ILLINOIS POLLUTION CONTROL BOARD

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

ADDITIONAL COMMENTS FROM CW^{3}M COMPANY, INC. FOR THE ILLINOIS POLLUTION CONTROL BOARD'S 1ST NOTICE OF AMENDMENTS TO 35 ILL. ADM. CODE 732 AND 734

As a summarization of what has happened from the initial filing of the proposed amendments through the second hearing on the issue, CW^{3}M Company offers the following list of recommended changes or the preferred language to be considered by the Board for adoption as amendments to 35 Ill. Adm. Code 732 & 734. Following this list is a commentary on each of the items where changes to the regulations were proposed by the Agency.

Section 734.210 Early Action

a) (1) Immediately report ~~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)~~

c) Within 20 days after initial notification to IEMA of a release plus 14 ~~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.

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

g) For purposes or payment from the Fund, the activities set forth in subsection (f) of this Section (f) of this Section must be performed within 45 days after initial notification to IEMA or a release plus 14 ~~7~~ ~~14~~ days, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days plus 14 ~~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 14 ~~7~~ ~~14~~ days. Costs incurred beyond 45 days plus 14 ~~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 14 ~~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.

CW^{3}M Comments

The double underlined text in Section 734.210(c), (d), (e), and (f) represent the proposed language by CW^{3}M Company. The single underline, strikethrough text represents the original proposed language by the IEPA. The non-underlined, strikethrough represents the current regulations.

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, *provided that the Agency* ***shall allow*** *remediation to the extent necessary to remediate or prevent groundwater contamination at off-site property that is not subject to a groundwater ordinance already approved by the Agency for use as an institutional control.*

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, *provided that the Agency* ***shall allow*** *remediation to the extent necessary to remediate or prevent groundwater contamination at an off-site property that is not subject to a groundwater ordinance or other institutional control that is used to address groundwater contamination.* 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.

CW^{3}M Comments

CW^{3}M recommends in Section 734.360(c) and (d) that "may approve" be changed to "shall allow." The double underlined text was proposed by the IEPA in the post-hearing comments after the first hearing. The only changes made by CW^{3}M Company are in double underlined and bold text, and are mentioned above.

Section 734.630 Ineligible Corrective Action Costs

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.

Board Note: Subsection (ddd) does not prohibit the payment of costs associated with remediation approved by the Agency pursuant to subsection 734.360(c) or (d) to remediate or prevent groundwater contamination at 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.

Board Note: Subsection (eee) does not prohibit the payment of costs associated with remediation approved by the Agency pursuant to subsection 734.360(c) to remediate or prevent groundwater contamination at an off-site property.

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.

Board Note: Subsection (fff) does not prohibit the payment of costs associated with remediation approved by the Agency pursuant to subsection 734.360(d) to remediate or prevent groundwater contamination at an off-site property.

CW^{3}M Comments

The above Board Notes were recommended by the IEPA in the Agency's June 2, 2011, post-hearing comments. CW^{3}M Company, Inc. agrees with the addition of the Board Notes.

Section 734.632 Eligible Corrective Action Costs Incurred After NFR Letter

Notwhithstanding subsections (gg) and (nn) of Section 734.630 of this Part, *[t] following shall be considered corrective action activities eligible for payment from the Fund even when an owner or operator conducts these activities after the issuance of a No Further 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.* Costs eligible for payment under this subsection (d) are the costs to transport the soil to a properly permitted disposal site and disposal site fees. Disposal site fees include, but are not limited to, personnel and materials to complete the following: disposal site waste characterization sampling, disposal site authorization and coordination, scheduling, field oversight, disposal site charges, reimbursement preparation and certification.

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 corrective action conducted pursuant to subsections (a), (b), and (c) of this Section. Consulting fees associated with 734.632 (d) are limited to disposal site fees activities. Consulting fees shall be subject to Subpart H of this Part.

CW^{3}M Comments

CW^{3}M has proposed the single underlined, non-italicized text found in 734.632(d) and (f). Original language proposed by the IEPA after the first Hearing is indicated by double underlining. Our attempt is to limit the scope of consulting fees for soil disposal to a narrower range.

Section 734.810 UST Removal and Abandonment

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.
>
> BOARD NOTE: Payment for the Costs associated with the abandonment of each UST must be paid on a time and materials basis.

CW^{3}M Comments

CW^{3}M Company recommends the addition of the Board Note to Section 734.810.

