid claims, the total cost approved for
5 reimbursement from the UST fund shall not exceed
6 the money in the UST fund available to pay the
7 cost. Can you summarize exactly what the Agency's
8 vision is on that, how that's going to be
9 implemented, and what -- how that's going to
10 play out?

11 MR. ALBARRACIN: That came from
12 the joint resolution. That was one of the items
13 that the task force was asked to look at. One
14 of the approaches, as it stands right now, the
15 fund is 18 months behind in payment. You know,
16 we can approve a claim very quickly, but the
17 payment has to stand in line and wait. There
18 is nothing else we can do about that at this
19 point. The backlog has been in place for a few
20 years now. So that was one -- again, one of the
21 approaches that was studied by the task force
22 when they met.

23 MR. GOODIEL: So are you basically
24 saying if there is a backlog, some of these will

1 not be approved or is it going to be status quo
2 as we're doing now where we continue to wait? I
3 don't understand, I mean, what the approach or
4 what the end game is here.

5 MR. KING: Gary King from Illinois
6 EPA. The question assumes that everything that
7 was in the charge to the task force became law
8 and that's not correct. I mean, one of the
9 concepts that was looked at was whether you
10 could develop a prioritization process such
11 that we would never have a backlog in the
12 future.

13 And during the course of the
14 meetings of the task force, the Agency presented
15 some options as to what a prioritization plan
16 might look like.

17 And the -- the entities --
18 the non-government entities that were part of
19 the task force were very much opposed to that.
20 They were very much opposed to the prioritization
21 plan that the Agency was recommending and so that
22 never became part of the legislation.

23 So we don't have a prioritization
24 plan as we originally envisioned. We do have this

1 provision that deals with legacy sites, but that's
2 the only thing that made it into the law relative
3 to that.

4 HEARING OFFICER FOX: Mr. King,
5 if I may ask, and please tell me if I'm
6 mischaracterizing what you just said, but the
7 possibility of prioritization was one of the
8 things that the task force was specifically
9 asked to look at, but they did not apparently
10 reach any consensus on what that might look
11 like or how to adopt one, is that a fair way
12 to characterize that?

13 MR. KING: I think that's a fair
14 characterization, yes.

15 BOARD MEMBER MOORE: Could I follow
16 up then? So then currently the process of first
17 come, first serve, people go on a list according
18 to their -- as to who is eligible on a dated --

19 MR. KING: We are still on first
20 come, first serve process. The priority payment
21 list is still in effect. It's on our website
22 and we still proceed that way.

23 MR. GOODIEL: So again, doesn't
24 that stand the same way, first come, first serve,

1 priority list, the way it is now?

2 MR. ALBARRACIN: Yes.

3 MR. GOODIEL: Okay. And then I've
4 got one other question on No. 4 of your item where
5 you state sites with operating USTs at the time of
6 the release received higher priority so is that
7 gone as well as opposed to someone who is just
8 getting out of business and getting approval?

9 MR. ALBARRACIN: Yes. And as Gary
10 King said, none of the prioritization proposal
11 made it into the legislation.

12 MR. GOODIEL: Okay.

13 MR. ALBARRACIN: That was part of
14 the -- that was one of the elements of the
15 prioritization scheme.

16 MR. GOODIEL: Okay.

17 HEARING OFFICER FOX: Mr. Goodiel
18 or Mr. Johnson, did you have any followups or
19 any additional questions?

20 MR. GOODIEL: I do not.

21 HEARING OFFICER FOX: We can certainly
22 get back to you if you do.

23 Ms. Rowe, I believe you had
24 indicated you had something you wanted to ask.

1 MS. ROWE: Yes.

2 HEARING OFFICER FOX: Please go
3 ahead.

4 MS. ROWE: This may qualify as
5 testimony.

6 HEARING OFFICER FOX: Perhaps it
7 would be best to swear you in or perhaps it would
8 be best to wait when Mr. Smith is testifying to
9 have you two do so, in effect, as a panel?

10 MS. ROWE: Yes. Although this is
11 very germane to this issue. I don't know how
12 you want to do that.

13 HEARING OFFICER FOX: If it's
14 germane, why don't we go ahead and swear you in
15 and have you address Mr. Albarracin and Mr. King.

16 MS. ROWE: Okay.

17 (Ms. Rowe sworn.)

18 MS. ROWE: I was also on the task
19 force and to follow-up with Gary King, there
20 were several issues and ideas that were looked
21 at in order to get rid of this huge, huge backlog
22 for payment.

23 One of the biggest contractors
24 in the state, United Science Industries, ended up

1 going bankrupt. They were about a 17 million in
2 the red and that brought huge, huge attention to
3 this backlog.

4 CW3M tried to do some projections
5 on the fund and demand on the fund. 2004 piqued
6 demand. It was, like, 94 or 96 million that was
7 being grabbed on and now as a result of the 1998
8 OSFM dictates, and it steadily dropped down -- I
9 think we're about, like, \$52 million now, but the
10 task force was asked to look at the fund options,
11 whether we're behind, whether we're in the red,
12 where's this thing going?

13 So a lot of the things that
14 Hernando laid out there were things that they
15 looked at, ideas, thoughts, projections.

16 The legislation that we ended
17 up with was very, very much different than the
18 ideas that were flowed during task force. It
19 wasn't all as dooms day as we thought. It's
20 not that bad. Some of the things in 2006 are
21 working, but payment is still bad. I mean, it
22 was, like, 22 months. We're down to, like, 15
23 or 16 months. Our bond debt will retire, Gary,
24 like, 2013?

1 MR. KING: End of 2012.

2 MS. ROWE: They extended the bond?

3 MR. KING: No. The payment
4 requirements are up at the end of 2012.

5 MS. ROWE: Well, I was asking the
6 bond debt from an earlier one, doesn't that retire,
7 according to your understanding, and we'll get,
8 like, another \$14 million a year?

9 MR. KING: We're talking about the
10 same thing.

11 MS. ROWE: Okay. But anyway a lot
12 of ideas were asked to be looked at by the task
13 force and that is what Hernando presented and then
14 what actually happened was a little bit different.
15 So I think that's why there was a little confusion
16 there.

17 HEARING OFFICER FOX: Ms. Rowe,
18 thank you. Did you wish to follow-up questions at
19 all?

20 MS. ROWE: No. I just wanted to
21 state that we started one place and we kind of
22 ended up a little different so Russ was looking
23 at the task force objectives based on where the
24 rules that the Agency proposed today were. It

1 was a little confusing.

2 HEARING OFFICER FOX: All right.

3 Do we have any other questions that anyone would
4 wish to ask Mr. Albarracin and Mr. King on the
5 basis of their testimony?

6 MR. ROMINGER: I've got just
7 another clarifying question for Hernando.

8 Hernando, you talked about
9 nobody has been through successful bidding. I
10 just wanted to make sure we are clear on that.
11 It sounded like what you were saying was nobody --
12 because paperwork wasn't done or they didn't follow
13 proper procedures, nobody has gone through the
14 full process of obtaining bids to seek
15 reimbursement, is that what --

16 MR. ALBARRACIN: Nobody has
17 successfully since June 8, 2010, when the act
18 was amended --

19 HEARING OFFICER FOX: Okay.

20 MR. ROMINGER: -- under the new
21 provisions.

22 MR. ROMINGER: Okay. And by
23 successfully, I mean, has somebody gone through
24 the whole process following the new procedures

1 and somehow failed to arrive at obtaining a bid
2 or did they stop somewhere previous to that and
3 not pursue the full -- not go through the full
4 bidding process?

5 MR. ALBARRACIN: I'm not aware
6 that anyone has gone through the whole bidding
7 process. I'm not aware that anybody has even
8 tried. Like I said, we meet weekly. Just come
9 to our manager's meeting. We have not been
10 presented with any proposals for bidding, anybody
11 going through the whole process, public notice,
12 opening -- the whole new process, nobody that has
13 done that --

14 MR. ROMINGER: Okay.

15 MR. ALBARRACIN: -- to my knowledge.

16 MR. ROMINGER: Okay. Thank you.

17 BOARD MEMBER MOORE: So does that
18 mean you haven't approved budgets?

19 MR. ALBARRACIN: No, not at all. Not
20 at all.

21 BOARD MEMBER MOORE: So this doesn't
22 require them to submit bids before the budgets are
23 approved?

24 MR. ALBARRACIN: No, it does not.

1 That's correct.

2 HEARING OFFICER FOX: Mr. Rominger,
3 did you have any follow-ups?

4 MR. ROMINGER: That's all I have.

5 HEARING OFFICER FOX: Very good. I
6 see Mr. Johnson indicated that he has a question.

7 Mr. Johnson, did you want to go
8 ahead and ask that?

9 MR. MARVIN JOHNSON: Well, I guess
10 I'll stay on that bidding since I'm fairly familiar
11 with it and still, I'll be honest because I don't
12 understand all of it, and I work with it every day,
13 do you feel that that might be a sign that it's not
14 working since nobody has done it in over a year or
15 a year almost?

16 MR. ALBARRACIN: I don't really
17 know, you know. Before the act was changed in
18 June, we had a different set a rules for bidding,
19 a lot less complicated, I would say, a lot fewer
20 requirements, and that came about in 2006 when
21 we had our last rulemaking.

22 Since that time, we started
23 seeing bids and that, like I said, every week,
24 we would see all these bids. Then it dropped off

1 dramatically. We started seeing fewer and fewer
2 and fewer bids in our meetings. We can speculate
3 as to why. In our thinking internally, it was,
4 well, our rates must be working. You know, our
5 rates adjusted for inflation every year so maybe
6 our rates are working.

7 Since the new procedures were
8 in place, I really don't know if it's -- is it
9 too cumbersome, is it -- we don't really know.
10 Nobody has tried it. Again, before that change
11 came about, we were seeing very, very, very few
12 bids compared to when the rules were amended in
13 2006 -- in March of 2006 when we started seeing
14 bids on a weekly basis.

15 HEARING OFFICER FOX: Mr. Johnson,
16 a follow-up?

17 MR. MARVIN JOHNSON: Well, I guess
18 my follow-up would be that they have changed
19 the rates for the abandonment because they've
20 admitted they knew that they weren't high
21 enough, which we knew that as a consultant
22 because we knew what the slurry costs, and so
23 if the rates aren't high enough, but nobody
24 has successfully bid, does that mean the tanks

1 didn't get abandoned, they just were left or
2 the consultants decided they were too cumbersome
3 and it wasn't worth trying to go through that
4 process?

5 MR. ALBARRACIN: With the tank
6 abandonment, how we found this out was because
7 people did give bids prior to the change in June
8 of 2010. People were giving bids and showing
9 us this is what it is really costing us and
10 that's how we found that our rates were not
11 high enough.

12 Why haven't -- that has not
13 been our experience with any of the rates that
14 we have published in the rules.

15 HEARING OFFICER FOX: Mr. Goodiel,
16 I see you indicated you had a question?

17 MR. GOODIEL: Yes.

18 HEARING OFFICER FOX: Please go
19 ahead.

20 MR. GOODIEL: I guess my follow-up
21 to that end, then, is if the 2006 rates concerning
22 this were working, the bidding process and
23 everything else, and you saw it fall off and you
24 didn't see as much, then, why did you see it

1 necessary to tighten those bidding regulations
2 even tighter and make it more cumbersome and
3 more confusing, just to be honest, if they were
4 working prior to this change?

5 MR. ALBARRACIN: That was done
6 because we were seeing some abuse with the bidding.
7 And prior to the change, we required three bids --
8 a minimum of three bids and we started to see some
9 abuse. I will just say that that was our way to
10 address that situation. That's why we tightened
11 up the bidding requirements for that reason.

