

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

T-TOWN DRIVE THRU, INC.,)	
<i>Petitioner,</i>)	
)	
v.	)	PCB No. 07-085
	)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
<i>Respondent.</i>)	

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Pursuant to 35 ILL. ADM. CODE §§ 101.500, 101.508 and 101.516, petitioner T-Town Drive Thru, Inc. ("Petitioner"), by its attorneys, The Sharp Law Firm, P.C., moves the Board to enter summary judgment for Petitioner and against respondent Illinois Environmental Protection Agency ("Agency") with respect to the \$8,109.02 in corrective action costs at issue in this appeal.

I. INTRODUCTION.

This appeal, like several others with which we will soon move to have this matter consolidated, comes to the Board in a brown paper wrapper marked "claim lacking documentation," but it is much more than that. At issue is whether the Agency is empowered, on review of an application for reimbursement pursuant to and within a previously-approved budget, to disregard its previous decision, to disregard the applicant's evidence, and to attempt to limit reimbursement to one kind of out-of-pocket cost incurred by the consultant, rather than the cost incurred by the owner/operator for all the relevant services as defined by 35 ILL. ADM. CODE Part 732 Subpart H. As shown below, both applicable statutory provisions and the legislative history of the regulations at issue demonstrate that the Agency has no such power.

II. THE FACTS.

The motion is based on the following facts, which are not genuinely disputed.

Petitioner is the owner of a Leaking Underground Storage Tank ("LUST") site in Effingham County. Rec. at 019-021. It retained United Science Industries, Inc. ("USI") as consultant-contractor for remediation of the site pursuant to the portions of the Illinois Environmental Protection Act governing such remediation, 415 ILCS 5/57 *et seq.* (the "LUST Act"), and USI filed with the Agency a Corrective Action Plan ("Plan") and a related budget. Rec. at 005; August 29, 2006 approval letter, Exhibit A hereto.¹ The Agency modified the Plan and budget in relatively modest respects and, as modified, approved same. *Id.* The approved budget expressly called for analysis costs of \$15,867.57. Exhibit A at attachment A; Rec. at 008, 022.

After the Plan was completed, Petitioner sought reimbursement for \$8,109.22 in analysis costs for services rendered in connection with various tests which are subject to the lump-sum or unit-price² reimbursement rates set forth in 35 ILL. ADM. CODE Part 732 Appendix D. Rec. at 024-025. In each case, the amount sought was the approved amount set forth in said appendix, as adjusted for inflation under 35 ILL. ADM. CODE § 732.870. In support, Petitioner submitted two invoices relevant here:

- *An October 20, 2006 invoice from USI to Petitioner seeking, inter alia, \$60,287.11 for "Field Purchases and Other".* Rec. 053. Attached to this invoice was detail material stated on forms originally prepared by the Agency and

¹ The Agency has filed as the Administrative Record ("Rec.") only part of the information before it when it made its decision. Additional materials relevant to this motion are attached as exhibits hereto.

² As more fully discussed below, the changes effected by adoption of 35 ILL. ADM. CODE Part 732 Subpart H established maximum amounts deemed to be reasonable for all services in a series of task areas, including analysis services. In some cases, these rates were stated in per-unit terms (e.g., \$1/Ft. of well) and in others as a flat amount for the services. Because in either case they applied to all services related to the task area, lumped together for brevity herein we refer to them hereinafter as "lump sum" rates.

customarily used by USI as back-up for its invoices.³ Among the back-up were Rec. 061, detailing charges of \$60,207.59, and Rec. 122, containing the additional \$79.52. The \$60,207.59 included \$7,787.00 of the \$8,109.02 analysis costs now at issue (Rec. 061).⁴ To establish that the samples had in fact been collected, sent for analysis, analyzed by an approved lab on the basis claimed, and handled by USI in the resultant evaluation of the Plan's success, USI attached, among other things, results from Teklab, Inc. ("Teklab") for the samples. Rec. 064-098, 103-117.

- *An October 11, 2006 invoice from USI to Petitioner seeking, inter alia, \$44,662.80 for "Field Purchases and Other".* Rec. 129. Among the back-up for this invoice were Rec. 140, which detailed \$44,662.80 and itemized the additional \$322.02 of analytical costs now at issue.⁵ Again, to establish that the samples had in fact been collected, sent for analysis, analyzed on the basis claimed, and handled by USI in the resultant evaluation of the Plan's success, USI attached results from Teklab. Rec. 143-146.

Petitioner also admitted certifications, under penalty of perjury, from John Buening, Petitioner's owner, and Joseph M. Kelly, P.E., that "the bills in the attached application for reimbursement are for performing corrective action activities", that said bills "were incurred in conformance with the Environmental Protection Act", that "the costs for remediating the above-listed incident are correct, are reasonable, and were determined

³ We are advised that some of these forms were no longer being used by the Agency, but USI had continued to use them as detail to its invoices.

⁴ Specifically, Rec. 061 itemizes 20 BETX Soil with MTBE at \$87.37, 20 PH at \$14.39, 20 PNA or PAH Soil at \$156.24, 20 Metals Total Soil at \$96.62, 20 soil preparations for the Metals Total at \$16.45, 20 soil sample collection kits at \$10.57, and 3 sample shipping at \$51.40.

⁵ Specifically, Rec. 140 itemizes 1 BETX at \$87.37, 1 Flash Point at \$33.92, 1 Paint Filter at \$14.39, 1 PH at \$14.39, 1 Moisture Content at \$12.33, 1 Lead TCLP Soil at \$16.45, 1 soil preparation for metals TCLP at \$81.20, 1 sample shipping at \$51.40, and 1 soil sample collection kit at \$10.57.

in accordance with Subpart H: Maximum Payment Amounts, Appendix D Sample Handling and Analysis amounts". Rec. 021. Also submitted was a sworn certification "that the amount sought was expended in conformance with the approved budget and approved plan". Rec. 020.

The Agency denied the analysis costs claim in its entirety, stating:

\$8,109.02, deduction for costs that lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 732.606(gg). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act; therefore, such costs are not approved pursuant to Section 57.7(c)(4)(C) of the Act because they may be used for corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

Analysis costs do not have any backup invoices listing the costs for lab costs.

Rec. 003 (the "Decision"). In consultations with USI, the Agency insisted that Petitioner submit invoices from Teklab for the portion of the services performed by it and that reimbursement be limited to those invoices. The Agency disregarded the documentation USI and Petitioner *had* submitted, disregarded the sworn certifications submitted to it, and based its decision on no admissible evidence in its record.

III. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. McDonald's Corp. v. IEPA, PCB 04-14 at 2 (Jan. 22, 2004). Because the denial letter frames the issues to be reviewed, the Board focuses only on the grounds stated in the Decision in determining whether it may be affirmed. Pulitzer Comm. Nsprs., Inc. v. IEPA, PCB 90-142 at 6-7 (Dec. 20, 1990).

IV. APPLICABLE LAW.

LUST Act § 57.7(c), as amended by P.A. 92-554 § 5, provides:

(1) Agency approval of any plan and associated budget, as described in this subsection (c), shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.

...

(3) In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title.

LUST Act § 57.7(c)(4), as amended by P.A. 92-651 § 74, P.A. 92-735 § 5, and P.A. 92-574 § 5, provides substantially the same.⁶

LUST Act § 57.8 states:

(a) Payment after completion of corrective action measures. The owner or operator may submit an application for payment for activities performed at a site after completion of the requirements of Sections 57.6 and 57.7, or after completion of any other required activities at the underground storage tank site.

(1) In the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. Such determination shall be considered a final decision. The Agency's review shall be limited to generally accepted auditing and accounting practices. In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal. If the Agency fails to approve the payment application within 120 days, such application shall be deemed approved by operation of law and the Agency shall

⁶ LUST Act § 57.7(c)(4), as amended by those acts, provides:

(A) Agency approval of any plan and associated budget, as described in this item (4), shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.

...

(C) In approving any plan submitted pursuant to Part (E) of this paragraph (4), the Agency shall determine, by a procedure promulgated by the Board under item (7) of subsection (b) of Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of corrective action, and will not be used for corrective action activities in excess of those required to meet the minimum requirements of this title.

proceed to reimburse the owner or operator the amount requested in the payment application. However, in no event shall the Agency reimburse the owner or operator an amount greater than the amount approved in the plan.

35 ILL. ADM. CODE § 732.800 states:

a) Methods for Determining Maximum Amounts. This Subpart H provides three methods for determining the maximum amounts that can be paid from the Fund for eligible corrective actions costs. All costs associated with conducting corrective action are grouped into the tasks set forth in Sections 732.810 through 732.850 of this Part.

1) The first method for determining the maximum amount that can be paid for each task is to use the maximum amounts for each task set forth in those Sections, and in Section 732.870

b) The costs listed under each task set forth in Sections 732.810 through 732.850 of this Part identify only some of the costs associated with each task. They are not intended as an exclusive list of all costs associated with each task for the purposes of payment from the Fund.

With respect to the sections referenced in § 732.800(b), 35 ILL. ADM. CODE § 732.835

deals with sample handling and analysis and states:

Payments for costs associated with sample handling and analysis must not exceed the amounts set forth in . . . Appendix D of this Part. Such costs must include, but are not limited to, those associated with the transportation, delivery, preparation, and analysis of samples, and the reporting of sample results. . . .

Appendix D, referenced in § 732.835, provides in pertinent part:

Chemical	Max. Total Amount per Sample
BETX Soil with MTBE	\$85
Flash Point or Ignitability Analysis	\$33
Paint Filter	\$14
PH	\$14
Polynuclear Aromatics PNA, or PAH SOIL	\$152
Moisture Content	\$12
Lead TCLP Soil	\$16
Metals Total Soil	\$94
Soil preparation for Metals TCLP Soil	\$79
Soil preparation for Metals Total Soil	\$16
En Core® Sampler, purge-and-trap sampler, or equivalent sampling device	\$10
Sample Shipping	\$50

With respect to those rates, 35 ILL. ADM. CODE § 732.870 states:

The maximum payment amounts set forth in this Subpart H must be adjusted annually by an inflation factor determined by the annual Implicit Price Deflator for Gross National Product as published by the U.S. Department of Commerce in its Survey of Current Business.

Also relevant are 35 ILL. ADM. CODE §§ 732.845 and 732.850, which state in part:

Section 732.845 Professional Consulting Services

Payment for costs associated with professional consulting will be reimbursed on a time and materials basis pursuant to Section 732.850

Section 732.850 Payment on Time and Materials Basis

This Section sets forth the maximum amounts that may be paid when payment is allowed on a time and materials basis.

a) Payment for costs associated with activities that have a maximum payment amount set forth in other Sections of this Subpart H (e.g., sample handling and analysis, drilling, well installation and abandonment, or drum disposal[]) must not exceed the amounts set forth in those Sections, unless payment is made pursuant to Section 732.860 of this Part. . . .

35 ILL. ADM. CODE § 732.606(gg), relied upon by the Decision, states merely, "Costs ineligible for payment from the Fund include but are not limited to . . . [c]osts that lack supporting documentation".

V. ARGUMENT.

A. The Agency's Attempt, on Reimbursement Application, To Reverse Its Findings on Budget Approval Is Improper.

There is no dispute that in reviewing Petitioner's proposed budget, the Agency approved contemplated analysis costs of \$15,867.57. See p. 2 above. There also can be no dispute as to what that approval means. LUST Act § 57.7(c), as amended by P.A. 92-554 § 5, expressly provides (emphasis added):

(1) Agency approval of any plan and associated budget, as described in this subsection (c), *shall be considered final approval for purposes of seeking and obtaining payment*

from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.

...

(3) In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title.

For purposes of that provision:

the term " plan" shall include:

- (A) Any site investigation plan submitted pursuant to subsection (a) of this Section;
- (B) Any site investigation budget submitted pursuant to subsection (a) of this Section;
- (C) Any corrective action plan submitted pursuant to subsection (b) of this Section; or
- (D) *Any corrective action plan budget* submitted pursuant to subsection (b) of this Section.