Detailed Explanations of Each Originally Proposed Change or Addition

1. Section 734.100 Plans & Budgets Approved Prior to June 8, 2010.

This item was addressed at the first hearing on May 10, 2011. In the transcripts of that first hearing, Mr. Albarracin said, on the record that plans and budgets that were approved prior to June 8, 2010, would stand as approved without re-review by the Agency. We appreciate the IEPA clarifying this, and agree that the plans and budgets should stand as approved, and concur with the Agency's language as proposed.

2. Section 734.210 Early Action

This item was discussed at the first hearing on May 10, 2011. On the record, Mr. Albarracin stated that the IEPA proposed the new language in order to stay consistent with the OSFM rules (cited in the Board Note). In the post hearing comments, the IEPA states (on page 5) that the "IEPA would not object if the Board chose to retain the "plus 14 days" timeframe in subsections 734.210(c) (d) (e) and (g)". We appreciate the IEPA's willingness to work together with consultants on this matter, and ask that the necessary changes are made to assure this language is clarified. As the IEPA suggested, the Board Note should be removed.

3. Section 734.360 Application of Certain TACO Provisions

This item was discussed at the May 10, 2011, Hearing in length. Ultimately, the IEPA stated that they would prepare a proposed set of rules that would allow for the on-site remediation of soil that did not exceed the Tier 2 I/C remediation objectives in order to prevent the contamination of off-site properties. We appreciate their willingness to work together on this issue, and their follow through. In the IEPA post-hearing comments, the Agency claimed that the language originally proposed by CWM Company was too broad. We appreciate their critique, and understand that the language may not be perfect, but it stated our concern and was an attempt to initiate dialogue. The post hearing comments submitted by the IEPA somewhat dodges or eludes our concern. In particular, we would like to draw attention to 734.360(b). In the best interest for innocent off-site property owners, why should it devalue their property if a tank owner/operator (on-site property) chooses to leave their property registered as industrial/commercial rather than residential? As it currently stands, an industrial/commercial (aka most LUST sites) site would be forced to leave contamination above Tier 2 Residential

CUOs in the ground. Additionally, we ask that in subsections 734.360(c) and (d), the word "may" be changed to "shall". The substitution from "may" to "shall" simply provides that the option is available. It assures that they will not waste time and materials writing a plan that will not be approved. As we have stated before, not being a firm rule allows too much variation among IEPA Project Managers. Some are very workable, others are not. If the rule is gray, it will be used as an excuse not to follow, rather than use it for its intended purpose. We illustrated a very real and ongoing problem at one of our sites facing this issue. This site still has not received a response from the Agency and has been in limbo since December of 2008. The rules need to be written as such that the project can move forward regardless of the whim of the Project Manager. As "shall", still does not require remediation, but makes a clear distinction of what may or may not be conducted and under what circumstances the remediation is allowable.

4. Section 734.630 Ineligible Corrective Action Costs

We appreciate the IEPA for responding to the original proposal by CW^3M Company. As we have illustrated in the past, we believe that this section 734.630 (ddd)(eee)(fff) must go hand-in-hand with section 734.360. Since both sections deal with possible on-site remediation in order to protect off-site properties stemming from high on-site concentrations below the Tier 2 I/C CUOs. We thank the IEPA for proposing the Board Notes that do not prohibit payment for achieving remediation that does not exceed the Tier 2 I/C CUOs on-site to prevent off-site contamination. In conjunction with our proposed language that changes "may approve" to "shall allow" in section 734.360, we would like to proceed toward concurrence with the Board Notes in the following subsections (ddd), (eee) and (fff).