12 Even though it was not being
13 used by a lot of people, it was -- it was
14 significant enough to address through the law
15 and regulations.

16 MR. GOODIEL: Staying with the
17 bidding then, since it is tightened up, more
18 cumbersome, a lot more work on the consulting
19 side is required to obtain the bids, I'm going
20 to tell you honestly, I don't know if we would
21 even be being able to do it. We would probably
22 walk away from the job.

23 But how is the Agency --
24 are they going to reimburse the consultant for

1 all the advising in the local papers actually
2 travel to the location for the bid openings,
3 writing all the specs, wading through the bids
4 to determine if the contractor is qualified or
5 unqualified, and is that cost going to be eligible?

6 I've not seen anything in the
7 regulations as far as that with the consulting
8 fee necessary to do this. Is all the additional
9 work necessary to obtain these bids to your new
10 specs, is that going to be reimbursable?

11 MR. ALBARRACIN: All costs associated
12 with the bidding are eligible for reimbursement.
13 You know, the way that we ruled the statute and
14 then the regulations is that, you know, the owner
15 shall award the winning bid as timely as possible,
16 lowest bid shall be used. Therefore, all those
17 costs associated with public notice determining
18 whose responsibility and so forth are eligible
19 for reimbursement.

20 MR. GOODIEL: At a time and
21 materials rate?

22 MR. ALBARRACIN: Yes.

23 HEARING OFFICER FOX: No further
24 questions, Mr. Goodiel?

1 MR. GOODIEL: No.

2 HEARING OFFICER FOX: Ms. Rowe, I
3 see you indicated you have a question. Please,
4 go ahead.

5 MS. ROWE: Hernando, have you
6 decided or set up procedures as to what will be
7 the demonstration to decide if you need a bid?

8 MR. ALBARRACIN: At the time that
9 a budget is submitted, a plan and a budget, with
10 all the documentation of the bidding, what we
11 feel at that time you will show that whatever
12 the job was could not be done for the Subpart H
13 rate and, therefore, you had to go and seek bids
14 and you went through the whole process and so
15 forth.

16 So that's basically the
17 demonstration, to show that the work would not
18 be done for the maximum payment amounts and
19 Subpart H of the rules.

20 MS. ROWE: You would calculate
21 that up front to suggest that I even go solicit
22 the bids and step into that process so do you
23 have a procedure to say I'm going to go forward with
24 the bidding?

1 MR. ALBARRACIN: It's the same
2 as it was before we made this change. When
3 somebody needed to do bidding, we would get
4 the documentation showing the three bids --
5 usually it was three bids usually we see higher
6 than our Subpart H amounts. Therefore, it was
7 necessary to bid. So it would be no different
8 since the rules changed -- since the law changed.

9 You would show that you
10 went through the bidding process and the lowest
11 bid is higher than the Subpart H amounts and
12 that will indicate there was a need for the
13 bidding.

14 So there was no -- there has
15 never been a procedure up front to seek bidding.
16 You determine that by asking for estimates, I
17 suppose, from contractors and you find out that
18 it cannot be done for the Subpart H rates.
19 Therefore, you go to bidding. So all that
20 comes with your plan and budget when you submit
21 it to us.

22 MS. ROWE: Well, typically, you
23 look at a project and you say, oh, this is not
24 going to work with Subpart H. Now, I know I

1 need to go out for bids. And to be honest,
2 I'll have to agree with Russ, we've walked
3 away from projects already where it looks
4 like we need to go for bids. It looks way too
5 cumbersome or we'll never get it done in time.

6 So we haven't even ventured
7 into this process. But we're looking for this
8 step that says I'm okay to even go for bidding,
9 my procedures that say I'm going to exceed
10 Subpart H are acceptable, that I've calculated
11 this okay, and the Agency is going to agree with
12 me that I should venture into the bidding process.

13 MR. ALBARRACIN: Now, see, that's
14 never been the case. Bidding has been in place
15 since 2006 and then in 2010, it was amended, the
16 procedures were amended.

17 So in 2006, when we received
18 bids from a consultant or owner/operator, we
19 would see the three bids, we would see a
20 minimum of three, usually three, we would see
21 the amounts, we would do the math, we knew that
22 it was over our Subpart H amounts and, therefore,
23 that was acceptable.

24 Nobody came forward saying

1 we didn't do the bidding because we exceed the
2 Subpart H amounts and here's why or here's how
3 we exceeded. So it's no different now since
4 June 2010.

5 You determine that by asking
6 for estimates. I assume that's how it works.
7 You find out that it cannot be done for the
8 Subpart J amount and, therefore, you go to
9 bidding. There is no pre-demonstration. There
10 has never been that pre-demonstration necessary.

11 BOARD MEMBER JOHNSON: What was
12 the nature of the abuse that you discovered
13 between 2006 and June of 2010 that led you to
14 change the bidding process?

15 MR. ROMINGER: Can I ask a
16 clarifying question here beforehand?

17 HEARING OFFICER FOX: Sure.

18 MR. ROMINGER: Mr. Goodiel had a
19 question that seemed to imply that we changed --
20 that the Agency proposed a change to the bidding
21 rules, but if I could ask Hernando, in the House
22 Joint Resolution, one of the things that the
23 task force was to look at, and I'll read from
24 this, it's on Page 5, Lines 18 through 21,

1 "Competitive bidding of costs that will be
2 reimbursed from the fund with such bidding,
3 including, but not limited to, public notice
4 of bid proposals," so that -- is that one of
5 the things that the task force looked at as
6 part of the different methods of attacking the
7 problems it saw with the fund?

8 MR. ALBARRACIN: Yes.

9 MR. ROMINGER: Okay. And then in
10 the public act that was passed, that public act
11 included specific provisions to follow in order
12 to do a bidding process?

13 MR. ALBARRACIN: Yes.

14 MR. ROMINGER: Okay. And then
15 there are some rules -- most of the rules we
16 have are directly from the statute -- repeated
17 from the statute --

18 MR. ALBARRACIN: Yes.

19 MR. ROMINGER: -- on the bidding?

20 And then there are some bidding
21 provisions that are not statutory, but those are
22 modeled after the Central Management Services rules
23 on bidding --

24 MR. ALBARRACIN: Yes.

1 MR. ROMINGER: -- is that correct?

2 MR. ALBARRACIN: Yes.

3 MR. ROMINGER: The procurement code?

4 MR. ALBARRACIN: Yes.

5 MR. ROMINGER: Okay. So really
6 the bidding process, what we're putting in place
7 is the framework that's set up in the statute
8 and then to the extent it's not consistent or
9 not directly from the statute, it was modeled
10 after CMS rules?

11 MR. ALBARRACIN: That's correct.

12 MR. ROMINGER: Okay.

13 BOARD MEMBER JOHNSON: But you
14 did, did you not, testify that there was -- you
15 noticed an abuse of the bidding process prior
16 to the June 10th change regardless of how that
17 came about? What was the nature of that? What
18 did you perceive that was an abuse?

19 MR. ALBARRACIN: One example I
20 can give is that we were seeing proposals coming
21 in with bidders from out of state and the rates
22 that were in those proposals were at least
23 twice the Subpart H amounts -- at least
24 twice, if I recall correctly.

1 What was interesting about
2 that is very, very few contractors had used
3 the bidding for that particular task. I'm
4 talking about excavation, transportation,
5 disposal and backfilling of soil.

6 When we contacted those bidders
7 in Missouri, you know, one of them didn't want
8 to talk to us and one of them sought the services
9 of a lawyer. So it was suspicious that the --
10 since the bidding provisions were very, very
11 loose, I will say, the way we had it before June
12 2001, there was little control that we had
13 over the bidding.

14 And the fact that the previous
15 provisions also had -- one of the provisions said
16 that the primary contractors could do the work
17 for the lowest bid -- for the winning bid. In
18 this case, we were looking at rates that were
19 at least two times the amount and two times the
20 Subpart H amount and we just saw no reason for
21 that.

22 BOARD MEMBER JOHNSON: Okay.

23 HEARING OFFICER FOX: Does that take
24 care of your question?

1 BOARD MEMBER JOHNSON: Yes.

2 HEARING OFFICER FOX: Ms. Rowe,
3 please go ahead.

4 MS. ROWE: I'm just going to hit
5 this one head on because this was one of our
6 cases and it ended up being appealed and settled,
7 but we had -- we had a project and we -- we have
8 equipment. We used to have trucks. We do not any
9 longer. We subcontract that work. We subcontract
10 all of the equipment. We have to haul it into a
11 landfill. We have to buy materials. When we
12 begin a job or go to prepare a budget, we start
13 calling, we get estimates and put our numbers
14 together. We got extremely high landfill rates.
15 We went, this is not going to work.

16 We called trucking companies
17 and people we rented equipment from before and
18 asked for them to prepare bids for us. One was
19 from Cape Girareau, Missouri and he handwrote his
20 bid. Apparently, this was suspicious, although
21 I've seen hundreds of handwritten bids from the
22 Agency, but anyway, it didn't go over very well.

23 The landfill at the time was
24 not -- they had plenty of cover and they didn't

1 really want this soil so the rate was jumped
2 through the ceiling. I can't -- couldn't help
3 that, but this created a rift or a war with this
4 bid. So that was ours, our fault, our issue.

5 This little contractor trucker
6 gets a call from the EPA and they state that
7 they've got the state police looking for him.
8 They got scared and they said I'm going to call
9 my attorney. That's exactly what happened.

10 So because of that, the Agency
11 used CMS bid guidelines to put into the last
12 year's legislation and rules. It doesn't work
13 when you're not a public entity that gets paid
14 in 30 days of doing the work and it's not bid
15 like an IDOT job.

16 These are small contractors
17 who were waiting 16 to 20 months by the time
18 they get paid. These are private, little corner
19 lots and things that we're doing work on.
20 This is not a bridge, I-55 type work. So it's
21 just a different animal. But I just wanted to
22 address that because that was our issue. It is
23 what it was.

24 BOARD MEMBER JOHNSON: Thanks.

1 HEARING OFFICER FOX: Thank you,
2 Ms. Rowe.

3 Did we have any further
4 questions while we are still addressing
5 Mr. Albarracin and the Agency's testimony?

6 BOARD MEMBER MOORE: Would you
7 mind telling us was there more than just
8 this abuse that she's talking about or was
9 that the particular one that really set things
10 in motion?

11 MR. KING: Let me go back to when
12 the rules -- when they were amended back in '06.
13 Okay. That was a long, arduous rulemaking process.

14 BOARD MEMBER MOORE: That would be
15 an understatement.

16 MR. KING: That would be an
17 understatement. And we had proposed in our
18 Subpart H procedures in terms of what would
19 be maximum payment amounts and one of the
20 issues that was raised at that time was what
21 happens if the project is going to be above
22 those payment amounts, shouldn't there be
23 some other alternative way to do things and so
24 it was very late in the process that we drafted

1 a rule to deal with bidding.

2 As we were implementing that,
3 in looking at what we put together, it didn't
4 seem that it was as good as it should be. For
5 instance, one of the things now in there is there
6 has to be a public opening. In the previous
7 version, it was just a private opening.

8 Considering the fact -- again,
9 you know, we are talking about this -- when we
10 are reimbursing these projects, we are expending
11 state of Illinois dollars. So we really felt
12 that there needed to be a -- we thought a
13 tightening of the procedures was appropriate
14 so that we could avoid any issues of impropriety.

15 BOARD MEMBER MOORE: And just one
16 follow-up question. If I understood you correctly,
17 you're telling us that the cost that are incurred
18 in this bidding process will be submitted and be
19 eligible for reimbursement?