LUST Act § 57.7(c)(5), as amended by P.A. 92-554 (emph. added). Section 57.7 as amended by the other acts of the 92nd legislature provides in substance the same. Hence, as a matter of law, the Agency's approval of Petitioner's budget constituted findings that the proposed costs were "reasonable", would "be incurred in the performance of site investigation or corrective action", and would "not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title." § 57.7(c)(3) as amended by P.A. 92-554. Having made that decision in approving the budget, on application for payment "[i]n no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal." LUST Act § 57.8(a)(1). Significantly, in rendering its Decision, the Agency did not claim that the tests at issue were not in "adherence to the corrective action measures in the proposal" it had approved.

The claim that the Agency “cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements” of the Act, and hence must be denied under “Section 57.7(c)(4)(C) of the Act because they may be used for corrective action activities in excess of those required to meet the minimum requirements” of the Act (Rec. 003), is not only contrary to the previous finding, it is specious. This was a *reimbursement* application; the claimed costs “will not” be used for *any* activities – *the activities have been completed*. The Decision’s erroneous future tense reflects a failure to appreciate that an application for payment under § 57.8 *is not* a plan or report under § 57.7(c)(4)(C), which it invokes.

This result is not changed by the rulemaking commenced in 2004 which resulted in substantial changes to 35 ILL. ADM. CODE Part 732, including adoption of maximum reimbursable amounts for many common LUST clean-up activities (the “Rulemaking Proceedings”).⁷ Indeed, the legislative history for those amendments makes clear that after-the-fact reconsideration of approved budgets is improper. For example, during that rulemaking the Agency sought to have emergency regulations adopted, claiming that otherwise it could only process applications for payment submitted pursuant to budgets approved prior to Illinois Ayers Oil Co., PCB 03-214 (Apr. 1, 2004). Its rationale for being able to make payments under approved budgets was that “[r]eviews of such applications for payment can continue because the reviews consist of comparing the costs in the applications for payment to the costs approved in the budgets.” *Illinois Environmental Protection Agency’s Motion for the Adoption of*

⁷ In the Matter of Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22A. Excerpts of papers filed in those proceedings bearing on issues in this appeal are attached hereto as exhibits; in addition, for the reader who wishes to cite full documents in the Board’s electronic database, the filing date thereof in R04-22A is provided.

Emergency Rules, R04-22A (Apr. 19, 2004) at 2 (Exhibit B hereto).

Moreover, Doug Clay, manager of the Agency's LUST Section, later testified:

the statute talks about review based on generally accepted audit and accounting practices. . . . [T]his refers to when there's been a budget approved ahead of time, and that is what we do. The budget has been approved. And what the LUST claims unit will do is basically add up invoices, make sure that the costs are eligible and consistent with the plan . . . and budget that had been approved.

Transcript ("Tr.") of Proceedings Held May 25, 2004, R04-22A (Jun. 1, 2004) at 23-24

(Exhibit C). LUST Claims Unit head Doug Oakley gave similar sworn testimony:

When we look at budget approved claims, it is different than early action, in that we don't look at individual rates. We look to make sure the costs associated with certain activities are within the line that – that's like six budget line items. And if the costs for those activities fall at or below those line items, that's as far as we go, other than looking for mandatory documents.

Id. at 84.

Q. . . . You have to have an approved budget and has been reviewed and compared to something to determine what is being reasonable? And then it's reimbursed, right?

A. (BY MR. OAKLEY) *If the type of amounts are equal to or less than those line items, it will be paid.*

Tr. of Proceedings Held May 26, 2004, R04-22A (Jun. 1, 2004) at 60 (Exhibit D) (emph. added).

Q. But so long as all of the items are contemplated within the budget and the budget has been specific enough, and those items that are being claimed for recovery are in fact part of the budget, you approve that?

A. (BY MR. OAKLEY) Right.

Tr. of Proceedings Held May 25, 2004, R04-22A (Jun. 1, 2004) at 91 (Exhibit C).

The Agency further stated:

Setting forth rates in the rules will allow owners, operators and consultants to know the amounts considered reasonable for purposes of reimbursement from the UST Fund, and *the Illinois EPA can easily review and approve costs as long as they do not exceed the applicable maximum payment amounts.*

Illinois Environmental Protection Agency's Response to Prefiled Questions, R04-22A (Jun. 15, 2005) at 22 (emph. added) (Exhibit E).

The rules will also help simplify the reimbursement process by setting forth the rates that are considered reasonable for reimbursement from the UST Fund. *Owners and operators and consultants will know the amounts that will be considered reasonable for the activities being proposed, and the Illinois EPA can easily review and approve costs as long as they do not exceed the applicable maximum payment amounts.*

Id. at 35 (emph. added). Agency witness Gary King made similar points in comparing the Agency's proposal with a counterproposal from USI:

it seems like what is being proposed here is [not] that much different than what the agency is proposing, we're just using different terms and setting different points on the normal distribution. The agency's proposal is basically saying, you know, we're going to take the average, which I think is sort of taking as a median, we got 50 percent of cases falling below that point of normal distribution, that will be your expedited unit rate. They call it maximum, but it's the expedited. *If you come in with costs under that point, it's going to fly through the system. . . .* So it seems to me that if we could just get beyond the semantics, that we're sort of getting to the same point here, and that is where do you set that point in which you get expedited review. And there are problems if you set it too high, everything moves to that high point . . . The agency proposal set at a median, . . .

Tr. of Proceedings Held July 27, 2005, R04-22A (Aug. 8, 2005) (Exhibit F) at 158 (emph. added).

Here the amount billed by USI to Petitioner and sought by Petitioner from the Agency was *less* than what the Agency had previously found to be "reasonable" and to "be incurred in the performance of . . . corrective action activities [not] in excess of those required to meet the minimum requirements" of the Act. Its attempt to reconsider those findings on application for payment under LUST Act § 57.8 is not only without statutory basis, it is unreasonable and contrary to the representations which the Agency made in obtaining approval of the Subpart H regulations.

**B. *The Agency's Attempt to Pay Only
What the Laboratory Charged Is Improper.***

Before the amendments sought in the Rulemaking Proceedings, reimbursement for remediation activities generally was governed by a "time and materials" basis. In the Rulemaking Proceeding, the Agency sought – and succeeded in the case of the services now at issue – to replace that system with a new one providing for "lump sum" maximum amounts which it would pay for bundles of services in a series of identified task areas. See *Statement of Reasons, Synopsis of Testimony, Statement Regarding Material Incorporated by Reference, and Statement of Amendment to the Board's Version of the Rules*, R04-22A (Jan. 13, 2004) at 21, 29-30 (Exhibit G). The goal, the Agency repeatedly said, was to "streamline" the remediation reimbursement process (*id.* at 30, 34). This was to be accomplished as follows:

Subpart H divides all response activities into tasks and sets forth the maximum amounts that can be paid from the UST Fund for each task. Because of the difficulty of enumerating every cost that may be associated with a site, Section 732.800(b) explains that the costs identified in Subpart H are only the major costs associated with a particular task. *The maximum payment amount is intended to include all costs associated with completing the identified task.*

Id. at 30 (emph. added). The Agency told the Board that "Illinois EPA anticipates a cost savings as a result of the streamlining". *Id.* at 34. Indeed, Mr. Clay stated:

The new budget and reimbursement process would eliminate the majority of budgets and reimbursement packages submitted based on a time and material basis and replace them with submittals based on unit rates and lump sums for specific tasks established in the regulations. We believe this will streamline the approval of budgets and the processing of reimbursement claims. Currently, there is a tremendous amount of time spent reviewing budgets and the processing of reimbursement claims.

Testimony of Douglas W. Clay in Support of the Environmental Protection Agency's Proposal to Amend 35 Ill. Adm. Code 732 (attached to Illinois Environmental Protection Agency's First Errata Sheet to Its Proposal for the Amendment of 35 Ill. Adm. Code 732,

R04-22A (Mar. 8, 2004)) at 2 (Exhibit H).

In numerous instances, industry participants objected because it was not clear what all was to be included in the proposed lump sum. The Agency repeatedly replied that everything related to a task was included.

Q. . . . Do you have a list of tasks that you utilize to develop those original numbers of hours at the rate[?]

MR. CLAY: I think we included in the original testimony a list of tasks that were not intended to be all inclusive. *The scope of work is what you need to do to meet regulations. . . . That list of tasks was not intended to be all inclusive.*

Tr. of Proceedings Held July 27, 2005, R04-22A (Aug. 8, 2005) at 16-17 (Exhibit F)
(emph. added).

Q. . . . [H]ow is it competitive bidding provisions are supposed to apply in the absence of the scope of work?

MR. CLAY: The scope of work is what it takes to meet the regulations, I've answered that.

. . .

MR. [KOCH]: So, how am I to know what is and what is not included for purposes of using competitive bidding?

MR. CLAY: It's whatever it takes to meet the regulations

Id. at 43-45. Cf. Statement of Reasons, Synopsis of Testimony, Statement Regarding Material Incorporated by Reference, and Statement of Amendment to the Board's Version of the Rules, R04-22A (Jan. 13, 2004) at 30 (Exhibit G) (emph. added):

the costs identified in Subpart H are only the major costs associated with a particular task. *The maximum payment amount is intended to include all costs associated with completing the identified task.*

The Agency argued, and the Board agreed in its first-notice decision, that tasks not specifically listed in the description could not be reimbursed separately:

As to the suggested change to allow for tasks not specifically listed under a maximum payment amount to be reimbursed separately, the Agency believes that such a change

will eventually result in Subpart H becoming a reimbursement on time and materials basis for every item not specifically identified in the rules. The Agency states that developing an all-inclusive list of costs associated with each task identified in Subpart H would be impossible.

Opinion and Order of the Board, R04-22A (Dec. 1, 2005) at 45 (Exhibit I). Cf. *Comments of the Illinois Environmental Protection Agency*, R04-22A (Sep. 23, 2005) at 18 (Exhibit J).

Those principles were expressly and repeatedly applied to analysis costs such as now at issue. For example, Daniel A. King asked the Agency:⁸

Pursuant to 734.835 Sample Handling and Analysis, costs associated with transportation, delivery, preparation, analysis and reporting of samples are reimbursable costs and should be billed in accordance with the rates listed in 734.Appendix D. It is the Agency's intent that the per sample rates listed may be divided up between the entity doing the transportation, deliver, analysis, etc.?

The Agency responded:

Sections 734.835 and 734.Appendix D merely set forth the maximum payment amounts owners and operators may be reimbursed for costs associated with sample handling and analysis. Please note that an individual maximum payment amount for shipping is included at the bottom of Section 734.Appendix D. *The Board's proposed rules do not address, and the Illinois EPA did not envision the rules addressing, how the amounts reimbursed to an owner or operator are divided among the parties performing the work.*

Illinois Environmental Protection Agency's Response to Prefiled Questions, R04-22A (Jun. 15, 2005) at 12 (emph. added) (Exhibit E). Similarly, Jay P. Koch asked:⁹

Subpart H, Appendix D provides rates for Sample Handling and Analysis. Section 734.835 indicates that these rates are for transportation, delivery, preparation, analysis and result reporting. Often times analytical samples are transported to a central shipping location by one party, delivered to the laboratory by another and then analyzed by the lab (a third party). Are the rates provided in Appendix D to cover the activities of all three parties described above?

The Agency responded, "The Illinois EPA included all costs associated with sample

⁸ *Prefiled Questions of Daniel A. King*, R04-22A (May 4, 2005) ¶ 41 (Exhibit K).

⁹ *Prefiled Questions of Jay P. Koch*, R04-22A (May 4, 2005) ¶ 6 (Exhibit L).

handling and analysis, regardless of the number of parties involved, in the maximum payment amounts it proposed under Sections 734.35 and 734.Appendix D.” *Illinois Environmental Protection Agency’s Response to Prefiled Questions*, R04-22A (Jun. 15, 2005) at 14-15 (Exhibit E).

Thus, as adopted 35 ILL. ADM. CODE § 732.835, dealing with sample handling and analysis, expressly states (emph. added):

Payments for costs associated with sample handling and analysis must not exceed the amounts set forth in Section Appendix D of this Part. Such costs *must include, but are not limited to*, those associated with the *transportation, delivery, preparation*, and analysis of samples, and the reporting of sample results.