5. Section 734.632 Eligible Corrective Action Costs Incurred After NFR Letter

There has been extensive discussion regarding these "reentries" and consulting fees. In fact, in the second Hearing on June 16, 2011, we thought that CW^{3}M and the IEPA were on the same page at one point. Board Member Liu of the IPCB posed a question to which Mr. Albarracin positively responded, that somewhat negated the progress that was made. Originally, and the point to which we thought was reached at the second Hearing was that "disposal site fees" (as the IEPA refers to them) would include the "personnel costs" (referred to by Hearing Officer Board Member Fox) required for the additional soil disposal after the NFR. CW^{3}M Company refers to these costs as "consulting fees" (which they ultimately are). Mr. Smith originally made the point in the second Hearing that there are "consulting fees" that must be made reimbursable for the additional post-NFR soil disposal. They are going to be REQUIRED in order to get this soil removed. Sample collection, landfill authorization and coordination, and oversight will be required "personnel" costs in order to assure that the contaminated soil gets to the landfill. With the new statute, more contamination will be left in the ground, not by choice of the owner or operator. Why should the owner or operator be forced to pay the personnel costs out of pocket when he was forced to leave the contamination in place? Those costs should be reimbursable under the Fund, but limits them to the scope for what the Agency seems to feel are reasonable activities and charges, and the language should be amended to include these costs. Our language, proposed above, reflects our concern for what needs to be covered for reimbursable costs under the Fund. That being said, we understand that the Agency does not want Plans and Budgets submitted for approval. If this is the case, language needs to be added (as proposed above) that protects consultants (owners and operators) from spending time and resources on the extra soil disposal/consulting fees (sample collection, landfill authorization and coordination, and

oversight), only to have them rejected by the IEPA. For a simple project (i.e., water line installation) the volume of soil to be disposed of would be minimal. It would still require profiling, landfill authorization, possibly oversight. The Agency contends that "someone" will be there overseeing the project anyway, but that might be a plumber who has no idea what soil is to be sent to the landfill or how to deal with manifests. Once completed, a reimbursement claim will need to be prepared, certified, and submitted. Those tasks also require professional or consulting fees. With all due respect to Mr. Albarracin, he indicated in testimony in the June 16, 2011, hearing that he envisioned a simpler or streamlined approach for these reimbursements. But, if we can't have a streamlined approach now, how can we have a different one after an NFR has been issued? We see no statutory or rule change on the level of supporting documentation required for a reimbursement claim, so while it sounds like a wonderful and efficient idea, we don't see it happening in practicality. Mr. Albarracin indicated in testimony that people will already be at the site performing the post-NFR excavation (i.e., water line installation). That is true; however, the way we see it, two separate projects will be coinciding. There is the project of the water line installation, and there is the project of ensuring that the proper measures are taken to get the required soil to the landfill. We understand that the IEPA is looking to minimize costs, but they cannot seriously expect a water line installation company to make sure that a waste characterization sample is collected for the landfill, that landfill authorization and waste profiling has been completed, to schedule and coordinate activities with the landfill, to schedule and coordinate activities with the trucking company, and finally (and possibly most importantly), to ensure that the actual contamination is leaving the site and going to the landfill. The waste characterization sample is typically collected well in advance and is needed for authorization. After all, they are not LUST consultants; they are a water line installation company. It is our

opinion that if they are expected to do this work, in addition to the water line installation, the integrity of LUST consulting will be compromised. It was made clear that the Agency agrees to pay for lab fees, disposal fees, transport, and landfill authorization, but, again, with all due respect, who do they think performs these tasks? Robots? No, it's the consultants. If they do not want to call this "corrective action" costs or consulting fees, then call it something else, but it is still personnel costs. CW^{3}M attempted to address this issue and define a narrow scope of consulting fees associated with disposal site fees. By defining this clearly in rulemaking, there is less argument between owner operators and the Agency when the work has to occur and that is our intention.

6. Section 734.810 UST Removal or Abandonment Cost

It was stated by Mr. Albarracin in the first hearing that costs for UST abandonment would move from "inadequate" Subpart H rates to a "time and materials" payment. We appreciate the initiative of the IEPA to proactively make this change, and assume that the procedure will be clarified in the final rules. As the language currently reads, and as both consultants that were present at the first hearing confirmed, the intent is murky. CW^{3}M Company has no objection to moving tank abandonment costs to a time and materials basis, contingent upon the IEPAs ensured approval of these time and materials reimbursement costs. We have proposed a Board Note that would clarify this rule.

7. Section 734.855 Bidding

CW^{3}M Company has previously stated that the bidding process, as proposed, will not work. A new system must be proposed and set in place to encourage bidding, and provide a way for

consultants to move through the process seamlessly and without worry of wasting valuable time and resources. The bidding was added during the rulemaking for 734 in order to offer the tank owners a way to justify costs over Subpart H. This change effectively takes that option away.

Conclusion

CW^{3}M Company would again like to take this opportunity to thank the Illinois Pollution Control Board, the Illinois Environmental Protection Agency, and the other participants during this process for their willingness to listen to our concerns and work together to achieve clear and effective rules for the industry we work in.