20 MR. ALBARRACIN: That's correct.

21 BOARD MEMBER MOORE: So whatever
22 their costs are to drive everybody to the same
23 place and have this public bid opening and
24 they're going to have advertising on the front

1 end, they'll have to be reviewing the bids and
2 all of that will be eligible for reimbursement.

3 So are you thinking that some
4 of this has to do with the fact that it's just
5 people just aren't quite used to going through
6 that more formal process?

7 MR. KING: I think that's true
8 and I think Carol's point that this -- that
9 kind of bidding procedure does not work well
10 on small projects. I would absolutely agree
11 with that. It really works better on a
12 larger --

13 BOARD MEMBER MOORE: You mean
14 the public bidding process?

15 MR. KING: Yes. Well, that's --
16 but then that's why we have this whole Subpart H
17 process where we've got undisputed rates so that
18 people don't have to bid every project.

19 The Subpart H process that
20 we've had has worked well with these smaller
21 projects, but we do have -- you know, I mean,
22 if there are some big projects out there
23 that, you know, bidding a public open bidding
24 process that's similar to what is used with

1 state contracts, well, then it might work
2 appropriately.

3 HEARING OFFICER FOX: Ms. Rowe?

4 MS. ROWE: Would extension of
5 the early action time frame be approvable for
6 a bid process, something like this? I think
7 we've talked about that, Russ.

8 You've got your 45 days plus
9 now seven and you can imagine the time frame you
10 have to go through to get a bid approved. You
11 wouldn't even get it out the door in 45 days.
12 I think you're -- we don't do a lot of tank
13 abandonment, but I think your time and materials
14 or your bids would probably be a bigger issue
15 time frame.

16 MR. ALBARRACIN: For tank abandonment,
17 again, we would pay on a time and materials basis.
18 So bidding would not be necessary.

19 MS. ROWE: You wouldn't need it?

20 MR. ALBARRACIN: No.

21 MS. ROWE: Or a tankful or a larger
22 cost excavation in an early action would probably
23 be more warranted than, like you said, your
24 Subpart H where you can make a bid?

1 MR. ALBARRACIN: Well, you know,
2 if bidding was necessary for early action where,
3 I suppose, they would need more time to complete
4 this bid, the majority of the early action
5 request for payment that we get, bidding is
6 not required. It's not needed. Even additional
7 time is not needed.

8 People complete the work
9 whether it's pulling the tanks, removing soil,
10 backfilling, collecting samples, all that kind
11 of stuff is done well within the 45-plus --
12 well, now plus seven time frame.

13 BOARD MEMBER JOHNSON: Right.
14 You're saying in the instance, however, rare
15 or unusual it might be, that there are
16 circumstances that make the bidding process
17 necessary, they are not going to get it done
18 in this 45 or 45-plus seven days, is there a
19 way that they can apply to you guys to get an
20 extension of that time and still proceed
21 into the early action?

22 MR. ALBARRACIN: That's correct.
23 And the sooner that we are contacted, the
24 better --

1 BOARD MEMBER JOHNSON: Okay.

2 MR. ALBARRACIN: -- in order to
3 know what's going on and why and that kind of
4 thing. So the sooner that we are contacted --

5 BOARD MEMBER MOORE: You would
6 have the authority, then, to grant an extension?

7 MR. ALBARRACIN: I'm sorry?

8 BOARD MEMBER MOORE: You do have
9 the authority to grant an extension?

10 MR. ALBARRACIN: Yes. We do have
11 it now, yes.

12 HEARING OFFICER FOX: Ms. Rowe,
13 do you have any follow-up that you wish to ask?

14 MS. ROWE: No. That answered my
15 question. Thank you.

16 HEARING OFFICER FOX: Great.
17 Mr. Goodiel, do you have any other questions?

18 MR. GOODIEL: Going back to the
19 whole bidding, have you looked at a cost benefit
20 analysis for the additional requirements of this
21 new bidding process as opposed to -- you said
22 earlier that it was working and you had even
23 seen a falloff in the '06 bidding process. You
24 may have had one or two abuses, what you

1 considered to be abuses for whatever reasons,
2 but now the requirements are so cumbersome that
3 they are going to have significant consulting
4 costs as far as writing the bids and writing
5 it so that you get qualified licensed contractors
6 to work on this job and then public bid openings,
7 your advertising. Have you looked at potential
8 costs associated with that and considered that
9 issue?

10 MR. ALBARRACIN: No.

11 HEARING OFFICER FOX: Any follow-up,
12 Mr. Goodiel?

13 MR. GOODIEL: No.

14 HEARING OFFICER FOX: Very good.

15 Any follow-up with questions for
16 Mr. Albarracin or the Agency generally?

17 I do have some, Mr. Rominger,
18 on behalf of the Board. It looks like it's time
19 to turn to those. Many of these have been covered
20 so I promise I'll be as short as I can be.

21 I do want to bring to your
22 attention, and perhaps Mr. Rominger, you are the
23 right person to cite this to. The Board's
24 UST regulation at 734.150 establish a UST

1 advisory committee consisting of 11 members.
2 There appears to be some overlap with the task
3 force that was created during the House Joint
4 Resolution, but my request to the Agency is
5 this; if you could provide perhaps in a
6 post-hearing comment to us the names and contact
7 information of the members of that advisory
8 committee, we can be certain that they are part
9 of either a service or a notice listing.

10 Is that something that the
11 Agency can perhaps either by the pre-filing
12 deadline for the second hearing include in a
13 post-hearing comment?

14 MR. ROMINGER: I don't know if
15 that -- if the advisory committee has ever been
16 constituted. To my knowledge, they've never
17 received a request.

18 HEARING OFFICER FOX: And if that
19 is the case, is that something you would be willing
20 to report?

21 MR. ROMINGER: Yes. We can respond
22 to that.

23 HEARING OFFICER FOX: Excellent.
24 Very good.

1 The first question on the
2 substance of the Agency's proposal pertains to
3 Section 734.100(b), Applicability. The Agency
4 proposed revisions indicate that the costs that
5 are associated with a plan and budget approved
6 prior to June 8, 2010, must be reviewed in
7 accordance with the law that was in effect at
8 the time that the costs were incurred.

9 Would you please clarify for
10 the record whether a plan and budget that had
11 been approved prior to June 8, 2010, would need
12 to undergo new review by the Agency in order
13 for the owner/operator to proceed?

14 MR. ALBARRACIN: No. We have
15 been -- we have reviewed -- this has come up a
16 couple -- a few times where people have questioned
17 this and we are looking at it on a case-by-case
18 basis, but we have allowed that approval to stand.

19 HEARING OFFICER FOX: Very good.

20 MR. KING: If I could add one caveat
21 to that.

22 HEARING OFFICER FOX: Of course,
23 Mr. King. Go ahead.

24 MR. KING: The statute and the

1 rules -- Board rules allow us to call in
2 corrective action plans that have -- that
3 are, I believe, four years old that have not
4 completed the corrective action.

5 At that point, we would --
6 you know, if we called them in and said we
7 want a new corrective action plan, then, we
8 would expect that the work would be done in
9 accordance with the new plan as opposed to
10 the old plan that was out there.

11 HEARING OFFICER FOX: That would
12 be -- you refer to calling it in on the basis
13 of that four-year deadline, that's, in fact,
14 the existing authority that the Agency has?

15 MR. KING: That's correct.

16 HEARING OFFICER FOX: Thank you,
17 Mr. King.

18 I want to turn, then, to
19 Section 734.210 regarding early action. At
20 Page 5 of the Agency's statement of reasons,
21 the Agency cites Section 176.310(b)(3) of the
22 OSFM rules as the basis for amending this
23 section.

24 That sited OSFM rule appeared

1 only to require the time to confirm the presence
2 or absence of release must not exceed 45 days
3 whereas the 45-day report in Section 210
4 encompasses much more information than simple
5 confirmation of a release or its absence.

6 Can the Agency offer any
7 comment on amending these Subsections (c), (d)
8 and (g) by reducing that additional allotted
9 time from 14 to seven days?

10 MR. ALBARRACIN: In the Board
11 note under Paragraph (g).

12 HEARING OFFICER FOX: Subsection (g),
13 734.210?

14 MR. ALBARRACIN: Two-ten, correct.

15 HEARING OFFICER FOX: Forgive me
16 from interrupting. I'm sorry.

17 MR. ALBARRACIN: That's fine.
18 Previously, the Board had added this 14 days to
19 the 45-day time frame in order to be consistent --
20 in order to match the 14-day time frame in the
21 OSFM regulations. And now, since the fire marshal's
22 regulations have reduced that time frame from
23 14 days to seven days, that is why we are
24 proposing to amend that time frame from 14

1 days to seven days simply to match the fire
2 marshal regulations.

3 HEARING OFFICER FOX: To match
4 them more broadly simply then that Section
5 176.310(b)(3)?

6 MR. ALBARRACIN: Yes, that's
7 correct.

8 HEARING OFFICER FOX: Thank you,
9 Mr. Albarracin. If I could ask you to respond,
10 there was a suggestion in the pre-filed testimony
11 from CW3M that this reduction might conceivably
12 be matched by a reduction of the Agency's review
13 time from 120 to 60 days. Does the Agency have
14 reaction to that suggestion?

15 MR. KING: The response we would
16 have on that is the 120-day time frame is part
17 of the statute by which we function. So, I mean,
18 that's something that's in the law already.

19 HEARING OFFICER FOX: Part 16 that
20 addresses UST's?

21 MR. KING: That's correct.

22 HEARING OFFICER FOX: Very good.
23 Thank you, Mr. King.

24 I'd like to turn, if I may,

1 Mr. Albarracin, to Section 734.360 pertaining
2 to some of the TACO provisions and standards.
3 Section 360(d) addresses institutional controls
4 generally specifically where groundwater ordinance
5 is not required.

6 Can you comment on whether
7 this was intended to provide an additional
8 measure for remediation where the Agency has not
9 approved a groundwater ordinance?

10 MR. ALBARRACIN: This was intended,
11 you know, if there was no groundwater ordinance
12 approved by the Agency, then, the proposal was
13 to require institutional control on the property
14 where the release occurred, that is, imposing an
15 on-site groundwater use restriction. No portable
16 wells may be installed.

17 This is another element to
18 help with the cost of remediation -- overall cost
19 of remediation so when we have a groundwater
20 ordinance in place, that's already a given, that
21 has to be used, and that's part of remediation
22 proposal. When there isn't one, then, the idea is
23 to have an on-site groundwater use restriction
24 that will be consistent with a groundwater

1 ordinance.

2 HEARING OFFICER FOX: Very good.

3 Thank you.

4 If I may ask you to comment
5 on this, if a groundwater in ordinance or another
6 institutional control doesn't remediate off-site
7 contamination, and this is an issue that at least
8 comes up generally, of course, and particularly,
9 if an off-site owner would not accept any
10 institutional control, could you comment on the
11 use of Tier 2 or Tier 3 objectives to help
12 remediate that site?

13 MR. ALBARRACIN: When a groundwater
14 ordinance is in place, it has to be used in the
15 mechanism to address any off-site contamination
16 and that would be to provide a notification to
17 those residents or entities. I mean, that's
18 already given. That's already -- it's already
19 in the Board rules that were amended in 2006.

20 This in ordinance provides
21 for no groundwater wells can be installed for
22 portable purposes, that kind of thing. So if
23 there is contamination off-site in the soil,
24 that's a separate issue. That can be addressed

1 either through remediation or some sort of an
2 institutional control, Tier 2, Tier 3, as you are
3 suggesting.