Similarly, 35 ILL. ADM. CODE § 732.800(b) as adopted states (emph. added):

The costs listed under each task set forth in Sections 732.810 through 732.850 of this Part identify *only some of the costs associated with each task. They are not intended as an exclusive list* of all costs associated with each task for the purposes of payment from the Fund.

That the maximum amount represents all costs is further shown by the Agency’s Analytical Cost Form (Rec. 024), which states:

The laboratory analysis charge includes all costs associated with the transportation and/or delivery and analysis of each applicable sample. The charge includes but is not limited to costs associated with laboratory personnel, sample handling, transportation and/or delivery of samples to the laboratory, sampling equipment, sampling containers, sample disposal and all aspects of the applicable laboratory analysis.

There can be no doubt that the Board relied on the Agency’s representations in its decisions. For example, the Board adopted the Agency’s logic for deleting references to “materials, activities, or services” because pursuant to the proposed Subpart H, payment would generally no longer be made based on “materials, activities, or services”. *Opinion and Order of the Board*, R04-22A (Feb. 17, 2005) at 9 (Exhibit M). It said new Subpart H intended to “streamline payment from the UST Fund” with “lump

sum” or unit rates for many activities. *Id.* at 11. It adopted the Agency’s logic that under the proposal “less time [will be] required for Agency review”. *Id.* at 17, 24.¹⁰ It also explained that the amounts provided in proposed Subpart H for its 11 categories of tasks covered “all reimbursable tasks” in those categories (*id.* at 17, 24), and it stated that Subpart H

enumerates only the “major costs” associated with a task. The section clarifies that *the maximum payment amount is intended to include all costs associated with an activity and the subpart does not enumerate eligible costs.*

Id. at 12 (emph. added). The Board said it proposed “a rule that includes lump sum maximum payments for certain tasks”. *Id.* at 82 (emph. added). Finally, language evidencing that all services and costs related to a task area were covered by the lump sum was included in the final regulations (see p. 15 above), and when the Board finally decided that professional consulting would “be reimbursed on a time and materials basis pursuant to Section 732.850” (35 ILL. ADM. CODE § 732.845), it expressly provided that professional services associated with the “sample handling and analysis” task were not covered (35 ILL. ADM. CODE § 732.850(a)).

The foregoing is, we submit, more than sufficient to grant Petitioner’s Motion for Summary Judgment, but if there were any doubt it is dispelled by events which occurred as a result of changes which the Board required. Specifically, the Board sought to temper the harshness of the Agency’s “average equals maximum” approach by allowing reimbursement of a larger amount when it was established through a competitive bidding process. In offering the amendment, Mr. Clay made clear that consultants are

¹⁰ After first notice, the Agency reiterated its goal of streamlining, based in significant part on the premise that at the reimbursement stage “the Illinois EPA can easily review and approve costs as long as they do not exceed the applicable maximum payment amounts”. *Illinois Environmental Protection Agency’s Response to Prefiled Questions*, R04-22 (Jun. 15, 2005) at 15, 22, 35 (Exhibit E).

entitled to the Subpart H amounts even if parts of the services in a task area are acquired, or could be acquired, at a lower price:

Q. . . . So I go out and I get three bids as the Agency has allowed me. And it also allows me that if I wanted to, I could do the work for the lowest bid. How do I get paid for my handling for my time to go get those bids for the scope of work? Because I'm a person who is using a subcontractor with the indirect financial interest. I mean, how do I get paid?

A. (By Mr. Clay) In that case, I think *you would be entitled to that lump sum as if the owner and operator were paying for the subcontractor*. And then, you know, that's sort of a business decision. That's a decision you're making, that you want, in your case, your company to do the work as opposed to the low bidder.

Tr. of Proceedings Held Aug. 9, 2004, R04-22A (Aug. 20, 2004) at 86-87 (Exhibit N)
(emph. added). *See also id.* at 67-68 (emph. added):

Q. [Member Johnson] . . . [Y]our proposed language is the maximum payment amount for the work bid shall be the amount of the lowest bid, unless the lowest bid is less than the maximum payment amount set forth in Subpart H, in which case the maximum payment amount set forth in Subpart H shall be allowed. . . . [I]t's implying that regardless of what the bids are [--] you get three of them, they're all under the amount that you've defined as the maximum number . . . [-- w]e're going to get the maximum payment allowed. Am I reading that right?

A. (By Mr. Clay) *Yes*.

He admitted he didn't expect charges to be less than what Subpart H deemed reasonable often. *Tr. of Proceedings Held July 27, 2005, R04-22A (Aug. 8, 2005)*
(Exhibit F) at 156.

**C. Petitioner Submitted Adequate Documentation
To Support Payment of the Amount Claimed.**

As shown above, the amounts charged by USI to Petitioner, and sought in reimbursement by Petitioner, were exactly what Subpart H provided for the tasks at issue, adjusted for inflation as provided under 35 ILL. ADM. CODE § 732.870. There can be no dispute that these amounts are, as a matter of law, reasonable. In the rule-making, the

Agency stated, "Under the Board's First Notice Proposal costs are considered reasonable as long as they do not exceed the applicable maximum payment amount lump sums". *Illinois Environmental Protection Agency's Response to Prefiled Questions*, R04-22 (Jun. 15, 2005) at 34 (Exhibit E). Similarly, Mr. Clay testified that the "numbers that we proposed, the Board has now proposed in their first notice, we believe are fair and reasonable." *Tr. of Proceedings Held July 27, 2005*, R04-22A (Aug. 8, 2005) at 55 (Exhibit F). See also *Illinois Environmental Protection Agency's Post Hearing Comments*, R04-22A (Sep. 23, 2004) at 7-8 (Exhibit O) (amounts set forth in Subpart H "are reasonable for the work being performed" and "generally consistent with the amounts owners and operators request for reimbursement and the amounts the Illinois EPA approves"). Moreover, the Board expressly found that, except as rejected with respect to professional services,

the Board has found the maximum payment rates to be 'reasonable' and not in 'excess' of activities necessary to meet the 'minimum' requirements of the Act.

Opinion and Order of the Board, R04-22 (Dec. 1, 2005) at 62-63 (Exhibit I).

Because the services provided by Teklab are only a part of those covered by the Subpart H lump sum, the Agency's demand for documentation of Teklab's charges and its attempt to limit reimbursement to those amounts are improper. Moreover, the historical function of subcontractor invoices was as evidence for a consultant's handling charge, not at issue here (see *Tr. of Proceedings Held Aug. 9, 2004*, R04-22 (Aug. 20, 2004) at 37 (Exhibit N)), and the Agency told the Board in the rulemaking that "[w]ith the new streamlining process" many documents "will no longer be submitted to the Agency", specifically citing subcontractor invoices. *Id.* at 45. Indeed, it said a reimbursement application properly could include merely "an invoice with a minimum amount of

information to document the costs requested for reimbursement (e.g., the task performed, the amount charged for the task, and the date the task was conducted).” *Comments of the Illinois Environmental Protection Agency*, R04-22A (Sep. 23, 2005) at 19 (Exhibit J). Petitioner provided *at least* that information here. See pp. 2-4 above.

It bears noting that in offering those final comments, in an attempt to beat back industry proposals and to obtain approval of its proposals, the Agency *repeatedly* stressed that USI supported or did not object to provisions which were in fact adopted by the Board. *Id.* at 16, 18, 20, 21, 22, 23, 25, 26. It is disconcerting that after having explained its proposals in ways designed to win USI’s and the Board’s approvals, the Agency now seeks to breach those representations.

VI. CONCLUSION.

The statute makes clear that when, as here, an owner-operator seeks reimbursement for an amount equal to or less than that set forth in a previously-approved budget, the Agency is supposed to abide by its previous decision that the budgeted costs are “reasonable” and to “be incurred in the performance of . . . corrective action activities [not] in excess of those required to meet the minimum requirements” of the Act (see pp. 5-8 above). Moreover, in approving the Subpart H rate at issue, the Board found it “to be ‘reasonable’ and not in ‘excess’ of activities necessary to meet the ‘minimum’ requirements of the Act” (p. 18 above). As the Agency repeatedly made clear (pp. 12-16 above), under its proposals the sum allowed for sample handling and analysis tasks covers not just the laboratory analysis of the soil, but everything related thereto. Thus, under the regulation as adopted the lump sum at issue “must include, but [is] not limited to, those associated with the transportation, delivery, preparation, and analysis of

samples, and the reporting of sample results" (35 ILL. ADM. CODE § 732.835). Here Teklab merely analyzed the samples and reported the results to USI. Everything else was done and provided by USI.

It was the Agency which proposed the lump-sum, bundle-of-services approach which now applies, and it did so on the logic that it would review less paperwork and on the assurance that applications which were within previously-approved budgets and the Subpart H limits would be paid (pp. 9-12, 16 above). Its current attempts to walk away from its representations, and to evade the terms of the law, must be rejected. The reimbursement sought by Petitioner was proper, and Petitioner submitted appropriate documentation (pp. 2-4, 18-19 above). Denial of the claim was thus erroneous.

Accordingly, Petitioner's Motion for Summary Judgment should be granted.

September 12, 2007

T-TOWN DRIVE THRU, INC.

By: 
One of its Attorneys

John T. Hundley
Mandy L. Combs
THE SHARP LAW FIRM, P.C.
P.O. Box 906 – 1115 Harrison
Mt. Vernon, IL 62864
618-242-0246
Counsel for Petitioner T-Town Drive Thru, Inc.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that I served the foregoing document upon all persons entitled to same by causing copies to be deposited in the United States Post Office mailbox at 14th and Main Streets, Mt. Vernon, IL, before 6:00 p.m. this date, in envelopes with proper first- class postage affixed, addressed as follows:

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

James G. Richardson, Esq.
Illinois Environmental Protection Agency
1021 N. Grand Ave. East
Springfield, IL 62702

Hon. Carol Webb
Illinois Pollution Control Board
1021 N. Grand Ave. East
P.O. Box 19274
Springfield, IL 62794

September 12, 2007



John T. Hundley
Mandy L. Combs
THE SHARP LAW FIRM, P.C.
P.O. Box 906 – 1115 Harrison
Mt. Vernon, IL 62864
618-242-0246
Counsel for Petitioner T-Town Drive Thru, Inc.

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John\US\IT-Town/SummJudgMtn.doc
Brenda\US\IT-Town/SummJudgMtn2.doc

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 - (217) 782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 - (312) 814-6026

ROD R. BLAGOJEVICH, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

CERTIFIED MAIL

7004 2510 0001 8587 2851

AUG 29 2006

AUG 31 REC'D

T-Town Drive Thru
Attn: John Buening
802 West Main Street
Teutopolis, Illinois 62467

Re: LPC #0490450002 -- Effingham County
Teutopolis/T-Town Drive Thru
101 West Main Street
Leaking UST Incident No. 942051 & 982759
Leaking UST Technical File

Dear Mr. Buening:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the High Priority Corrective Action Plan (plan) submitted for the above-referenced incident. This plan, dated July 10, 2006, was received by the Illinois EPA on July 21, 2006. Citations in this letter are from the Environmental Protection Act (Act) in effect prior to June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

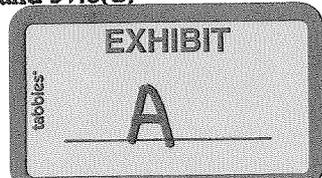
Pursuant to Section 57.7(c) of the Act and 35 Ill. Adm. Code 732.405(c), the plan is modified. The following modifications are necessary, in addition to those provisions already outlined in the plan, to demonstrate compliance with Title XVI of the Act and 35 Ill. Adm. Code 732:

The Plan shall be modified as follows:

1. The amount of soil that is purposed for removal and replacement shall not include overburden and those soils not analytically determined to be impacted above the applicable Tier 2 cleanup criteria;
2. The costs for the services, materials, and activities for the Plan and said modifications shall be reasonable and kept in accordance with the minimum requirements to comply with the act.

Please note that all activities associated with the remediation of this release proposed in the plan must be executed in accordance with all applicable regulatory and statutory requirements, including compliance with the proper permits.

In addition, the total budget for the High Priority Corrective Action Plan is approved for the amounts listed in Attachment A. Please note that the costs must be incurred in accordance with the approved plan. Be aware that the amount of payment from the Fund may be limited by Sections 57.8(e), 57.8(g) and 57.8(d) of the Act, as well as 35 Ill. Adm. Code 732.604, 732.606(s), and 732.611.