4 In the case of an on-site
5 groundwater use restriction, since it only applies
6 to the on-site property where the release occurred,
7 if there is any remediation that needs to take
8 place off-site, then, in that case, the remediation
9 could take place where there's groundwater or
10 soil. In this case, we're talking about
11 groundwater. So groundwater or an institutional
12 control would be secured in that situation.

13 Or there could be remediation
14 done on the so-called on-site property where
15 the release occurred in order to prevent migration
16 and contamination to the off-site property where
17 there is private property or a roadway, whatever
18 the case may be.

19 So in the case of an ordinance,
20 it's the parameters are set because it's been --
21 because an ordinance has been approved by this
22 local municipality. Any groundwater contamination
23 going off-site, the tank owner provides notification
24 to the off-site people saying this is an ordinance

1 that had been approved by the Agency, so on and so
2 forth.

3 In the case of a groundwater use
4 restriction, there is that option of going off-site
5 and remediating that contamination or remediating
6 on-site so that it doesn't affect the off-site. I
7 don't know that's confusing or not.

8 HEARING OFFICER FOX: It's a
9 complicated situation, I know, but I appreciate
10 your response.

11 Can I ask Mr. Albarracin, it
12 seems to me that CW3M had proposed specific
13 additional language to be added into the Board's
14 proposal here at Sections 734.360(c), (d), (ddd),
15 and (fff). I think it's fair to say it's generally
16 in an effort to address that kind of situation
17 that you are describing.

18 Do you have a specific reaction
19 or comment on the language that they had proposed in
20 their pre-filed testimony?

21 MR. ALBARRACIN: We will respond in
22 writing to that to that proposal -- to that language
23 that they proposed.

24 HEARING OFFICER FOX: Very good. We

1 can go off the record to speak about that, but I
2 appreciate your willingness -- apparent willingness
3 to prepare that, Mr. Albarracin.

4 I have -- actually, perhaps,
5 Mr. Rominger, this would be best directed to you.
6 I have a bidding question, but I think it's a
7 very, very simple one. Subsection -- Section
8 734.855(c)(2)(B) addresses the correction of
9 what are called clearly evident mistakes and
10 there is a reference there to "transportation
11 errors."

12 While the CMS rules that
13 would appear to be the basis of that refers to
14 the transposition errors that would seem to fall
15 logically under the category of clearly evident
16 errors, is -- am I correct in assuming there
17 might have been a little word choice error there
18 or is that something you would like to address
19 in writing in a post-hearing comment?

20 MR. ROMINGER: That seems to be
21 a good example of that type of error. Without
22 looking at the language, that sounds correct,
23 what you described.

24 HEARING OFFICER FOX: But I'm

1 perfectly content to wait if you would like to
2 look into that and wait for a post-hearing
3 comment to see if you would like to look at
4 that.

5 MR. ROMINGER: I can go ahead and
6 confirm that for you.

7 HEARING OFFICER FOX: Okay. That
8 sounds great.

9 That exhausts the questions
10 that I have. Did any of the Board members have
11 any other questions that you want to pose to the
12 Agency?

13 And certainly, we can give an
14 opportunity to all of those who are here if you
15 have any follow-ups or any other questions that
16 you would like to pose to the Agency, please let
17 me know and we can take those.

18 Great. We have -- if there is
19 no objection, we have been going for nearly an
20 hour and a half at this point. The room is getting
21 warm. Why don't we take a 10-minute break and
22 resume at 2:35. And Mr. Smith, at that point, we
23 will be ready to take questions that folks may
24 have for you. Thanks very much.

1 (Whereupon, after a short
2 break was had, the
3 following proceedings
4 were held accordingly.)

5 HEARING OFFICER FOX: Our break
6 having passed, we will resume. We're just about
7 to turn to the pre-filed testimony filed by
8 Mr. Smith on behalf of CW3M, but Mr. Rominger
9 has indicated Mr. King may have, before we turn
10 to Mr. Smith, one more thing he would like to
11 add to the record. Mr. Rominger, we can go
12 ahead to that right away.

13 MR. ROMINGER: Yes. I'll just turn
14 it over to Gary.

15 MR. KING: Yeah, I just -- this is
16 just an additional fact. I don't know that it's
17 really so much pertinent to the issues in this
18 proceeding, but I just thought the Board would be --
19 find this interesting.

20 As of March of this year, okay,
21 from the inception of the program to March of this
22 year, we paid out from the UST fund in response
23 to payment requests \$982.5 million.

24 So we are expecting that

1 sometime this summer, in July or August, we're
2 going to hit the \$1 billion level in terms of
3 the amount of money that's been reimbursed
4 under this program.

5 BOARD MEMBER MOORE: Congratulations.

6 MR. KING: I'm not sure -- you know,
7 some people have said we should advertise that and
8 I'm not sure that we really want to, but I know the
9 Board, since you've been involved all the way along
10 with these proceedings, you would be interested in
11 that fact.

12 HEARING OFFICER FOX: Very good.
13 Anything further, Mr. King?

14 MR. KING: No. That's it.

15 HEARING OFFICER FOX: Thank you for
16 that information. Mr. Rominger, anything else
17 before we turn to Mr. Smith?

18 MR. ROMINGER: No.

19 HEARING OFFICER FOX: Very good.
20 Mr. Smith, thank you for waiting. We have, of
21 course, at the Board received your pre-filed
22 testimony. If you have an additional copy of
23 that that you would to admit as an exhibit here
24 today, we can address that very quickly and move

1 on.

2 Mr. Smith, I have been handed
3 a copy that you have produced of the pre-filed
4 testimony submitted by you on behalf of CW3M
5 dated March 17th of 2011.

6 Have I understood correctly
7 that you wish to admit this into the record of
8 this hearing as Exhibit No. 4?

9 MR. SMITH: Yes, I do.

10 HEARING OFFICER FOX: Very good.
11 Is there any objection to admitting a copy of
12 that into the record of this proceeding?

13 Neither seeing nor hearing
14 any, specifically, Mr. Rominger, he does not,
15 it will be so marked and admitted, Mr. Smith,
16 as Hearing Exhibit No. 4. Let me take just a
17 second to mark that.

18 (Document marked as
19 Hearing Exhibit No. 4
20 for identification,
21 5/10/11.)
22 (Hearing Exhibit No. 4
23 admitted as evidence.)

24 HEARING OFFICER FOX: And Mr. Smith,

1 as we did with the witnesses from the Agency, if
2 you would like to offer a brief introduction or
3 summary, your testimony is entered into the record
4 as if read so there would be little point, I think,
5 in repeating it. But if you do want to share any
6 summary, please go ahead in doing that.

7 MR. SMITH: Sure. Do you need to
8 swear me in first?

9 HEARING OFFICER FOX: Yes.
10 Absolutely. Thank you for reminding me.

11 (Mr. Smith was sworn.)

12 MR. SMITH: My name is Vince Smith.
13 I have been employed with CW3M Company as a senior
14 environmental engineer since June of 2000. I'm a
15 registered professional engineer in Illinois.

16 To begin, I would like, on
17 behalf of CW3M, to express our appreciation to
18 the Pollution Control Board for making us aware
19 of this rulemaking and for the opportunity to
20 present testimony today.

21 This rulemaking will have an
22 immediate and direct effect on our business and
23 similar businesses around the state and appear
24 to be unrelated to environmental consulting,

1 but can play a role in remediation.

2 As included in our testimony,
3 we really would like to find a solution for this
4 whole on-site property affecting or potentially
5 affecting off-site properties. We're not sure
6 that that's totally been addressed in the
7 regulations as written and we've offered some
8 suggested -- at least opening statements in
9 making some revisions to those to help address
10 this problem.

11 While we proposed some changes
12 to Sections 734.360(c) and (d), subsequent to that,
13 we've realized that probably Section (b) as well
14 of 734.360 may need the same language applied to
15 it.

16 On some of these projects where
17 we have this situation where an on-site release
18 is or could affect an off-site property, on some
19 of those, we have found solutions working with
20 the Agency. On others, we're just kind of in
21 limbo.

22 What we would like to see is
23 just a more rigid guideline for us to operate
24 under and for the Agency to operate under so

1 that we each know what's expected of the other
2 and so we can get these projects moving forward.

3 As with any new regulation or
4 public act, there's always examples of unintended
5 consequences or situations that just simply weren't
6 thought of or addressed in the initial regulation
7 or act.

8 For instance, the section
9 dealing with plans and budgets approved before
10 the act was changed on June 8, 2010. A lot of
11 those have been kind of left in limbo. We
12 weren't really sure how the changes to the act
13 were going to affect the status of those in
14 terms of the plans approved, the budgets approved,
15 is all the work still approved and reimbursable.

16 In terms of the bidding process,
17 yes, there were some issues with the bidding
18 process as it was written. As it's been alluded
19 to, it was kind of a -- I don't want to call it
20 last minute because it was the last several months,
21 I believe, of the prior rulemaking that that came
22 up and it was put in there, but to go from what
23 we had to what's been proposed now, we feel is
24 just so cumbersome. It's overkill for what we're

1 doing and quite honestly, I think if we got to
2 a site where we thought or knew that we are
3 going to have to bid it, it would probably just
4 get put on the shelf and we'll just wait for
5 better conditions before we try to move it along.

6 United Science Industries was
7 once the largest LUST contractor in Illinois,
8 environmental contractor, and was probably the most
9 vocal consultant during the original and the 734
10 rulemaking, and as was said earlier, they have
11 since gone bankrupt.

12 As part of that bankruptcy,
13 other consultants were invited to review and
14 bid on their existing projects, the projects
15 that they had under contract. We took part
16 in that. Part of our review was not just looking
17 for additional work for us to do, but also to
18 kind of do some forensic analysis of what went
19 wrong for them to hopefully not allow our company
20 to fall into the same conditions that led to
21 them going out of business.

22 During our review of those
23 projects, we were struck by the number and the
24 magnitude of cuts made to reimbursement requests.

1 In this current climate where work is performed
2 and a year and a half goes by before you get
3 paid, any cuts, any additional delays in payments
4 just has catastrophic consequences for us.
5 You've already done the work. You've already
6 paid your people. You've paid your subcontractors.
7 You've prepared your claim.

8 In order to survive in this --
9 in waiting this long, you borrow against your
10 receivables. What was once profit is now
11 basically all taken up by interest payments.
12 To then see a reimbursement reduced or delayed
13 further is just devastating. The lender demands
14 additional collateral and the work done is kind
15 of similar to housing prices that makes all
16 headlines. I mean, basically your project is
17 underwater financially.

18 During the original rulemaking
19 for 734, Subpart H was represented to consultants
20 as less documentation required and kind of a win
21 some, lose some scenario on the financial side.
22 Following a debate over procedures, there was a
23 Pollution Control Board decision that changed
24 this back to kind of the same documentation that

1 was required pre-734 and on the financial end,
2 it became break even, lose some.

3 Prior to and following that
4 decision, though, some of the reasons given
5 to cut or deny the claims of USI were
6 questionable. And I'm not trying to imply that
7 these cuts alone were the cause of their demise,
8 but they were certainly a contributing factor.

9 These regulations -- the LUST
10 regulations serve as a contract basically between
11 the tank owners and operators and their
12 environmental insurance provider, the EPA. Any
13 room for interpretation within those regulations
14 has the potential for conflict. As the EPA is
15 trying to minimize costs, while owner/operators
16 are trying to minimize losses, losses to either
17 their operations and/or property values.

18 These conflicts cost both the
19 owner/operators and the EPA in time and money.
20 So clear, thorough, concise rules that each side
21 understands just minimizes this waste of precious
22 resources.

23 Once again, we would like to
24 thank the Pollution Control Board for their

1 proactive approach in creating fair rulemaking
2 environment. While the original 734 rulemaking
3 hearings were quite contentious and both sides
4 began very far apart, the end result was a set
5 of rules that have overall worked fairly well
6 especially in light of the magnitude and changes
7 to the program at that time.

8 We hope that the outcome of
9 this rulemaking produces a similar result.

10 Since 734 was enacted, some consultants have
11 dropped out of the LUST business entirely. Most,
12 including us, have scaled back. I think some
13 have become somewhat fearful of involvement or
14 speaking up after the last LUST rulemaking and
15 demise of USI.

16 We are here today to reiterate
17 to the EPA and the Board that we sincerely wish
18 to find solutions that meet the needs of all
19 parties involved. I would be happy to discuss
20 anything that's contained in our pre-filed
21 testimony and we look forward to working together
22 to make rules that are clear and just for a
23 hassle-free way through the LUST technical and
24 physical process.

1 In addition, some of this --
2 we were talking earlier about the drop off in
3 the number of bids that were required. I think
4 what we saw was especially on the excavation
5 transportation disposal costs was it kind of
6 came down to supply and demand. At the time
7 of the creation of 734, there was a whole lot
8 of demand for excavation, transportation and
9 disposal.

10 Subsequent to that, the loss
11 of some contractors doing this line of work, the
12 amount of work that is now available to do, the
13 demand has really fallen off where once we were
14 very -- held captive by landfills, they could
15 essentially say this is our price, this is what
16 you will pay, we find them a lot more willing to
17 work with us if we go to them and say, hey, look,
18 Subpart H is close. We can't make it. Can we
19 work together? We've been able to get much
20 better pricing from them to do that, which I
21 think attributes to some of that drop off.

22 With that, I'll take any questions
23 anyone asks.

24 HEARING OFFICER FOX: Mr. Smith,

1 thank you. We can go right to those.

2 Is there anyone on the basis
3 of his pre-filed or his testimony today that
4 may have any questions for Mr. Smith?

5 BOARD MEMBER MOORE: Mr. Smith, do
6 you have any estimate as to what this bidding
7 process may cost you?

8 MR. SMITH: In terms of just --

9 BOARD MEMBER MOORE: The additional
10 costs. Have you done any --

11 MR. SMITH: We really haven't done
12 that. I mean, we can certainly do that and provide
13 that to you.

14 BOARD MEMBER MOORE: You know, I would
15 kind of be interested in what you're thinking.

16 MR. SMITH: Yes. It would be -- it
17 would be a considerable investment and part of
18 that -- part of our fear is to go through all of
19 that investment of time and resources only to find
20 out someone, for instance, bid slightly under
21 Subpart H. Well, if they are a responsible bidder,
22 then, you've basically given away your time and
23 effort to the whole bidding process because now,
24 you're back under Subpart H.

1 If they're disqualified, what are
2 your reasons for disqualifying someone? Are they
3 upheld or whatever you want to say when it comes to
4 review time or when it comes to the review by the
5 Agency?

6 It's just -- I think there's
7 some many unknowns in a great potential investment
8 in time and resources that we're not sure it would
9 be worth it, but we will provide subsequent to this
10 an estimate of what we think it would take just to
11 do a typical bid as prescribed in the proposed
12 regulations.

13 BOARD MEMBER MOORE: Are you really
14 expecting to -- once the bids -- if they go through
15 this public bidding process, isn't your intention to
16 be accepting the bids submitted? I mean, all three
17 will be there for review. You're not expecting to
18 disqualify people because there's -- I mean, there
19 will be eligibility requirements because it's a
20 public bid, right?

21 MR. ALBARRACIN: That's correct.

22 BOARD MEMBER MOORE: So you're not
23 thinking you're going to be disqualifying people at
24 the eleventh hour or even the first hour?

1 MR. ALBARRACIN: No, I am not.

2 MR. SMITH: I think our fear is more
3 the opposite where we disqualify someone. We say,
4 you know, we've checked your references, we've
5 talked to some people that you've worked for in the
6 past and they were not pleased with your work or we
7 know that they're not really equipped to do that,
8 they don't have the permits, the licensing, the
9 whatever.

10 BOARD MEMBER MOORE: Right.

11 MR. SMITH: We basically say, no, your
12 bid has been disqualified. Will the Agency concur
13 with our decision?

14 BOARD MEMBER MOORE: I think that
15 might be -- unless I -- could you address that?

16 MR. ALBARRACIN: It's hard -- you
17 know, it is hard to address that at this point when
18 we haven't even received the first example of it.
19 The provisions are very specific as to what needs
20 to be done and how. If they're followed, I wouldn't
21 expect any problems at the eleventh hour
22 or whatever.

23 BOARD MEMBER MOORE: Thank you.

24 HEARING OFFICER FOX: Ms. Rowe, if

1 we could get you in just a moment.

2 Mr. Smith, I wanted to follow-up
3 very quickly. You had expressed a willingness
4 to provide some itemization of the costs and you
5 heard Mr. Rominger just submit some information
6 after hearing, but before the second hearing. We
7 have to submit a deadline for that. So is that
8 something you'd be willing to do before the second
9 hearing so that the board would have a chance to
10 look at it?

11 MR. SMITH: Yes.

12 HEARING OFFICER FOX: Very good. Then
13 we'll --

14 MR. SMITH: Just let me know when it's
15 due.

16 HEARING OFFICER FOX: We will discuss
17 that off the record, the procedural issue of the
18 deadline for those comments, and if you would be
19 willing to do that, we would appreciate that
20 addition to the record.

21 Ms. Rowe, I believe you had a
22 question and was I correct in understanding that
23 sign? Please go ahead.

24 MS. ROWE: Amongst the consultants,

1 we have discussed the bid issue and we have
2 our -- at CW3M right now, we have several projects
3 that we're doing what we're calling cleanup after
4 another tank alert. They've removed tanks, they've
5 left the project, they've not taken samples, they've
6 not done it correctly. The early action period has
7 long gone and were trying to recreate that
8 atmosphere to gather that information.

9 We know who those contractors
10 are. And they would be people who would bid on
11 excavation work, tank removal work and they're
12 licensed, but we also know how they work and this
13 is just -- the LUST world is very small and I
14 think probably the point you guys can comment on
15 that, I guess.

16 HEARING OFFICER FOX: Mr. Goodiel,
17 please go head.

18 MR. GOODIEL: I would like to
19 follow-up. The Agency has stated that it's
20 based on CMS bid backs, but in order to bid
21 on CMS CDP -- CDD projects, the contractor
22 has to be certified and has to go through an
23 entire process in order to even bid on this.

24 In this case, there are no such

1 guidelines in place, no pre-qualifications, that
2 type of thing. So we're expected to go to an area
3 where we may not get a lot o work, we don't know
4 the local contractors, publicly advertise it in the
5 local paper there and we're going to get four or
6 five bids from people that we don't know.

7 You know, there's no
8 pre-qualification process for those people and
9 then in CMS also, there are provisions for change
10 orders if there is something that was not expected
11 in a project.

12 I guess my question to the
13 Agency is if we determine a contractor -- a
14 potential subcontractor is not qualified to do
15 the work, how that's going to be addressed, if
16 they are the low bidder, and then also if
17 something is -- I mean, there are unexpected
18 circumstances all the time. What provisions --
19 if we're going under CMS, what provisions are
20 made change order in this process?

21 If we are going to go with the
22 CMS bidding process, there are a whole lot of
23 other issues that are not being addressed such
24 as pre-qualification contractors and bonding,

1 performance bonds, that type of thing.

2 HEARING OFFICER FOX: Did anyone
3 from the Agency wish to respond or elaborate
4 upon that?

5 MR. KING: Well, my only thought
6 is if the desire is to make things simpler, adding
7 the suggestion that has just been made would make
8 things even more complicated, it seems to me.

9 MR. GOODIEL: I would agree, it
10 would definitely make it more complicated, but
11 there are -- there is a huge risk when you're
12 getting contractors -- subcontractors that you
13 don't know their history or you don't know how
14 they performed. Are they properly licensed?
15 Is their equipment dependable? Are their trucks
16 dependable and those type of issues?

17 When you're going with the
18 CMS process, that's been predetermined. They
19 have proven that they are a quality contractor
20 and it's just kind of halfway there with this
21 bidding process. It's not all the way there with
22 CMS requirements.

23 MR. ALBARRACIN: On -- if you
24 look at the proposed regulations, 855(d) --

1 734.855(d) is where it lists what factors
2 need to be considered in determining whether
3 a bidder is responsible. I mean, I can read
4 this if you want. You know, the bidder has a
5 satisfactory record performance. These are the
6 things that need to be looked at by the tank
7 owner, whoever it is looking at these potential
8 bidders. If the bidder has a satisfactory
9 record of integrity and business ethics, if
10 the bidder has available -- the appropriate
11 financial material and equipment and facilities
12 and so forth, these are the factors to be
13 considered. Again, not all are inclusive.

14 MR. GOODIEL: Is that for the
15 owner/operator and the consultant who is the
16 representative for the owner/operator or if we
17 determine that in the submittal of the data,
18 we provide data and documentation that we don't
19 believe these people are qualified and someone
20 within the Agency has another belief, how is
21 that -- that's my concern and that's why this
22 whole bidding process really concerns me because
23 it is wide open and there is a lot of opportunity
24 for a huge loss of money on the part of the

1 owner/operator and/or the consultant.

2 MR. ALBARRACIN: I mean, you know,
3 if there are other factors that you wish to be
4 considered that can be included in here, I mean,
5 you are welcome to propose that as well.

6 You know, it is -- other than
7 that, it's hard to react to something that we
8 haven't dealt with or have yet to deal with it.
9 I mean, this is what we have before us. I mean,
10 if there are other suggestions where you want to
11 amend this to make it simpler, to make it -- you
12 know, go ahead and propose something. We will
13 look at it.

14 HEARING OFFICER FOX: Mr. Goodiel,
15 did you have any follow-ups at this point?

16 MR. GOODIEL: No. Thank you.

17 HEARING OFFICER FOX: Mr. Albarracin,
18 if I may elaborate on that point a little bit,
19 you have cited some helpful factors that are in
20 Subsection (d). Is it the Agency's position
21 that those factors are to be applied by the
22 owner/operator and consultant or by the Agency
23 in reviewing bids?

24 I guess my question is at

1 what point those factors are applied against
2 a prospective bidder's business background?

3 MR. ALBARRACIN: Our position is
4 that these are factors to be applied by the
5 owner/operator or their agent, in this case, a
6 consultant.

7 HEARING OFFICER FOX: Very good.
8 Thank you.

9 Were there additional questions
10 for Mr. Smith on the basis of his testimony? I'm
11 not seeing any. Did the Board members have any
12 questions at all?

13 Mr. Smith, I've got about three
14 questions, most of which are in the nature of a
15 clarification if I could --

16 MR. SMITH: Okay.

17 HEARING OFFICER FOX: -- have your
18 patience in running through those.

19 You, under Section 734.210,
20 pertaining to early action, your pre-filed
21 testimony notes an expectation that some additional
22 time will be needed for reporting -- the reporting
23 responsibility, especially finding and explaining a
24 release in a local jurisdiction for the authority

1 that has jurisdiction at the local level.

2 Can you provide any estimate
3 on how much additional time you would expect to
4 be required to meet those requirements?