ROCKFORD - 4302 North Main Street, Rockford, IL 61103 - (815) 987-7760 • DES PLAINES - 9511 W. Harrison St., Des Plaines, IL 60016 - (847) 294-4000
ELGIN - 595 South State, Elgin, IL 60123 - (847) 608-3131 • PEORIA - 5415 N. University St., Peoria, IL 61614 - (309) 693-5463
BUREAU OF LAND - PEORIA - 7620 N. University St., Peoria, IL 61614 - (309) 693-5462 • CHAMPAIGN - 2125 South First Street, Champaign, IL 61820 - (217) 278-5800
SPRINGFIELD - 4500 S. Sixth Street Rd., Springfield, IL 62706 - (217) 786-6892 • COLLINSVILLE - 2009 Mall Street, Collinsville, IL 62234 - (618) 346-5120
MARION - 2309 W. Main St., Suite 116, Marion, IL 62959 - (618) 993-7200

Page 2

Please note that, if the owner or operator agrees with the Illinois EPA's modifications, submittal of an amended plan and/or budget, if applicable, is not required (Section 57.7(c) of the Act. Additionally, pursuant to Section 57.8(a)(5) of the Act and 35 Ill. Adm. Code 732.405(e), if payment from the Fund will be sought for any additional costs that may be incurred as a result of the Illinois EPA's modifications, an amended budget must be submitted.

NOTE: Amended plans and/or budgets must be submitted and approved prior to the issuance of a No Further Remediation (NFR) Letter. Costs associated with a plan or budget that have not been approved prior to the issuance of an NFR Letter will not be paid.

All future correspondence must be submitted to:

Illinois Environmental Protection Agency
Bureau of Land - #24
Leaking Underground Storage Tank Section
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276

Please submit all correspondence in duplicate and include the Re: block shown at the beginning of this letter.

An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.

If you have any questions or need further assistance, please contact Sam Hale, III at 217/782-6762.

Sincerely,



Clifford L. Wheeler
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

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Attachment: A
Appeal Rights

c: United Science Industries
Division File

Attachment A

Re: LPC #0490450002 -- Effingham County
Teutopolis/T-Town Drive Thru
101 West Main Street
Leaking UST Incident No. 942051 & 982759
Leaking UST Technical File

SECTION 1

The following amounts are approved:

\$2,008.80	Drilling and Monitoring Well Costs
\$15,867.57	Analytical Costs
\$192,282.08	Remediation and Disposal Costs
\$12,951.56	UST Removal and Abandonment Costs
\$30,040.36	Paving, Demolition, and Well Abandonment Costs
\$39,042.16	Consulting Fees

Handling charges will be determined at the time a billing package is reviewed by the Illinois EPA. The amount of allowable handling charges will be determined in accordance with Section 57.8(f) of the Environmental Protection Act and 35 Illinois Administrative Code 732.607.

The Total Amount approved for the High Priority CAP is \$292,192.53..

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Appeal Rights

An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board pursuant to Sections 40 and 57.7(c)(4) of the Act by filing a petition for a hearing within 35 days after the date of issuance of the final decision. However, the 35-day period may be extended for a period of time not to exceed 90 days by written notice from the owner or operator and the Illinois EPA within the initial 35-day appeal period. If the owner or operator wishes to receive a 90-day extension, a written request that includes a statement of the date the final decision was received, along with a copy of this decision, must be sent to the Illinois EPA as soon as possible.

For information regarding the filing of an appeal, please contact:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
312/814-3620

For information regarding the filing of an extension, please contact:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276
217/782-5544

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RECEIVED
CLERK'S OFFICE

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD APR 19 2004

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

STATE OF ILLINOIS
Pollution Control Board

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

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
MOTION FOR THE ADOPTION OF EMERGENCY RULES

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through its attorney Kyle Rominger, and submits this Motion for the Adoption of Emergency Rules. The Illinois EPA moves that the Illinois Pollution Control Board ("Board") adopt as soon as possible the Illinois EPA's proposed amendments to 35 Ill. Adm. Code 732 and the proposed 35 Ill. Adm. Code 734 in an emergency rulemaking pursuant to Section 27(c) of the Environmental Protection Act ("Act") [415 ILCS 5/27(c)], Section 45 of the Administrative Procedures Act ("APA") [5 ILCS 100/5-45], and Section 102.612 of the Board's procedural rules [35 Ill. Adm. Code 102.612]. The Illinois EPA makes this motion so it can review budgets and applications for payment from the Underground Storage Tank Fund ("UST Fund") prior to the Board's adoption of final rules in this rulemaking.



The basis for this Motion is the Board's Opinion and Order in Illinois Ayers Oil Co., PCB 03-214 (April 1, 2004). In that opinion the Board found that the Illinois EPA's internal rate sheet is an improperly promulgated rule that should have been promulgated pursuant to the Administrative Procedures Act. Id. at 16, 18. Without the rate sheet, the Illinois EPA lacks a standard methodology for determining whether the costs submitted for approval in budgets and applications for payment are reasonable. A standard methodology for determining the reasonableness of costs is included in the proposed rules currently before the Board.

The Board's adoption of the proposed rules in an emergency rulemaking will allow the Illinois EPA to review budgets and applications for reimbursement prior to the Board's adoption of final rules. If emergency rules are not adopted, the Illinois EPA will be limited to reviewing only applications for payment that are submitted pursuant to budgets approved prior to the Board's opinion in the Illinois Ayers case. Reviews of such applications for payment can continue because the reviews consist of comparing the costs in the applications for payment to the costs approved in the budgets. The Illinois EPA cannot review other cost submissions, however, (e.g., budgets that have not yet been approved and applications for payment that are not submitted pursuant to a budget approved prior to the Illinois Ayers opinion) until a standard methodology for determining whether the costs are reasonable is adopted in rules.

The Illinois EPA believes the adoption of the proposed rules in an emergency rulemaking is proper. The Board has the authority to adopt rules in an emergency rulemaking if a situation exists which "reasonably constitutes a threat to the public interest, safety, or welfare." 5 ILCS 100/5-45; 415 ILCS 5/27(c); 35 Ill. Adm. Code

1 ILLINOIS POLLUTION CONTROL BOARD

2 May 25, 2004

3

4 IN THE MATTER OF:)
)
 5 PROPOSED AMENDMENTS TO:) R04-22
 REGULATION OF PETROLEUM LEAKING) (UST Rulemaking)
 6 UNDERGROUND STORAGE TANKS)
 (35 ILL. ADM. CODE 732))
 7)

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

11

12

13 The Rulemaking Proceeding, before the Illinois
 14 Pollution Control Board, was held May 25, 2004, at the
 15 McLean County Law and Justice Center, Room 700,
 16 Bloomington, Illinois, commencing at 9:00 a.m.

17

18

19 Reported By: Ann Marie Hollo, CSR, RMR
 License No.: 084-003476

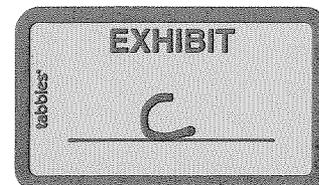
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23

24



1 APPEARANCES:

2 Illinois Pollution Control Board
3 100 West Randolph Street
4 Suite 11-500
5 Chicago, Illinois 60601

6 By: Marie Tipsord, Esq., Hearing Officer

7 Illinois Pollution Control Board Members:

8 Chairman J. Philip Novak, Esq.

9 G. Tanner Girard, Ph.D.

10 Thomas E. Johnson, Esq.

11 Andrea Moore, Esq.

12 Anand Rao, Senior Environmental Scientist

13 Alisa Liu, P.E.

14 Posegate & Denes, P.C.

15 111 North Sixth Street

16 Springfield, Illinois 62701

17 By: Claire A. Manning, Esq.

18 Appearing on behalf of PIPE and ISPE

19 Barnes & Thornburg

20 Suite 4400

21 One North Wacker Drive

22 Chicago, Illinois 60606-2809

23 By: Carolyn S. Hesse, Esq.

24 Appearing on behalf of CW3M

25 Illinois Environmental Protection Agency

26 1021 North Grand Avenue East

27 Springfield, Illinois 62794

28 By: M. Kyle Rominger, Esq.

29 Appearing on behalf of IEPA

30 Illinois Environmental Protection Agency Witnesses

31 Gary P. King, Douglas W. Clay, P.E.,

32 Harry A. Chappel, P.E., Brian Bauer,

33 Hernando A. Albarracin, and Chris Kohrmann

34 EXHIBITS

35 Exhibit Number	36 Marked	37 Admitted
38 Exhibit Number 16	39 9	40 11
41 Exhibit Number 17	42 9	43 11
44 Exhibit Number 18	45 9	46 11
47 Exhibit Number 19	48 10	49 11
50 Exhibit Nos. 20 - 22	51 10	52 11
53 Exhibit Number 23	54 11	55 11

1 made to that?

2 MR. BAUER: Sure. Basically, we added a
3 whole section for the kind of -- we had an oversight.
4 We only included costs for engineering barriers. So
5 this time, we also included any costs for replacement
6 of asphalt and or concrete as part of the corrective
7 action in this.

8 We also, under some of the costs, based on
9 some of the comments from -- I believe it was probably
10 the rates. That they made some comments about the
11 rates for tax purposes and mobilization charge. We'll
12 cover that a little later.

13 MR. ROMINGER: On page 229 through 231 of the
14 transcript, we said we would look into Section
15 578(a)(1) of the Act regarding a requirement and its
16 relation to the Agency's review of all reports versus
17 10 percent of the reports submitted.

18 MR. CLAY: The issue was, you know, whether
19 the Agency is looking at all the reports, and I think
20 10 percent was used. There's actually a 20 percent
21 number in the regulations at 732.504(a)(3). And so I
22 don't believe there's any percentage in the statutes
23 themselves.

24 At 578(a)(1), the statute talks about review

1 based on generally accepted audit and accounting
2 practices. And this is when this refers to when
3 there's been a budget approved ahead of time, and that
4 is what we do. The budget has been approved. And
5 what the LUST claims unit will do is basically add up
6 invoices, make sure that the costs are eligible and
7 are consistent with the plan that had been approved,
8 the plan and budget had been approved.

9 In addition, 732.504(a)(3) talks about the 20
10 percent of site classification reports being
11 reviewed. That is the goal as stated in 732.504(a).

12 That section goes on further under 732.504(b)
13 to state the Agency may conduct a full review of any
14 plan or report not selected in accordance with the
15 provisions of this section.

16 In 732.504(c), notwithstanding any other
17 limitation of review, the Agency may conduct a full
18 technical review of any plan of report identified in
19 this section.

20 And in 732.504(d), it identifies the Agency's
21 decision on whether or not to select plans, reports
22 for full review shall not be subject to appeal.

23 MR. ROMINGER: In the same area on pages 228
24 through 229 and page 231, the Agency was to look at

1 function versus a full review of the Agency.

2 When the Agency reviews a claim for payment
3 of a cost that's already been in an approved budget,
4 does it do a full review? Would it consider what the
5 Agency reviews, a full review of those claimed costs
6 that are already in an approved budget, and does it
7 take an additional 120 days to do so?

8 A. (BY MR. CLAY) I would say we have up to 120
9 days, and I would characterize it as an audit. I'd
10 like Doug Oakley to talk about exactly what they look
11 like.

12 MR. OAKLEY: When we look at budget approved
13 claims, it is different than early action, in that we
14 don't look at individual rates. We look to make sure
15 the costs associated with certain activities are
16 within the line that -- that's like six budget line
17 items. And if those costs for those activities fall
18 at or below those line items, that's as far as we go,
19 other than looking for mandatory documents.

20 Q. So if the costs are all included in the
21 budgeted approved amount, they're approved?

22 A. Amounts, plural. It's within the six -- it's
23 not a bottom line. It's within those six lines.

24 What we would do, for instance, you have

1 field investigations. Let's say investigation. That
2 would be one line, or I believe six of them. And then
3 you have a total at the bottom. What we do is look at
4 the individual lines to make sure the activities
5 associated with those individual lines are equal to or
6 less than.