5 MR. SMITH: I think that's part of
6 our quandary on that issue. You know we are
7 required to notify the local jurisdiction of
8 this -- of a release. Their response to that
9 is going to be varied. If you're talking about
10 a major metropolitan area that has some sort
11 of an emergency response team in place or whatever,
12 it's probably very minimal. You notify them. I
13 have this release. I don't need any help.
14 Everything is, you know, under control. We're going
15 to proceed under this program.

16 You get to a rural community
17 that's never experienced this type of thing before.
18 Suddenly, we're calling them and, you know, the
19 horns go off and the trucks start showing up or
20 they're calling every week to say, okay, where
21 are we now? I think that's where it becomes
22 virtually impossible for us to project how much
23 this would impact.

24 HEARING OFFICER FOX: Okay. I

1 want to move on, if I could. This is the
2 subject that has come up, at least to some extent,
3 Section 734.360, TACO provisions. Your pre-filed
4 testimony on Pages 6 and 7 refers to your concern
5 that a client has been "trapped" by some of the
6 provisions of the public act that you're addressing
7 here.

8 Can you explain perhaps in
9 some more detail how that public act has affected
10 your client and specifically why the remediation
11 of the contaminated on-site soil is impossible to
12 remediate?

13 MR. SMITH: In the site that is
14 specifically coming to mind, there was a facility
15 that had two different tank fields. That's kind
16 of a -- if you want to call it a three-tiered
17 area. The top had one station, the second tier
18 had a station, the third and lowest evident tier
19 is an off-site, currently farm field.

20 Over the years, both tank
21 fields had releases. The releases were reported.
22 We did the early action. We did the investigation.
23 The contamination went down the hill and out onto
24 the farm field. There was minimal soil

1 contamination in the farm field. There was pretty
2 substantial groundwater contamination.

3 With applying a groundwater
4 use restriction to the on-site facility, applying
5 Tier 2 industrial commercial, because that's what
6 the facility is, restrictions to the property
7 basically means that there is no soil contamination
8 on the facility itself that requires remediation.

9 We get to the off-site property
10 and suddenly we're back to the Tier 1 -- this
11 whole thing is actually part of a lawsuit involving
12 the off-site owner suing the on-site estate of the
13 property. They want it cleaned up. However, with
14 the way this is written, we could go in and propose
15 to do something off-site. Clean -- take out the
16 contaminated soil, clean up the contaminated
17 groundwater, but that doesn't prevent it from just
18 immediately recurring as soon as we walk away from
19 it.

20 Obviously, to just stop -- to
21 stop it from happening again or continuing, we
22 need to do something on-site to prevent it from
23 continuing off-site and this is exactly the type
24 of situation that we are trying to address.

1 We just -- we need to know
2 a procedure or policies, whatever, so that we can
3 propose something that the Agency will accept
4 without saying, well, how about this? No. Let's --
5 you know, how about this? No. That costs a lot of
6 money.

7 HEARING OFFICER FOX: I have actually
8 just one more question, Mr. Smith. This is based
9 on 734.632 costs incurred after the issuance of an
10 NFR letter.

11 Your pre-filed testimony
12 proposed a new Subsection (f) here, F as in Frank,
13 that regards consulting fees for additional site
14 investigation and corrective action.

15 Can you comment based on your
16 own experience -- typical experience regarding
17 the payment of those consulting fees as part of
18 an audit or property transaction? In other words,
19 would those specifically, those payments, come
20 from a buyer, a seller, the fund or from some
21 fourth party?

22 MR. SMITH: Well, I guess we're trying
23 to define whether or not these come from the fund
24 and based on the testimony we heard previously, it

1 does not sound like they're coming from the fund.

2 However, if there's a piece of
3 property that is putting in a new waterline, needs
4 to add a tank to sell P85 or whatever, at a site
5 that has an NFR, but has the NFR with the industrial
6 commercial or the groundwater use restriction,
7 whatever, and you're going to generate soil from
8 there, I can't imagine that the Agency wants to
9 just say, okay, you put in this 5,000-gallon tank,
10 from that, you generated X-cubic yards of soil,
11 the site was contaminated at one time, we'll just
12 pay for the disposal of that as contaminated waste.

13 I would assume there would be
14 some investigation. Is the soil still contaminated?
15 How contaminated is it? Could it be used in some
16 other way? Then it brings in consulting fees.
17 And if so, you know, why aren't these a part of
18 the regulations.

19 HEARING OFFICER FOX: Mr. Smith,
20 thank you. That exhausts the questions that I
21 had, but I see Mr. Albarracin has a question and
22 please go ahead.

23 MR. ALBARRACIN: Mr. Smith, could
24 you provide the details on the site that you were

1 talking about previously, the one with the on-site
2 versus off-site contamination situation?

3 What site -- do you recall what
4 that site is?

5 MR. SMITH: It's the Hess estate.
6 It's -- the address, I believe, Morine, Illinois.

7 MR. ALBARRACIN: Thank you.

8 MR. SMITH: Uh-huh.

9 HEARING OFFICER FOX: I see
10 Mr. Goodiel has a follow-up question.

11 MR. GOODIEL: I know Hernando has
12 addressed this earlier. I assume CW3M was under
13 the same assumptions as far as the abandonment
14 policy and reimbursement under T and M like
15 Hernando had said.

16 Could you -- I guess I didn't
17 see that proposed and I assume that they didn't
18 either since that was in their pre-filed. Is
19 there somewhere where that is spelled out in your
20 proposal?

21 MR. ALBARRACIN: If you look in
22 the statement of reasons items on Page No. 9 --
23 I'm sorry -- Page No. 6, Item 9, a little bit
24 halfway down the page.

1 MR. GOODIEL: Okay. Okay. Thank
2 you.

3 HEARING OFFICER FOX: Okay.

4 MR. ROWE: What number was that?

5 MR. GOODIEL: Page 6, Item 9.

6 HEARING OFFICER FOX: Do we have any
7 additional questions for Mr. Smith this afternoon?

8 BOARD MEMBER MOORE: I'm sorry
9 that I don't understand this as well as I should,
10 but just bear with me here. So the individual
11 that you're talking about that's going to put
12 in the additional tank on a site -- an industrial
13 that has been cleaned up with an NFR letter and
14 cleaned up to the standards required, so you
15 dig up a certain amount of dirt, which is still
16 somewhat contaminated because it's not cleaned up
17 to the standards of the industrial site, right?

18 MR. SMITH: Correct.

19 BOARD MEMBER MOORE: I understand
20 that correctly. Okay. When they remove the dirt
21 where the tank is going to go, that is not eligible
22 for any kind of cleanup reimbursement?

23 MR. SMITH: The soil disposal would
24 be eligible for reimbursement.

1 BOARD MEMBER MOORE: But the
2 consulting fee and the -- the consulting fee is
3 the only thing that is not eligible? That's the
4 question.

5 MR. SMITH: I guess that's our
6 question. Just because a site has an NFR that
7 has Tier 2 restrictions does not mean the entire
8 site is contaminated and depending how long it's
9 been since it's received it's NFR, the last time
10 the soil was tested, I mean, mother nature does --

11 BOARD MEMBER MOORE: Right.

12 MR. SMITH: -- continue to clean
13 things up. I can't imagine that we would want
14 to just take what is clean or clean enough soil
15 and just take it to the landfill without checking
16 first.

17 MS. ROWE: We have to.

18 MR. SMITH: We have to. I mean,
19 whether you're going to take it there or not --
20 because the landfill typically won't take something
21 without knowing what is coming.

22 BOARD MEMBER MOORE: So those testing
23 costs and the consulting costs are the items that
24 are not eligible?

1 MR. SMITH: As we understand it, yes.

2 BOARD MEMBER MOORE: The disposal --

3 MR. SMITH: The disposal itself is.

4 BOARD MEMBER MOORE: -- is.

5 Well, isn't the disposal costs
6 significantly different when it's contaminated
7 versus not?

8 MR. SMITH: Yes, but they would assume
9 that it's contaminated.

10 BOARD MEMBER MOORE: So that would
11 be the cost?

12 MR. SMITH: So that would be the cost.
13 Whether it truly is or not --

14 BOARD MEMBER MOORE: So there is
15 some chance that the cost could be less if it were
16 tested?

17 MR. SMITH: Correct.

18 BOARD MEMBER JOHNSON: What you're
19 saying is you're forced to make a business decision
20 to throw away potentially clean soil in an area to
21 satisfy the contaminated soil?

22 MR. SMITH: Or with some
23 investigation, maybe you could locate the tank
24 to another area of the site and not even have to go

1 through this whole process.

2 HEARING OFFICER FOX: Mr. Albarracin,
3 please?

4 MR. ALBARRACIN: Sure. We're
5 talking about a site that received an NFR letter.
6 Therefore, there would be data from that previous
7 investigation that could be used to determine
8 are we in a contaminated area or not or how
9 contaminated it was and that kind of thing.

10 BOARD MEMBER MOORE: Thank you.

11 HEARING OFFICER FOX: Mr. Goodiel,
12 you have a follow-up?

13 MR. GOODIEL: If it is in a
14 contaminated area, what I understand is, it's the
15 disposal only. So you've still got some consulting
16 in some trucking, transportation. You've got
17 excavation costs involved in that. And as I
18 understand it, again, just to reiterate, those
19 costs would not be reimbursable. The cost of
20 getting it to the landfill, the cost of profiling
21 into the landfill, excavation of that soil, those
22 costs would be --

23 MR. ALBARRACIN: That's correct. Only
24 disposal costs would be covered.

1 HEARING OFFICER FOX: Mr. King,
2 it looks likes you had a question or a comment?

3 MR. KING: Well, we saw the testimony
4 as it was presented and we understand the issues
5 being presented. We have always -- as we have
6 gone through these regulatory processes, we have
7 always considered that the testimony we would
8 hear, we should consider whether that makes sense
9 to revisit the proposal that we have.

10 I think in this case, it's
11 appropriate for us revisit where we're at on
12 this and then get back to the Board at the next
13 hearing.

14 BOARD MEMBER MOORE: I think
15 that's excellent and Mr. Smith, if you want
16 to make yourself available, that would help.

17 MR. SMITH: Sure. What I would
18 like to add to that is if you're going to do this
19 waterline replacement or this tank installation or
20 whatever, you're going to dig a hole, you're going
21 to have soil to get rid of regardless. I don't --
22 I don't necessarily agree that those costs need to
23 be reimbursed because it's a decision I'm going to
24 add a tank and when I add a tank, I know I have to

1 dig a hole.

2 BOARD MEMBER MOORE: Right.

3 MR. SMITH: I know I'm going to have
4 soil to get rid of. However, the disposal is the
5 big -- the big issue there. I was forced to leave
6 this behind before and now, you know, now I have
7 to -- I incur extra costs by closing it prior to
8 this.

9 BOARD MEMBER MOORE: We're going
10 to look at it. Thank you.

11 MS. ROWE: Yes. Thank you.

12 HEARING OFFICER FOX: Were there any
13 further questions for Mr. Smith?

14 Neither seeing nor hearing any
15 from the participants or any sign that the Board
16 members do, why don't we go off the record very
17 quickly and we can take care of a quick procedural
18 issue or two.

19 (Whereupon, a discussion
20 was had off the record.)

21 HEARING OFFICER FOX: In going off
22 the record quickly, the participants did take up
23 a couple of quick procedural issues.

24 Specifically, those issues were

1 relating to our second hearing. The second hearing
2 in this docket has now been scheduled to take place
3 on Thursday, June 2nd (sic), beginning at 1:00 p.m.
4 in Chicago with a deadline of Thursday, June 2,
5 2011, both, A) to pre-file testimony for that
6 hearing and B) to respond in writing with the
7 post-hearing comment issues that have arisen in the
8 course of this first hearing.

9 Both Smith and Mr. Rominger,
10 on behalf of the Agency, have agreed to submit
11 written post-hearing comments.

12 BOARD MEMBER JOHNSON: The hearing
13 is on the 16th.

14 HEARING OFFICER FOX: That is correct.

15 BOARD MEMBER MOORE: Yes. You said
16 June 2nd.

17 HEARING OFFICER FOX: I am sorry to
18 have misspoken. The deadline of June 2nd applies
19 to pre-filing testimony for a hearing that begins
20 on Thursday, June 16th.

21 BOARD MEMBER MOORE: There you go.

22 HEARING OFFICER FOX: Thank you.

23 The copies of the transcript to today's hearing
24 should be available no later than Friday, May 20th,

1 and as soon as possible after the Board receives
2 its copy of the transcript, it will post that to
3 the clerk's office online or pool under this Docket
4 R11-22.

5 From that site, it can be viewed,
6 printed and downloaded and then printed free of
7 charge by any of you who would wish to take a look
8 at that.

9 In addition, anyone may file
10 written public comments with the clerk of the
11 Board. Those may be filed through the clerk's
12 office online and questions about that possibility
13 should be directed to our clerk's office.

14 Does anyone have any questions
15 about procedural aspects before we adjourn?

16 I thank all of you for your
17 patience and for your testimony in responses to
18 questions. We are adjourned and we will see
19 many of you, I'm sure, on June 16th. Thank
20 you.

21 BOARD MEMBER MOORE: Thank you
22 all.

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(Whereupon, the proceedings
were adjourned, to be
reconvened on Thursday, June
16, 2011, at 1:00 a.m.)

1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF C O O K)
4
5

6 I, LORI ANN ASAUSKAS, CSR, RPR,
7 do hereby state that I am a court reporter doing
8 business in the City of Chicago, County of Cook,
9 and State of Illinois; that I reported by means
10 of machine shorthand the proceedings held in the
11 foregoing cause, and that the foregoing is a true
12 and correct transcript of my shorthand notes so
13 taken as aforesaid.

14

15

16

Lori Ann Asauskas

17

Lori Ann Asauskas, CSR, RPR.

18

Notary Public, Cook County, Illinois

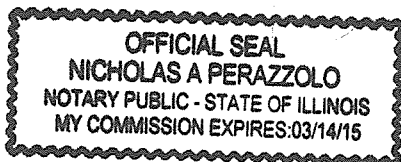
19

20 SUBSCRIBED AND SWORN TO
21 before me this 17th day
22 of May, A.D., 2011.

22

Nicholas Perazzo
23 Notary Public

24



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
UNDERGROUND STORAGE TANKS)	
(35 ILL. ADM. CODE 731) AND)	
PETROLEUM LEAKING)	R 11-22
UNDERGROUND STORAGE TANKS)	(Rulemaking – Land)
(35 ILL. ADM. CODE 732 AND 734))	

NOTICE OF FILING

To:

Clerk
 Illinois Pollution Control Board
 James R. Thompson Center
 100 West Randolph Street, Suite 11-500
 Chicago, Illinois 60601

Timothy Fox, Hearing Officer
 Illinois Pollution Control Board
 James R. Thompson Center
 100 West Randolph Street, Suite 11-500
 Chicago, Illinois 60601

Division Chief of Environmental Enforcement
 Office of the Attorney General
 100 West Randolph St., Suite 1200
 Chicago IL 60601

Office of Legal Services
 Illinois Department of Natural Resources
 One Natural Resources Way
 Springfield IL 62702-1271

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S SUBMISSION OF PRE-FILED TESTIMONY, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
 PROTECTION AGENCY

By: *Kyle Rominger*
 Kyle Rominger
 Deputy General Counsel

Dated: 4-22-11
 1021 North Grand Avenue East
 P.O. Box 19276
 Springfield, Illinois 62794-9276
 (217) 782-5544

R11-22
 EXH. 1
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 5-10-11

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

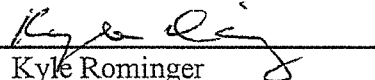
IN THE MATTER OF:)
)
UNDERGROUND STORAGE TANKS)
(35 ILL. ADM. CODE 731) AND)
PETROLEUM LEAKING) R 11-22
UNDERGROUND STORAGE TANKS) (Rulemaking – Land)
(35 ILL. ADM. CODE 732 AND 734))
)

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
SUBMISSION OF PRE-FILED TESTIMONY

NOW COMES the Illinois Environmental Protection Agency (Illinois EPA) and, pursuant to the Hearing Officer's Order of March 17, 2011, submits the pre-field testimony of Hernando Albarracin, a copy of which is attached.

In its March 17, 2011, Order accepting the Illinois EPA's proposal for hearing the Board requested that the Illinois EPA address the "published study or research report" requirement of 35 Ill. Adm. Code 102.202(e). The Illinois EPA did not use a published study or research report in developing the proposed amendments, and therefore did not submit any information pursuant to 35 Ill. Adm. Code 102.202(e).

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Kyle Rominger
Deputy General Counsel

Dated: 4-22-11
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
UNDERGROUND STORAGE TANKS)
(35 ILL. ADM. CODE 731) AND)
PETROLEUM LEAKING) R 11-22
UNDERGROUND STORAGE TANKS) (Rulemaking – Land)
(35 ILL. ADM. CODE 732 AND 734))
)

TESTIMONY OF HERNANDO ALBARRACIN IN SUPPORT OF
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S PROPOSAL

My name is Hernando Albarracin. I am the Manager of the Leaking Underground Storage Tank ("LUST") Section for the Bureau of Land at the Illinois Environmental Protection Agency ("Illinois EPA"). The principal function of the Section is to oversee the cleanups of federally regulated releases from underground storage tanks in Illinois. I have been in my current position since April 2008. Prior to assuming my current position, I was a Unit Manager in the LUST Section beginning in January 1996. Prior to assuming that position, I was a permit reviewer in the Permit Section for the Bureau of Land beginning in April 1989.

I received a B.S. in Mining Engineering in 1986 from Southern Illinois University at Carbondale. My resume is attached. Today, I will be testifying in support of amendments to the Pollution Control Board ("Board") rules governing the Illinois EPA's LUST Program.

House Joint Resolution 39 created the Underground Storage Tank (UST) Task Force to study the significant problems that the UST Fund faces and to suggest a new approach to determine how money in the UST Fund will be used to pay for corrective action costs in addressing petroleum releases at sites and to study ways to monitor and control the costs of cleanup of leaking UST sites. The task force was comprised of two members from the House; two from the Senate; one each from the Illinois EPA, Office of State Fire Marshal, Illinois

action activities shall include an expanded use of the Tiered Approach to Corrective Action Objectives rules.

2. Any bidding process adopted under Illinois Pollution Control Board rules to determine the reasonableness of costs of corrective action must provide for a publicly-noticed, competitive, and sealed bidding process that is, among other things, optional and allows bidding only if the owner or operator demonstrates that corrective action cannot be performed for less than the maximum payment amounts at 35 Illinois Administrative Code 734.Subpart H.

3. Title XVI of the Environmental Protection Act applies to all releases for which a No Further Remediation (NFR) Letter is issued on or after June 8, 2010, provided that (1) 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 (2) releases for which corrective action was completed prior to June 8, 2010, shall be eligible for a NFR Letter in the same manner as allowed under the law in effect at the time the corrective action was completed.

4. If a change in State or federal law requires additional remedial action in response to releases for which NFR Letters have been issued, the Illinois EPA shall propose in the next convening of a regular session of the current General Assembly amendments to Title XVI to allow owners and operators to perform the additional remedial action and seek payment from the UST Fund for the costs of the action.

This concludes my testimony.

- coordinated Site Remediation Program activities for the Leaking Underground Storage Tank Section;
- managed special projects, such as the remediation of abandoned gas stations funded by U.S. EPA grants, for the Leaking Underground Storage Tank Section;
- responded to oral and written inquiries, including inquiries of a controversial or sensitive nature;
- spoke at Illinois Brownfields Conferences and other public forums regarding the remediation of underground storage tank releases;
- translated Illinois EPA documents to Spanish to assist Hispanic communities in Illinois with environmental issues; and
- coordinated and facilitated the development of Leaking Underground Storage Tank Section documents for posting on the Internet.

Illinois Environmental Protection Agency, Springfield, Illinois – 1989-1996

Environmental Protection Engineer

As permit engineer in the Permit Section,

- reviewed hazardous waste management permit applications for compliance with the Resource Conservation and Recovery Act and Illinois regulations;
- attended inspections of hazardous waste management facilities in Illinois;
- attended public hearings concerning the issuance of RCRA permits;
- responded to oral and written inquiries regarding hazardous waste management regulations in Illinois;
- completed continuing education courses related to hazardous waste management;
- translated Illinois EPA documents to Spanish to assist Hispanic communities in Illinois with environmental issues; and
- assisted with the training of new employees.

Southern Illinois University, Carbondale, Illinois – 1988-1989

Researcher I

As researcher in the Department of Mining Engineering,

- performed work on rock mechanics research projects in the Department of Mining Engineering;
- conducted experiments in the laboratory and analyzed data;
- installed instrumentation in Illinois coal mines and monitored data; and
- assisted with writing of reports to project sponsors.

Southern Illinois University, Carbondale, Illinois – 1986-1988

Graduate Assistant

Conducted research on rock mechanics and ground control in the Department of Mining Engineering, utilizing finite element computer software while pursuing a master's degree.

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Pre-Filed Testimony of the Illinois Environmental Protection Agency to whom they are directed, by placing a copy of each in an envelope addressed to:

John Therriault, Assistant Clerk
Pollution Control Board
James R. Thompson Center
100 W. Randolph, Ste. 11-500
Chicago, Illinois 60601
(Via First Class)

Timothy Fox, Hearing Officer
Pollution Control Board
James R. Thompson Center
100 W. Randolph, Ste 11-500
Chicago, Illinois 60601
(Via First Class)

Division Chief of Environmental
Enforcement
Office of the Attorney General
100 W. Randolph, Ste 1200
Chicago, IL 60601
(Via First Class)

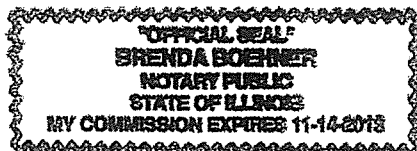
Office of Legal Services
IL. Dept of Natural Resources
One Natural Resources Way
Springfield, IL 60601
(Via First Class)

See Attached Service List
(Via First Class)

and mailing them (First Class Mail) from Springfield, Illinois on 4-22-11, with sufficient postage affixed as indicated above.