7 Q. So in your opinion, if one doesn't match up
8 and it's over in terms of the number of hours or it's
9 over in terms of the number of -- the particular
10 amount?

11 A. Amounts only. We don't look at hours, right.

12 Q. If it's over the amounts that have been
13 budgeted, it would be a complete denial then?

14 A. No.

15 Q. Then what would happen?

16 A. We would deny down the amount that was
17 approved for that particular line. And then at that
18 point, an amendment would be required or something.

19 Q. And so what happens then? Do you write a
20 letter to the applicant?

21 A. Yes. What we do is we write a final decision
22 letter and explain which line that they exceeded, and
23 that's that.

24 Q. And you consider you have 120 days to perform

1 A. Well, I'm saying if a claim was submitted for
2 a budget that was approved that included ineligible
3 costs, I believe we would deny those costs.

4 Q. Even if you earlier approved the costs as
5 being eligible in the budget?

6 A. We do not approve costs in budgets. I'm
7 talking about the claim review process.

8 MR. CLAY: Let me give you an example.

9 If on one of the line items -- and I think
10 this is one of the line items. Field purchases. And
11 if there is a flagpole on the invoice for the field
12 purchases, Doug is going to cut that because that is
13 obviously not corrective action.

14 Now, as he said, he didn't do a detailed
15 review where he looks at, you know, every single item,
16 but that's going to be something that jumps out at us
17 as an obvious ineligible item that would be cut.

18 Q. But so long as all of the items are
19 contemplated within the budget and the budget has been
20 specific enough, and those items that are being
21 claimed for recovery are in fact part of the budget,
22 you approve that?

23 A. (BY MR. OAKLEY) Right.

24 Q. But you have 120 days within which the Agency

1 ILLINOIS POLLUTION CONTROL BOARD

2 May 26, 2004

3

4 IN THE MATTER OF:)
)
 5 PROPOSED AMENDMENTS TO:) R04-22
 REGULATION OF PETROLEUM LEAKING) (UST Rulemaking)
 6 UNDERGROUND STORAGE TANKS)
 (35 ILL. ADM. CODE 732))
 7)

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

11

12

13 The Rulemaking Proceeding, before the Illinois
 14 Pollution Control Board, was held May 26, 2004, at the
 15 Lincoln Library, Carnegie North Room, 326 South
 16 Seventh Street, Springfield, Illinois, commencing at
 17 9:30 a.m.

18

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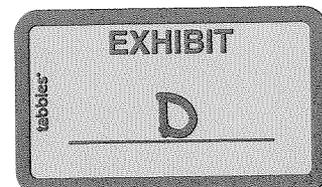
20 Reported By: Ann Marie Hollo, CSR, RMR
 License No.: 084-003476

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23

24



1 APPEARANCES:

2 Illinois Pollution Control Board
3 100 West Randolph Street
4 Suite 11-500
5 Chicago, Illinois 60601
6 By: Marie Tipsord, Esq., Hearing Officer

7 Illinois Pollution Control Board Members:
8 Chairman J. Philip Novak, Esq.
9 G. Tanner Girard, Ph.D.
10 Thomas E. Johnson, Esq.
11 Andrea Moore, Esq.
12 Anand Rao, Senior Environmental Scientist
13 Alisa Liu, P.E.

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38 Exhibit Number 24	39 8	40 8
41 Exhibit Number 25	42 17	43 17
44 Exhibit Number 26	45 30	46 30
47 Exhibit Number 27	48 43	49 43
50 Exhibit Number 28	51 191	52 191

53 24

1 Approved budgets -- when the Agency approved
2 a budget, and let's assume they used these rate
3 sheets, or whatever sheet, they're only going to
4 approve a certain amount for hours or rates or unit
5 rate, correct? I mean, you have to get an approved
6 budget?

7 A. (BY MR. CLAY) Yes. There has to be an
8 approved budget before payment can be made.

9 Q. And what is only going to be reimbursed is
10 only going to be a part of the approved budget? I
11 think you've provided that testimony before. You have
12 to have an approved budget and has been reviewed and
13 compared to something to determine what is being
14 reasonable? And then it's reimbursed, right?

15 A. (BY MR. OAKLEY) If the type of amounts are
16 equal to or less than those line items, it will be
17 paid.

18 Q. And I believe the testimony has already been
19 provided previously that the Agency feels that the
20 proposed rules will be in line with 90 percent, or
21 whatever within these sites will be in line with what
22 has already been reimbursed? The rates that you felt
23 were reasonable, being reimbursed, approved by the
24 budget and so forth?

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUN 15 2005

STATE OF ILLINOIS
Pollution Control Board

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

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

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
RESPONSE TO PRE-FILED QUESTIONS

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through one of its attorneys, Kyle Rominger, and submits the following responses to the pre-filed questions of United Science Industries, Inc. ("USI"), CW3M Company, Inc. ("CW3M"), and CSD Environmental Services, Inc. ("CSD") for the July 27, 2005, hearing. The Illinois EPA would like to thank the Hearing Officer for granting an extension for the filing of these responses.

The responses are divided into four sections: the first contains responses to Daniel King's questions, the second contains responses to Jay Koch's questions, the third contains responses to CW3M's questions, and the fourth contains responses to CSD's questions. The number of each response corresponds to the numbers of the pre-filed questions. To minimize the number of citations, most responses refer only to the provisions of Part 734. Where appropriate, however, the responses would also apply to



the corresponding provisions of Part 732 unless the context of the response indicates otherwise.

Answers to the Pre-Filed Questions of Daniel King of USI

1. The maximum payment amounts for activities required under Section 734.210(a) are found throughout Subpart H and depend upon the activities being performed. For example, amounts for tank removal activities are addressed in Section 734.810, amounts for free product removal activities and groundwater removal and disposal activities are addressed in Section 734.815, amounts for soil removal and disposal activities are addressed in Section 734.825, and amounts for professional consulting services are addressed in Section 734.845. As alternatives to the amounts set forth in these Sections, owners and operators can determine maximum payment amounts via bidding under Section 734.855. Owners and operators can also seek alternative maximum payment amounts for unusual and extraordinary circumstances under Section 734.860.

2. The maximum payment amounts for activities required under Section 734.210(b) are found throughout Subpart H and depend upon the activities being performed. Examples of activities that might be performed to comply with Section 734.210(b) and the Sections containing the maximum payment amounts for those activities are set forth in question 1 above. As alternatives to the maximum payment amounts, owners and operators can also bid costs Section 734.855 and seek alternative maximum payment amounts for unusual and extraordinary circumstances under Section 734.860.

39. Section 734.340(c) is not new language proposed by the Illinois EPA. The Section merely repeats language that already exists in Section 732.407(c).

40. The Illinois EPA included costs associated with the preparation of maps in the maximum payment amounts it proposed for the preparation and submission of plans and reports (Section 734.845). In many cases, the preparation of a map requires only the updating of an existing map from an earlier plan or report. As with other costs, if the maximum payment amounts set forth in the rules are insufficient for a particular site, they can be exceeded through the bidding or the unusual or extraordinary circumstances provisions.

41. Sections 734.835 and 734.Appendix D merely set forth the maximum payment amounts owners and operators may be reimbursed for costs associated with sample handling and analysis. Please note that an individual maximum payment amount for shipping is included at the bottom of Section 734.Appendix D. The Board's proposed rules do not address, and the Illinois EPA did not envision the rules addressing, how the amounts reimbursed to an owner or operator are divided among the parties performing the work.

42. The installation of monitoring wells, including their depths, should comply with Section 734.430 and generally accepted engineering practices.

43. Some maximum payment amounts are applicable through all phases of work. For example, the maximum payment amounts for sample handling and analysis (Section 734.Appendix D) are applicable during the early action phase, the site investigation phase, and the corrective action phase.

44. Sections 734.315, 734.320, and 734.325 contain general requirements regarding the depths of borings. The Board's rules do not mandate the use of a specific tool for borings.

45. The owner or operator should propose the most cost-effective method of disposal.

46. The Illinois EPA included all submittals of plans, budgets, reports, applications for payment, and other documentation in the maximum payment amounts it proposed for professional consulting services under Section 734.845. For example, the Illinois EPA proposed \$4,800 as the maximum payment amount for the preparation and submission of all 20-Day and 45-Day Reports, regardless of how many 20-Day and 45-Day reports are submitted.

47. The maximum payment amounts the Illinois EPA proposed to the Board were either evaluated against actual reimbursement submittals directly or developed using costs that were evaluated against actual reimbursement submittals.

Answers to the Pre-Filed Questions of Jay Koch of USI

1. Please refer to the response to Daniel King's question 29.
2. If an alternative technology corrective action plan is rejected one or more times, but is eventually approved, the Illinois EPA envisions that reasonable and justified professional service hours that do not exceed the maximum payment amounts set forth in Section 734.Appendix E would be reimbursed. If an alternative technology corrective action plan is rejected one or more times and as a result is never approved and implemented, and then a conventional technology corrective action plan is submitted, approved, and implemented, the Illinois EPA does not envision that costs associated the

preparation and submission of the alternative technology corrective action plan would be eligible for reimbursement. The Illinois EPA envisions that the costs associated with the preparation and submission of the conventional technology corrective action plan would be subject to the maximum payment amount set forth in Section 734.845(c)(1).

3. The Illinois EPA envisions that the determination of whether an unusual or extraordinary circumstance exists at a particular site will be based upon site-specific circumstances. What may be an unusual or extraordinary circumstance at one site may not be an unusual or extraordinary circumstance at another site. During previous hearings the Illinois EPA gave some examples of what might be considered an unusual or extraordinary circumstance. However, developing a list of unusual or extraordinary circumstances that could be applied prior to knowing the specific circumstances of a particular site would be impossible. Furthermore, the Administrative Procedures Act prohibits the Illinois EPA from publishing the requested lists of specific examples unless they are adopted in rules.

4. The Illinois EPA would not object to the addition of one or more representatives to the LUST Advisory Committee if the Board determines that the Committee's current composition does not provide adequate representation of interested parties.

5. Please see the response to Daniel King's question 17.

6. The Illinois EPA included all costs associated with sample handling and analysis, regardless of the number of parties involved, in the maximum payment amounts it proposed under Sections 734.835 and 734.Appendix D. Please note that an individual maximum payment amount for shipping is included at the bottom of Section

734.Appendix D. This amount was proposed for costs associated with the shipping of samples to the laboratory. The Illinois EPA included costs associated with transporting samples from the collection site back to the office for shipping in the maximum payment amounts it proposed for travel (Section 734.845(e)).

7. One of the goals the Illinois EPA hopes to achieve through this rulemaking is a reduction in the time it spends reviewing plans, budgets, reports, and applications for payment.

8. The Illinois EPA believes that such an audit would be costly and time consuming and is unnecessary. The Illinois EPA has explained how it developed the rates it proposed to the Board, and the Board determined that those rates, as amended in the Board's First Notice Proposal, will provide reimbursement of reasonable remediation costs. Any party that believes the proposed amendments will not provide reimbursement of reasonable remediation costs has the opportunity to present testimony and comments to the Board.

9. This question is addressed to the Board.

10. The provision proposed by the Illinois EPA that would make "costs an owner or operator is required to pay to a governmental entity or other person in order to conduct corrective action" ineligible for reimbursement is not included in the Board's First Notice Proposal. Pursuant to the Board's First Notice Opinion and Order, such costs should be reviewed on a site-specific basis. Because a site-specific determination is necessary, and because the Administrative Procedures Act requires the Illinois EPA to adopt the requested lists as rules, the Illinois EPA cannot provide the requested lists in these responses.

6. Groundwater must be remediated in accordance with the Tiered Approach to Corrective Action Objectives ("TACO") regulations (35 Ill. Adm. Code 742). Groundwater remediation required as a part of corrective action is eligible for reimbursement from the UST Fund.

7. The Illinois EPA did not consider any effect on property values in cases where groundwater ordinances are used as institutional controls. Groundwater ordinances have always been available as an institutional control under TACO and have been used at hundreds, if not thousands, of sites.

8. *Inter alia*, use of the proposed rules will help reduce costs to the UST Fund by helping to streamline the LUST Program. The proposed rules will allow a greater standardization of information submitted to the Illinois EPA, which in turn will allow for shorter document preparation time and shorter document review time, thereby reducing per-project costs for the owner's or operator's consultant and the Illinois EPA. Use of the proposed rules will also help reduce per-project costs by simplifying the reimbursement process. Setting forth rates in the rules will allow owners, operators, and consultants to know the amounts considered reasonable for purposes of reimbursement from the UST Fund, and the Illinois EPA can easily review and approve costs as long as they do not exceed the applicable maximum payment amounts. Finally, maximum payment amounts for the preparation and submission of various documents will reduce costs by encouraging the submission of complete documents that can be approved in one submission, without the need for the preparation, submission, and review of amendments or additional information.

K.

1. The question, as posed, makes the activities associated with the development of Tier 2 or Tier 3 remediation objectives sound daunting. However, the activities consist mainly of entering minimal data into computer software that automatically runs the required calculations. The Illinois EPA does not believe that payment on a time and material basis is necessary for this task.

2. The Illinois EPA does not track the requested information.

3. The Illinois EPA does not track the requested information.

L.

1. The Illinois EPA included costs associated with applications for payment from the UST Fund throughout the maximum payment amounts it proposed for professional consulting services under Section 734.845. The Illinois EPA did not include a particular number of applications for payment under any subsection of Section 734.845.

2. Yes.

3. The Illinois EPA used the rate of \$80 per hour multiplied by the total numbers of hours allocated to a particular task. Time associated with seeking reimbursement was included in the total number of hours allocated to each task.

4. Please see the response to question D(2) above.

5. Under the Board's First Notice Proposal costs are considered reasonable as long as they do not exceed the applicable maximum payment amount lump sums or unit rates.

6. The Illinois EPA multiplied eight hours of personnel time by the average rate of \$80 per hour.

7. An unforeseen circumstance that requires the amendment of a corrective action plan may or may not be an unusual or extraordinary circumstance. An owner or operator can seek reimbursement for the preparation and submission of the amended plan under Section 734.860 if he or she can make the demonstration required under that Section.

M.

1. The Illinois EPA does not know how the referenced statistics were generated and therefore declines to answer this question.

2. The Illinois EPA does not know how the referenced statistics were generated and therefore declines to answer this question.

3. The Illinois EPA believes the proposed rules will help improve review times and review consistency in the LUST Program. *Inter alia*, the proposed rules will help streamline the LUST Program by allowing for a greater standardization of information submitted to the Illinois EPA. Greater standardization will allow for shorter document preparation time, shorter document review time, and more consistent reviews. The rules will also help simplify the reimbursement process by setting forth the rates that are considered reasonable for reimbursement from the UST Fund. Owners and operators and consultants will know the amounts that will be considered reasonable for the activities being proposed, and the Illinois EPA can easily review and approve costs as long as they do not exceed the applicable maximum payment amounts.

4. The Illinois EPA will continue to review information submitted to it to determine whether the information demonstrates compliance with the Environmental Protection Act and the Board's regulations.

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A P P E A R A N C E S

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1 E X H I B I T S

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NUMBER	MARKED
Exhibit 94	9
Exhibit 95	10

5 MR. SINK: Yes.

6 MR. CLAY: Well, professional services, for
7 example, a drilling event, if you were to say
8 investigation may be included in the stage one, stage
9 two, stage three professional services. It was for
10 excavation, it could be in preparation for that, and the
11 professional services could be an early action, soil
12 removal early action, could be under your corrective
13 action plan of soil removal under corrective action.
14 Professional services, we feel, is accounted for
15 throughout depending on what part of the mediation you
16 have to be in.

17 MR. SINK: So in this \$960 for professional
18 services, exactly what tasks did that -- those involve,
19 what was that scope of the work?

20 MR. CLAY: It's the tasks associated as you
21 see in your question, preparation for the abandonment
22 removal. And I think if you look at our original
23 testimony, you could further get an explanation as to
24 exactly what that is and how we arrived at that \$960.

16

1 HEARING OFFICER TIPSORD: Anything else?
2 Moving right along then.

3 MS. ROWE: I'm sorry, Carol Rowe, CW3M.
4 Just to follow up with Barry's question. I think where
5 he was trying to get to was when the agency developed
6 their number and their projections, and in this case,
7 preparation, there was I think in the earlier hearings

8 you had a set number of hours at set at a rate. In those
9 developments, did you guys ever put together a scope of
10 work report to say those five tasks or those ten tasks
11 that we can think of at this point we would consider in
12 that, you know, because a lot of answers to these
13 questions were is this included, and the answer was
14 well, it's all included. Well, at some point, what is
15 extraordinary? How do we define that out here, if the
16 answer is always what was included. Do you have a list
17 of tasks that you utilize to develop those original
18 numbers of hours at the rate.

19 MR. CLAY: I think we included in the
20 original testimony a list of tasks that were not
21 intended to be all inclusive. The scope of work is what
22 you need to do to meet regulations. You know that was
23 stated before in testimony, but we did give some
24 examples of the types of things that we identified were

17

1 going into a corrective action plan, and that list was
2 developed in consultation with the CECI Consulting
3 Engineers Counsel, which is now ACEC, but we did not
4 necessarily do that for all of the numbers. That list of
5 tasks was not intended to be all inclusive.

6 MS. DAVIS: Cindy Davis with CSD
7 Environmental. If the task list is all inclusive, how
8 do we know what tasks are included in the cost, and what
9 tasks aren't?

16 subpart B. Not even site investigations, a whole other
17 part of work. How is an engineers to certify a cost
18 associated with a bid obtained to perform that water
19 supply well survey, in an entirely different phase of
20 work than what the agency has intended the payment
21 amount to fall under, or that activity to fall under
22 with regard to payment amount, and wouldn't that
23 certification provided by an engineer be provided on an
24 illegal basis because that's not the agency's

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1 intentions? Although maybe it's not illegal, because
2 it's never stated that that's where the regular costs
3 was to be allocated.

4 So my question really is, is how are we to
5 make any kind of heads or tails of this regulation, and
6 how is it competitive bidding provisions are supposed to
7 apply in the absence of the scope of work?

8 MR. CLAY: The scope of work is what it takes
9 to meet regulations, I've answered that.

10 MR. COOK: It is what it takes to meet the
11 regulations, but requirement under site investigation
12 where the agency's division of cost are covered under
13 early action, if that is in fact were required to show
14 that the cost cover all the cost in the maximum payment
15 amount, the maximum payment amount for 20 and 45 day
16 reports is an early action activity, there's no
17 opportunity to demonstrate that those costs are being

18 covered under site investigation. It's impossible, yet
19 we would be expected to know how those allocations were
20 envisioned, but not communicated; is that correct?

21 MR. CLAY: I mean, I don't understand the
22 question. I mean, you're making a statement and
23 apparently you understand it, you're making this
24 characterization, so.

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1 MR. COOK: Let me put this another way. The
2 \$960 for preparation for tank abandonment, is it
3 reasonable that that cost is covered under the site
4 investigation phase?

5 MR. CLAY: No.

6 MR. COOK: Is it reasonable to say that the
7 cost to consult with the agency with regard to the
8 preparation for that abandonment is included in the
9 cost, in that \$960?

10 MR. CLAY: What consultation is required?

11 MR. COOK: They have to call and talk to the
12 agency or talk to the fire marshall about scheduling
13 tank removal, is value that cost included?

14 MR. CLAY: Yes, if they need to call OSFM as
15 part of that, that would be included.

16 MR. COOK: The cost to coordinate with JULIE;
17 is that included?

18 MR. CLAY: If that were required, yes.

19 MR. COOK: Are either of those two tasks that
20 you just described listed anywhere in regulation

21 relative to \$960?

22 MR. CLAY: I don't believe they're listed
23 specifically.

24 MR. COOK: So, how am I to know what is and

45

1 what is not included for purposes of using competitive
2 bidding?

3 MR. CLAY: It's whatever it takes to meet the
4 regulations, and as a professional, I would hope you
5 would know what it takes to meet regulations.

6 MR. COOK: I would hope I would as well.
7 However, I'll save that for later, never mind.

8 HEARING OFFICER TIPSORD: MR. TRUESDALE.

9 MR. TRUESDALE: I have a quick yes or no.
10 With relation to competitive bidding, did you not state
11 in prior testimony today, Doug, that if you were to ask
12 the consultants in this room to list what they
13 considered to be items included in the scope of work for
14 a particular task, you would expect to get different
15 lists from each consultant?

16 MR. CLAY: Yes, I did.

17 MR. TRUESDALE: Okay.

18 MR. RUARK: Following up on that question,
19 if each consultant would look at this \$960 and picture
20 different things being performed for that, how am I, as
21 an owner operator, a lay person, going to evaluate that
22 to tell a consultant they ought to know what is in

17 testimony, the documentation we did for those numbers is
18 what we provided in testimony.

19 MR. SCHWEIGERT: The issue becomes then to me
20 in my next question is how can we determine fair,
21 because let's say it's \$960, and your range on average
22 was \$500 to \$2,000, and we don't know that range and you
23 set it at \$960, how can it be fair then that for the
24 consultant that comes out, and the work is actually

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1 going to cost \$2,000, they lose for the one that comes
2 out, they do it for \$500, they win. If you don't know
3 your range, and how broad that is, how can this possibly
4 be fair?

5 MR. CLAY: The numbers that we proposed, the
6 board has now proposed in their first notice, we believe
7 are fair and reasonable.

8 MR. SCHWEIGERT: That's just a statement. If
9 you do not have the definitive data to support that,
10 where we can see that that range of cost is fair, is it
11 your intent the some people will lose and some people
12 will win. Fair to me means the range is high enough,
13 that the people will come out on average and will make a
14 reasonable amount of money as a professional in the
15 field, and will not have to take this on an
16 extraordinary basis to bidding. You said before you did
17 not believe professional services should go to bidding,
18 on average, and I agree with that completely. How
19 without a range can you say this is fair?

13 for a corrective action plan for \$5,120, we would
14 anticipate paying that. Now, if you showed an invoice
15 for \$4,000, we're not going to pay \$5,120.

16 MR. COOK: Are we still required to bill,
17 Doug, on a time and materials basis?

18 MR. CLAY: No, we would expect to see -- I
19 would think we would see a one page invoice from you
20 that says preparation, corrective action plan for
21 \$5,120, we would review that, and I'm assuming that
22 corrective action plan had been submitted, and we would
23 pay it.

24 MR. COOK: And in this instance where

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1 averages are maximums, maximums become minimums too,
2 because if they're not, then how do you ever make up on
3 the site where the level of effort the five times what's
4 necessary, or what paid for, how do you ever make that
5 up? You have to charge that much to have any hope
6 whatsoever of coming close to breaking even, and that's
7 inherently problematic.

8 BOARD MEMBER JOHNSON: Contrary to statute,
9 too, I guess the agency would have to say that they are
10 going to consider any billing statements submitted for
11 \$5,120, that's the figure, as inherently reasonable,
12 because that's what the statute requires, only allows
13 you to pay reasonable cost.

14 MR. CLAY: Reasonable costs incurred.

15 BOARD MEMBER JOHNSON: That's a question from

16 the very first hearing. I asked how are you going
17 handle that if, in fact, that reasonable cost is less
18 than the maximum allowable, I'm not sure I understand
19 what you're saying.

20 MR. CLAY: If it's less than, then you know
21 we wouldn't anticipate that.

22 MR. COOK: Duane just brought up a excellent
23 point, that is that the tank owner's reimbursement, if
24 they own one site, which the vast majority of tank

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1 owners remain within the responsible party basically in
2 the state of Illinois, have one to two incidents, so if
3 there site, on the plot data points, their site happens
4 to fall out here, outside of the realm of the undefined
5 ordinary, they are in trouble.

6 MR. DOTY: To really look a little bit
7 further, you're only going to reimburse maximum costs
8 incurred. Putting yourself in the shoes of the tank
9 owner, you either got two or three sites, you either get
10 fully reimbursed or you don't. You can't get 80 percent
11 reimbursed on one job, and 20 percent reimbursed on
12 another. It won't come out in the wash for the tank
13 owner.