Wanda McClenden

SUBSCRIBED AND SWORN TO BEFORE ME
This 22nd day of April, 2011
Brenda Boehner
Notary Public



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	

Service List			
Party Name	Address	City/State/Zip	Phone/Fax
Office of the Attorney General Interested Party • Matthew J. Dunn	69 West Washington Street, Suite 1800	Chicago IL 60602	312-814-2634 312-814-2347
IEPA Petitioner • Gary P. King - Assistant Counsel • Kyle Rominger - Assistant Counsel • Hernando Albarran	1021 North Grand Avenue East P.O. Box 19276	Springfield IL 62794-9276	217/782-5544 217/782-9807
Sidley Austin LLP Interested Party • William G. Dickett	One South Dearborn Suite 900	Chicago IL 60603	312/853-7000 312/853-7036
Illinois Petroleum Marketers Association Interested Party • Bill Fleischi	112 West Cook Street	Springfield IL 62704	217/793-1858
Illinois Environmental Regulatory Group Interested Party • Alec Messina	215 East Adams Street	Springfield IL 62701	217/522-5512 217/522-5518
Chemical Industry Council of Illinois Interested Party • Lisa Frede	1400 East Touhy Avenue Suite 110	DesPlaines IL 60019-3338	

<u>Rapps Engineering & Applied Science</u> Interested Party	621 South Durkin Drive P.O. Box 7349	Springfield IL 62791-7349	217/787-2118 217/787-6641
<ul style="list-style-type: none"> • Michael W. Rapps 			
<u>Illinois Pollution Control Board</u> Interested Party	100 W. Randolph St. Suite 11-500	Chicago IL 60601	312/814-3620 312/814-3669
<ul style="list-style-type: none"> • - Clerk of the Board • Tim Fox - Hearing Officer 			
<u>Illinois Department of Natural Resources</u> Interested Party	One Natural Resources Way	Springfield IL 62702-1271	217/782-1809 217/524-9640
<ul style="list-style-type: none"> • Virginia Yang - Deputy Legal Counsel 			
<u>Illinois Society of Professional Engineers</u> Interested Party	100 East Washington	Springfield IL 62704	217-544-7424 217-525-6545
<ul style="list-style-type: none"> • Kim Robinson • Brittan Bolin 			
<u>Village of Niles</u> Interested Person	1000 Civic Center Drive	Niles IL 60714	
<ul style="list-style-type: none"> • Joseph J. Annunzio 			
Total number of participants: 11			

Notice List			
<u>Party Name</u>	<u>Address</u>	<u>City/State/Zip</u>	<u>Phone/Fax</u>
<u>Deuchler Environmental, Inc.</u> Interested Party	230 Woodlawn Avenue	Aurora IL 60506	630-897-8380
<ul style="list-style-type: none"> • Carrie Carter 			
<u>Illinois Petroleum Council</u> Interested Party	400 W. Monroe	Springfield IL 62704	
<ul style="list-style-type: none"> • Dave Sykuta 			
Total number of participants: 2			

Scheduled Hearings		
<u>Hearing Date/Time</u>	<u>Location</u>	<u>City & State</u>
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



HJ0039 Engrossed

LRB096 12039 JDS 23932 r

1 HOUSE JOINT RESOLUTION 39

2 WHEREAS, In 1993, Public Act 88-496 established the Leaking
3 Underground Storage Tank (LUST) program; and

4 WHEREAS, The purpose of the LUST program is, in accordance
5 with the requirements of the Federal Hazardous and Solid Waste
6 Amendments of 1984 of the Resource Conservation and Recovery
7 Act of 1976 and in accordance with the State's interest to
8 protect the environment, to establish procedures for the
9 remediation of environmental contamination caused by leaking
10 underground storage tanks; to oversee and review any required
11 remediation of sites containing those tanks; to establish an
12 Underground Storage Tank Fund to satisfy the financial
13 responsibility requirements imposed by federal and State laws
14 and regulations; and to establish procedures for persons
15 eligible to seek payment from the Fund for costs associated
16 with remediation; and

17 WHEREAS, Illinois motor fuel taxes and environmental
18 impact fees have financed the Fund; and

19 WHEREAS, Over the course of its operation, the Fund has
20 paid over \$1 billion for eligible environmental clean-ups; and

21 WHEREAS, During this period, the Fund has twice experienced

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1 funding shortages, the current shortage requiring applicants
2 for reimbursement to wait up to 18 months for payment; and

3 WHEREAS, There is currently a backlog of unpaid claims
4 totaling \$62 million; and

5 WHEREAS, If the Fund is not solvent, Illinois tank owners
6 and operators will be forced to find more costly methods to
7 satisfy their financial responsibility obligations under
8 federal and State laws and regulations; and

9 WHEREAS, The Illinois Environmental Protection Agency
10 estimates under the current system a future liability of \$864
11 million to clean up projected 6500 leaking underground storage
12 tank sites in Illinois over the next 20 years; and

13 WHEREAS, Under the current system, the existing funding
14 sources will not be sufficient to keep up with the costs; and

15 WHEREAS, The cost of an average leaking underground storage
16 tank site where costs are reimbursed from the Fund is
17 significantly higher than in other states; and

18 WHEREAS, Current law does not contain adequate methods for
19 monitoring and controlling costs at leaking underground
20 storage tank sites where costs are reimbursed from the Fund;

1 and

2 WHEREAS, The General Assembly finds that it is necessary to
3 form a Task Force to study the significant problems that the
4 Fund currently faces; therefore, be it

5 RESOLVED, BY THE HOUSE OF REPRESENTATIVES OF THE
6 NINETY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE
7 SENATE CONCURRING HEREIN, that there is created an Underground
8 Storage Tank Task Force to study the significant problems that
9 the Underground Storage Tank Fund faces and to suggest a new
10 approach to determine how moneys in the Fund will be used to
11 pay for corrective action costs in addressing petroleum
12 releases at sites and to study ways to monitor and control the
13 costs of clean-up of leaking underground storage tank sites;
14 and be it further

15 RESOLVED, That the Task Force shall consist of 11 members
16 appointed as follows:

17 (1) One person appointed by the Speaker of the House,
18 who shall serve as cochairman of the Task Force;

19 (2) One person appointed by the Minority Leader of the
20 House;

21 (3) One person appointed by the President of the
22 Senate, who shall serve as cochairman of the Task Force;

23 (4) One person appointed by the Minority Leader of the

1 Senate;

2 (5) The Director of the Illinois Environmental
3 Protection Agency, or his or her representative;

4 (6) One person representing the Office of the State
5 Fire Marshall;

6 (7) One person, designated by the President of a
7 petroleum marketers' association in Illinois;

8 (8) One person, designated by the Director of the
9 Illinois Environmental Protection Agency, of a petroleum
10 council in Illinois;

11 (9) One person, designated by the Director of the
12 Illinois Environmental Protection Agency, of an
13 association of petroleum and environmental engineers in
14 Illinois;

15 (10) One person, designated by the Director of the
16 Illinois Environmental Protection Agency, of an
17 association of convenience stores in Illinois;

18 (11) One person, designated by the Director of the
19 Illinois Environmental Protection Agency, of a council of
20 engineering companies in Illinois; and be it further

21 RESOLVED, That the approaches studied by the Task Force
22 shall include, but shall not be limited to, the following:

23 (1) In order to prevent the recurrence of a backlog of
24 unpaid claims, requiring that the total costs approved for
25 reimbursement from the Fund not exceed the monies in the

1 Fund available to pay the costs;

2 (2) Requiring that costs reimbursed from the Fund be
3 minimized to the greatest extent practicable, including,
4 but not limited to, utilization of the Illinois Pollution
5 Control Board's risk-based corrective action rules to the
6 greatest extent practicable;

7 (3) Requiring that costs that will be reimbursed from
8 the Fund be pre-approved by the State before they are
9 incurred;

10 (4) Prioritizing approvals of costs that will be
11 reimbursed from the Fund so that (1) sites posing a greater
12 threat to human health and the environment receive higher
13 priority than sites posing a lesser threat to human health
14 and the environment, and (2) sites with operating
15 underground storage tanks at the time of the release
16 receive higher priority than sites without operating
17 underground storage tanks at the time of the release;

18 (5) Competitive bidding of costs that will be
19 reimbursed from the Fund, with such bidding including, but
20 not being limited to, public notice of bid proposals; and
21 be it further

22 RESOLVED, That the Illinois Environmental Protection
23 Agency shall provide staff and support for the Task Force; and
24 be it further

1 RESOLVED, That the members of the Task Force shall receive
2 no compensation for serving as members of the Task Force; and
3 be it further

4 RESOLVED, That the Task Force shall make its
5 recommendations on proposed solutions to the significant
6 problems facing the Leaking Underground Storage Tank Program
7 and Fund and shall submit a report of its findings to the
8 Governor and the General Assembly by December 31, 2009.

Underground Storage Tank Task Force - Members' Contact Information - October 2009

Appointed by	Name	Title	Address	City, State	ZIP Code	Phone No.	E-mail Address
Speaker of the House	Representative Thomas "Tom" Holbrook		9200 W. Main, Suite 4	Belleville, IL	62223	(618) 394-2211	holbrookta@ilga.gov
Minority Leader of the House	Representative John D. Cavaletto		1370 W. Main St., Suite A, Box 1264	Salern, IL	62881	(618) 548-9080	john@johncavaletto.com
President of the Senate	Senator William R. "Bill" Haine		307 Henry St., Suite 210	Alton, IL	62002	(618) 465-4764	senhaine@cdnstl.com
Minority Leader of the Senate	Senator John O. Jones		2929 Broadway, Suite 5	Mt. Vernon, IL	62864	(618) 242-9511	johnojones@sbcglobal.net
Illinois EPA	Lisa Bonnett	Acting Deputy Director	1021 North Grand Ave. East, P.O. Box 19276	Springfield, IL	62794-9276	(217) 782-9196	lisa.bonnett@illinois.gov
Office of the State Fire Marshal	Scott Johnson	Northern Regional Administrator	James R. Thompson Center, 100 W. Randolph St., Suite 4-600	Chicago, IL	60601	(217) 720-8132	scott.johnson@illinois.gov
Illinois Petroleum Marketers Association/ Illinois Association of Convenience Stores	Mark Bayley	Martin and Bayley Inc.	928 County Road 1350 N.	Carmi, IL	62821	(618) 382-2334 Ext. 260	bayley@martinandbayley.com
	Jon Stewart	Tri-Star Marketing	2211 W. Bradley	Champaign, IL	61821	(217) 367-8386 Ext. 113	reneeral@trism.net
	Carl Adams	Illinois Avers Oil Co.	Box 772	Quincy, IL	62306	(217) 434-8662	carl@averco.com
	Jerry Huot	Baron-Huot Oil Co.	P.O. Box 517	Bradley, IL	60915	(815) 933-3365	jerry@huotoll.com
Illinois Petroleum Council	Dan Eichholz	Associate Director	400 W. Monroe St., Suite 205	Springfield, IL	62704	(217) 544-7404	eichholz@apl.org
Professionals of Illinois for Protection of the Environment	Carol Rowe, P.G.	President, CW3M Company	701 W. South Grand Avenue	Springfield, IL	62704	(217) 522-8001	carol_rowe@sbcglobal.net
American Council of Engineering Companies of Illinois	Andrew Rath sack	President, Andrews Engineering Inc.	3300 Ginger Creek Dr.	Springfield, IL	62711-9405	(217) 787-2334	arathsack@andrews-eng.com

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ILLINOIS POLLUTION CONTROL BOARD

March 17, 2011

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 CW³M 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 CW³M 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 CW³M 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, CW³M 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 CW³M 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

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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 CW³M 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 CW³M'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.~~

CW³M 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 Practice 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.~~

CW³M Company agrees with the change from the 1993 version of the D2487 Method to the 2010 version of the D2487 Method. CW³M 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)

CW³M 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. CW³M 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. CW³M does not agree with the extra reporting as 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.

CW³M 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, CW³M 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 of 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 where the entire Early Action analytical report has been available for submittal with the 45-Day Report. At the least, 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. 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". CW³M 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 CW³M 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 CW³M 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;

CW³M 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.

CW³M 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.

CW³M 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), CW³M 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

Notwithstanding 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 Remediation 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 residential 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 CW³M'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. CW³M 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.

CW³M 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 alteration 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 measurable. 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.~~

CW³M 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 would 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. CW³M requests that the IEPA make known the number of successful bidding processes that have taken place since Public Act 96-908 went into effect. CW³M 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 not 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 or 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.