14 MR. G. KING: I do have sort of an
15 observation question. At times, it seems like what is
16 being proposed here is that much different than what the
17 agency is proposing, we're just using different terms

18 and setting different points on the normal distribution.
19 The agency's proposal is basically saying, you know,
20 we're going to take the average, which I think is sort
21 of taking as a median, we got 50 percent of cases
22 falling below that point of normal distribution, that
23 will be your expedited unit rate. They call it maximum,
24 but it's the expedited. If you come in with costs under

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1 that point, it's going to fly through the system. If
2 it's something above that, then we have to go to our
3 other sections on usual circumstances or, you know, come
4 in and justify. Some of the values that you are coming
5 in with, I mean, I understand all the problems with how
6 the numbers were arrived at and scope of work, but it
7 seems like a lot of consultant groups would like to move
8 that point beyond the median and put it out there
9 somewhere where it might cover at least 80 percent of
10 the situations. So it seems to me that if we could just
11 get beyond the semantics, that we're sort of getting to
12 the same point here, and that is where do you set that
13 point in which you get expedited review. And there are
14 problems if you set it too high, everything moves to
15 that high point, and you haven't saved any money. The
16 agency proposal set at a median, so that 50 percent of
17 them apply, and the other one, you know, obviously have
18 different circumstances, and are going to have to be
19 reviewed on a site by site basis. Now is that a fair
20 characterization of where we are at this point in time?

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO)
REGULATION OF PETROLEUM)
LEAKING UNDERGROUND STORAGE)
TANKS (35 ILL. ADM. CODE 732))

R 04-22
(Rulemaking - Land)

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JAN 13 2004
STATE OF ILLINOIS
Pollution Control Board

**STATEMENT OF REASONS, SYNOPSIS OF TESTIMONY, STATEMENT
REGARDING MATERIAL INCORPORATED BY REFERENCE, AND STATEMENT
OF AMENDMENT TO THE BOARD'S VERSION OF THE RULES**

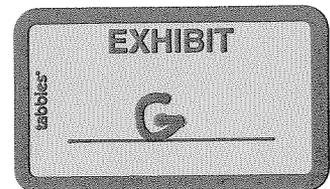
NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA") and, pursuant to 35 Ill. Adm. Code 102.202, submits its Statement of Reasons, Synopsis of Testimony, Statement Regarding Material Incorporated by Reference, and Statement of Amendment to the Illinois Pollution Control Board's ("Board's") Version of the Rules for the above referenced proceeding.

I. STATEMENT OF REASONS

A. Facts in Support, Purpose and Effect

1. Background

In this proposal the Illinois EPA submits proposed amendments to 35 Ill. Adm. Code 732 ("Part 732"), the rules governing the Leaking Underground Storage Tank ("LUST") Program. Part 732 prescribes the corrective action measures that must be taken in response to releases from petroleum underground storage tanks ("USTs"). It also sets forth procedures and requirements for seeking payment from the Underground Storage Tank Fund ("UST Fund"). The amendments are proposed in response to Public Act 92-0554, which amended the LUST Program's response requirements for UST releases reported on or after June 24, 2002, and Public



Subpart F: Payment or Reimbursement

Section 732.601 – Applications for Payment. Because, under the proposed new Subpart H, payment from the UST Fund will generally no longer be submitted and paid on a “time and materials” basis, references to “materials, activities, or services” are deleted from Section 732.601(a). In conjunction with the proposed amendments to Sections 732.200 and 732.204, Section 732.601(a) is also amended to reflect that a budget plan is not required for early action activities, other than free product removal activities conducted more than 45 days after confirmation of the presence of free product.

New Sections 732.601(b)(9) through (11) are proposed to require the submission of certain information as part of the application for payment. The information under Section 732.601(b)(9) is necessary to provide adequate documentation of the costs incurred by and owners and operators, and has always been required by the Illinois EPA prior to providing payment from the UST Fund. The information under Section 732.601(b)(10) is necessary to confirm that subcontractors have been paid in cases where handling charges are requested. Finally, the information under Section 732.601(b)(11) is necessary to confirm that sample analyses for which costs are requested were conducted by an accredited laboratory in cases where Section 732.106 requires analysis by an accredited laboratory.

In conjunction with the amendments to Section 732.305(d) and 732.405(d), Section 732.601(f) is amended to require the submission of a budget plan prior to the Illinois EPA’s review of a corresponding application for payment, except for early action costs other than costs associated with free product removal activities conducted more than 45 days after the confirmation of the presence of free product. Due to numerous additional citations that need to

Section 732.703(c) is amended to allow sites located in a right-of-way of any highway authority to perfect a No Further Remediation Letter via a Memorandum of Agreement between the highway authority and the Agency. Currently, such perfection of a No Further Remediation Letter is available only to sites located in Illinois Department of Transportation right-of-ways. Corresponding amendments are made to Sections of Section 732.703(c).

Section 732.704 – Voidance of a No Further Remediation Letter. Section 732.704(a)(2) is amended to delete unnecessary language. Owners and operators must complete any groundwater monitoring program prior to the issuance of a No Further Remediation Letter.

For consistency with the language of other provisions, Section 732.704(a)(5) is amended to refer to the 45-day period for recording the No Further Remediation Letter rather than a 45-day period for perfection of the letter. The amendment makes no substantive change to the Section because the date of perfection is the date of recording.

Section 732.704(a)(7) is amended in conjunction with the proposed amendments to Section 732.703(c). Sections 732.704(b) and (b)(1) are amended for consistency with Section 732.704(b)(2).

Subpart H: Maximum Payment Amounts

The Agency proposes new Subpart H as a part of the amendments designed to streamline payment from the UST Fund. Subpart H contains proposed maximum amounts that can be paid from the UST Fund for various release response activities. The maximum amounts for some activities are set forth as lump sums or unit rates, while the maximum amounts for others will continue to require review on a time and materials basis due to the inability to adequately determine standard lump sums or unit rates for all sites. A more detailed description of the Subpart follows.

Section 732.800 – Applicability. Section 732.800(a) explains that Subpart H divides all response activities into tasks and sets forth the maximum amounts that can be paid from the UST Fund for each task. Because of the difficulty of enumerating every cost that may be associated with a site, Section 732.800(b) explains that the costs identified in Subpart H are only the major costs associated with a particular task. The maximum payment amount is intended to include all costs associated with completing the identified task. Section 732.800(c) explains that Subpart H sets forth only the maximum payment amounts for eligible costs. Whether a particular costs is eligible for payment is still determined under Subpart F.

Section 732.810 – UST Removal or Abandonment Costs. Section 732.810 sets forth the maximum payment amounts for costs associated with the removal or abandonment of USTs. The maximum payment amount is based upon the volume of each UST removed or abandoned in place.

Section 732.815 – Free Product or Groundwater Removal and Disposal. Section 732.810 sets forth the maximum payment amounts for costs associated with the removal and disposal of free product or groundwater. Payment of costs associated with the removal of free product or groundwater via handbailing or a vacuum truck is based upon the number of gallons removed. Payment for costs associated with other methods of removal is determined on a time and materials basis.

Section 732.820 – Drilling, Well Installation, and Well Abandonment. Section 732.820 sets forth the maximum payment amounts for costs associated with drilling, well installation, and well abandonment, excluding drilling conducted as part of free product removal or an alternative technology. Payment for costs associated with drilling are based upon the drilling method used and the number of feet drilled. Payment for costs associated with the installation and

associated with sample handling and analysis. The maximum payment amounts are based upon the analysis conducted. Maximum payment amounts are also provided for sampling devices and sample shipping.

Section 732.APPENDIX E – Personnel Title and Rates. Section 732.APPENDIX E sets forth the titles and maximum hourly rates for personnel when personnel costs are paid on a time and materials basis. The Section also sets forth the educational, licensing, and experience requirements applicable to each title and rate.

B. Technical Feasibility and Economic Reasonableness

1. Technical Feasibility

No new technical requirements are created by the proposed amendments. The only amendments affecting technical requirements are those updating existing methods and procedures. Therefore, the Illinois EPA believes that no issues of technical feasibility are raised in this proposal.

2. Economic Reasonableness

This proposal may result in both increased and decreased incidental costs to the Illinois EPA and the Board. As a result of the proposed amendments, the Illinois EPA anticipates incurring costs related to forms revisions, internal training, public outreach, and an expected increase in application for payment submittals during the year following the adoption of the proposed amendments due to the deadline added at Section 732.601(j). The Illinois EPA anticipates a costs savings as a result of the streamlining of plan, budget plan, and report reviews provided by the proposed changes to Subpart E and addition of Subpart H.

As a result of the proposed deadline for the submission of applications for payment, the Board may see an increase in the number of appeals relating to applications for payment from the

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

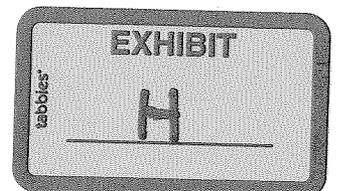
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S FIRST ERRATA SHEET TO ITS PROPOSAL FOR THE AMENDMENT OF 35 ILL. ADM. CODE 732

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through its attorneys Kyle Rominger and Gina Roccaforte, and submits this First Errata Sheet to its proposal for the amendment of 35 Ill. Adm. Code 732. The Illinois EPA proposes the following amendments to the text of the rules submitted in its proposal to the Board dated January 1, 2004:

1. Amend Section 732.110(e) to the following to replace "Section 732.703(d)" with "Section 732.703(c) or (d)" in the first sentence. A form addressing site ownership is not necessary for sites subject to Section 732.703(c).

e) Except in the case of sites subject to Section 732.703(c) or (d) of this Part, reports documenting the completion of corrective action at a site must contain a form addressing site ownership. At a minimum, the form shall identify the land use limitations proposed for the site, if land use limitations are proposed; the site's common address, legal description, and real estate tax/parcel index number; and the names and addresses of all title holders of record of the site or any portion of the site. The form shall also contain the following certification, by original signature, of all title holders of record of the site or any portion of the site, or the agent(s) of such person(s):

I hereby affirm that I have reviewed the attached report entitled _____ and dated _____, and that I accept the terms and conditions set forth therein, including any land use limitations, that apply to property I own. I further affirm that I have no objection to the recording of a No Further Remediation Letter containing the terms and conditions identified in the report upon the property I own.



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
REGULATION OF PETROLEUM) R 04-23
LEAKING UNDERGROUND STORAGE) (Rulemaking – Land)
TANKS (PROPOSED NEW 35 ILL.)
ADM. CODE 734))

TESTIMONY OF DOUGLAS W. CLAY IN SUPPORT OF
THE ENVIRONMENTAL PROTECTION AGENCY'S PROPOSAL TO ADOPT
35 ILL. ADM. CODE 734

My name is Doug Clay. I am the manager of the Leaking Underground Storage Tank ("LUST") Section within the Bureau of Land of the Illinois Environmental Protection Agency. I have been in my current position since September of 1994. The LUST Section is primarily responsible for reviewing the technical adequacy of plans, reports and associated budgets for the remediation of releases from underground storage tanks regulated under Title XVI of the Environmental Protection Act ("Act") and 35 Ill. Adm. Code, Parts 731 and 732.

Prior to assuming my current position, I was the manager of the Disposal Alternative Unit within the Permit Section of the Bureau of Land. I have also worked in the Permit Section in the Bureau of Water. I have been employed at the Illinois EPA since 1983 following the receipt of a B.S. degree in Civil Engineering from the University of Illinois. I have been a Registered Professional Engineer in Illinois since 1989. A copy of my resume is attached (Attachment 1).

Today I will be testifying in support of the proposed 35 Ill. Adm. Code, Part 734. These amendments are the result of: (1) modification to the Illinois Environmental Protection Act by Public Acts 92-0554 and 92-0735; (2) the need to reform the current

budget and reimbursement process; and (3) to clarify issues that have arisen since Part 732 was last amended. My testimony will provide a brief overview and focus on a portion of Subpart E, Subpart F, Subpart G and Appendices A and B.

Overview – The proposed Part 734 regulations are identical in substance to the proposed amendments to 35 Ill. Adm. Code 732, except as identified in testimony provided by Agency personnel. They apply to underground storage tank releases of petroleum reported to the Illinois Emergency Management Agency on or after June 24, 2002, and to releases that were reported prior to June 24, 2002, for which the owner or operator has elected to proceed in accordance with Part 734. These regulations are intended to streamline the leaking underground storage tank remediation process, clarify remediation requirements and most notably reform the budget and reimbursement process. The new budget and reimbursement process would eliminate the majority of budgets and reimbursement packages submitted based on a time and material basis and replace them with submittals based on unit rates and lump sums for specific tasks established in the regulations. We believe that this will streamline the approval of budgets and the processing of reimbursement claims. Currently, there is a tremendous amount of time spent reviewing budgets and reimbursement packages. Furthermore, the majority of plan and report denials, amendments to plans and reports submitted by consultants, and appeals before the Illinois Pollution Control Board are related to budget and reimbursement issues, as opposed to technical issues. The Agency believes that the proposed amendments will allow more efficient use of Board and Agency resources, improve consistency, lower remediation costs, expedite cleanups and allow tank owners and operators to be reimbursed in a more timely manner. The proposed costs in Subpart

ILLINOIS POLLUTION CONTROL BOARD
December 1, 2005

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

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

Proposed Rule. Second Notice.

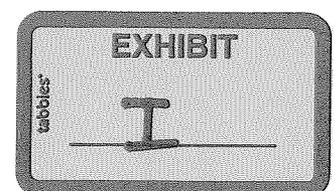
OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On January 13, 2004, the Illinois Environmental Protection Agency (Agency) filed two proposals for rulemaking. On January 22, 2004, the Board accepted and consolidated the proposals for hearing. The Board held numerous hearings and received substantial comment before proceeding to first notice on February 17, 2005, pursuant to the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/5-5 *et. seq.* (2004)). After an additional hearing and numerous comments, the Board today adopts a second-notice proposal and opens a subdocket B in this rulemaking, to address ongoing issues involving scope of work and reimbursement for professional consulting services.

The Board's authority in rulemaking proceedings stems from Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5 (2004)), which provides that the Board "shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of the Act." 415 ILCS 5/5(b) (2004). Title VII of the Act sets forth the statutory parameters for rulemaking by the Board. 415 ILCS 5/26-29 (2004). The Board may adopt a rule after hearing and determination of the economic reasonableness and technical feasibility of the rule. *See* 415 ILCS 5/27 (2004). The Board's decision is based on the record before the Board including all testimony and comments filed with the Board. 35 Ill. Adm. Code 102.418.

SUMMARY OF TODAY'S ACTION

The Board today adopts the proposal for second notice pursuant to the IAPA (5 ILCS 100/5-5 *et. seq.* (2004)). Due to the comments received after the first notice began and in consideration of the prior comments in this rulemaking, the second notice differs from the first



to change the phrase "maximum payment amount" in the first-notice opinion and the Agency agrees with the Board's decision. *Id.*

Section 734.630(ccc). The Agency does not believe that the deletion of this subsection as suggested by CW³M is necessary. PC 62 at 14. The Agency states that the proposed rule does not require the reclassification of groundwater by an adjusted standard so CW³M's reliance on 35 Ill. Adm. Code 620.260 has not been adequately explained, according to the Agency. *Id.* In response to CW³M's claim that this subsection has a negative effect on property values, the Agency asserts that the effect of remediation on property values is not a factor in UST Fund reimbursement. *Id.* The Agency asserts that reimbursement for the UST Fund is limited to costs necessary to meet the requirements of the Act and use of a groundwater ordinance as an institutional control meets the minimum requirements. *Id.*

Section 734.665. The Agency is opposed to changes in auditing language proposed by CW³M. PC 62 at 15. The Agency argues that although the owner/operator is the individual charged with providing the plans, reports, budgets, and applications to the Agency, those documents are often submitted directly by the consultant. *Id.* The Agency maintains that in many cases the owner/operator's only involvement is signing the documents and as a result the owner/operator is unlikely to have additional information about the documents. *Id.* The Agency asserts that limiting the Agency's review to information maintained by the owner/operator would limit the review to the document the Agency already has, in most instances. *Id.* The Agency asserts that the Agency needs to review information maintained by the owner/operator's consultant in order to conduct a complete and proper review of the information for the owner/operator. *Id.*

The Agency further states that providing a list of documents required during an inspection is impossible because the Agency cannot know what information is in the possession of the consultant or owner/operator until the Agency conducts the review. PC 62 at 15. The Agency does not believe that the suggested changes are necessary or that CW³M has provided sufficient justification to warrant a change. PC 62 at 15-16.

Section 734.800. The Agency argues that the changes suggested by CW³M and CSD would entirely alter the intent and effect of Subpart H. PC 62 at 17. The Agency states that the rates in Subpart H are *maximum* payment amounts, not "speed bumps" for reimbursement. *Id.* The Agency asserts that allowing reimbursement above the maximum payment amounts outside of the bidding and unusual or extraordinary circumstances provisions would render those provisions superfluous. The Agency also believes that the changes suggested by CW³M would result in frequent attempts to exceed the "threshold" amounts in the rules rather than routine requests at or below those rates. *Id.*

As to the suggested change to allow for tasks not specifically listed under a maximum payment amount to be reimbursed separately, the Agency believes that such a change will eventually result in Subpart H becoming a reimbursement on time and materials basis for every item not specifically identified in the rules. PC 62 at 18. The Agency states that developing an all-inclusive list of costs associated with each task identified in Subpart H would be impossible. *Id.*

alternative proposal would result in a process that violates the Act and the IAPA. Therefore, the Board will not adopt the concept.

Sufficiency of Rates

The Board notes that USI stated that in general the rates proposed in Subpart H are acceptable with the use of both the bidding process and the unusual and extraordinary circumstance provisions. In making this determination, USI employed three tests. The first test was whether the "unit of measure" assigned to the work activity was appropriate to the work being performed. Exh. 109 at 37-38. The second test was whether the regulations provided sufficient detail to allow a scope of work to be authored for a bid specification to allow for competitive bidding. Exh. 109 at 38-39. The third test was whether USI believes the price accurately reflects prevailing market prices and the whether the price includes conditions likely to be encountered at most sites in Illinois. Exh. 109 at 39. However, USI does challenge the maximum rates for professional consulting services.

CW³M's alternative proposal would use the Agency's proposed rates as interim rates until a process is in place to develop a database to be used in developing rates. PC 63 at 4. CW³M specifically states that CW³M does not endorse the rates as proposed. *Id.*

In proceeding to first notice with the proposal the Board stated:

The Board will not discuss each and every proposed lump sum maximum payment amount; however, the Board has carefully reviewed all the rates proposed by the Agency. Other than the rates discussed in more detail in this opinion, the Board finds the rates are reasonable and supported by the record. R04-22, 23 (Feb. 17, 2005) at 79.

Given the acceptance by USI, and even CW³M, of many of the maximum payment amounts listed in Subpart H, the Board finds that the maximum payment amounts, except as discussed below, are reasonable and supported by the record. The Board, as discussed above, further finds that absent a defined scope of work, the record does not support the rates for professional services in Section 732.845/734.845. The Board will amend the rule to allow for professional services to be reimbursed based on time and materials basis.

Statutory Authority

As discussed above and in the Board's first-notice opinion, Section 57.7(b)(2) of the Act allows reimbursement for corrective action that mitigates "any threat to human health, human safety, or the environment resulting from the underground storage tank release." 415 ILCS 5/57.7(b)(2) (2004). Section 57.7(c) of the Act (415 ILCS 5/57.7(c) (2004)) requires the Agency to determine that costs associated with any plan "are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation of corrective action activities in excess of those required to meet the minimum requirements of this Title." 415 ILCS 5/57.7(c) (2004). The Board has examined a substantial and detailed record in this proceeding and based on that examination, the Board has found the maximum

payment rates to be “reasonable” and not in “excess” of activities necessary to meet the “minimum” requirements of the Act. For this reason, employing maximum payment rates is consistent with the Act and therefore appropriate for the Board to adopt.

4. An Agency Database

An ongoing issue in this proceeding has been the quality of the data available to develop rates. Participants asked prior to first notice and again after first notice that the Board require the Agency to develop a database sufficient to support rates. More specifically, both USI and CW³M, in their alternative proposals, suggest that additional data be developed concerning the maximum payment amounts in Subpart H. USI offered testimony concerning the use of Automated Budget and Reimbursement Approach (ABRA) to collect data concerning both rates and scope of work. Exh. 109 at 72. The Agency is concerned that the database software presented by USI is complicated, confusing to understand, and cumbersome to use. PC 62 at 29. The Agency also does not believe that the large majority of consulting firms would embrace the use of the database software. *Id.* Finally, the Agency feels implementation and maintenance of such a database would require significant resources the Agency does not have. *Id.*

The Board addressed the issue of requiring the Agency to develop and maintain a database concerning reimbursement rates and scopes of work at in the first-notice opinion. The Board stated:

The Board acknowledges that many participants have made meaningful comments about the value of an electronic database to track reimbursement rates. However, the Board will not require the Agency to develop an electronic database of reimbursement information. The Board is not convinced that an electronic database is necessary to administer either these specific rules or the UST program. R04-22, 23 (Feb. 17, 2005) at 68.

The Board appreciates the efforts of USI to seek out the development of a system that will allow for collection of data concerning reimbursement rates as well as the scope of work for tasks. However, the participants are in effect asking the Board to direct the Agency to maintain or developed a process to be used internally by the Agency. The Board is unwilling to direct the Agency to do so, especially given the financial consequences to the Agency for the development and maintenance of such a process. And as stated at first notice, the Board is not convinced that an electronic database is necessary to administer either these specific rules or the UST program. Therefore, the Board will not direct the Agency to either use the ARBA system or develop a system for collection of data concerning reimbursement rates.

5. Agency Review Process

The issue of how the Agency performs reviews of materials submitted in the UST program and the length of time such reviews take has been discussed from the beginning of this rulemaking process. Most recently, CSD expresses concern that due process is not afforded to owners/operators who cannot afford to appeal an adverse Agency decision to the Board. PC 64 at 4. CSD demands that the Board provide an alternative to appeals to the Board in the rule or

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SEP 23 2005

STATE OF ILLINOIS
Pollution Control Board

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

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

COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through one of its attorneys, Kyle Rominger, and submits the following comments. These comments are divided into three sections. The first section contains comments on testimony submitted to the Board in response to its Proposed Rule First Notice Opinion and Order dated February 17, 2005, ("First Notice Proposal"). The second section contains comments on public comments submitted to the Board in response to its First Notice Proposal. The third section contains a few suggested non-substantive changes to the rules proposed by the Board to correct minor errors and promote consistency among the rules' provisions.

While many suggestions and issues deserving comment have been raised, time does not permit the Illinois EPA to provide detailed comments on all of them in this document. Moreover, the usefulness of this document would be diminished by its length if the Illinois EPA addressed each issue and suggestion raised in the testimony and public



appropriate or necessary, or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

9. Section 734.800

a. CW3M suggests changing Sections 734.800(a) and (c) to create a presumption of reasonableness for the costs set forth in Subpart H. It also suggests amending language in other sections to change maximum payments amounts into amounts that are "considered reasonable." See, e.g., the suggested changes to the first sentences of Sections 734.810 and 734.815. CW3M does not provide any additional testimony to support these changes.

CSD suggests changing the maximum payment amounts in Subpart H to "threshold values at or below which proposed budgets and requests for reimbursement can be approved without significant review, but require the owner/operator to submit actual costs for Agency review and approval." Exh. 99 at 3. Reimbursement could exceed the threshold value under a "longer and more detailed review." Id.

USI does not appear to believe that a fundamental shift in Subpart H to "considered reasonable" or "threshold" amounts is necessary, at least in Sections 734.810 through 734.840. USI states in its testimony that "USI's experience in LUST work in Illinois indicates that the billing methods, units of measure and prices [set forth in Section 734.810 through 734.840 of the Board's First Notice Proposal] are not highly inconsistent with those prevailing in the market today. And, to the extent that the maximum payment amounts are inconsistent with prevailing market rates or insufficient to cover unique situations, the scope of

work for these activities is defined in sufficient detail to accommodate the use of the competitive bidding provision and extraordinary circumstances provision provided in 734.855 and 734.860 as a means of establishing alternative maximum payment amounts.” Exh. 109 at 33-34.

The changes suggested by CW3M and CSD would entirely alter the intent and effect of Subpart H. As stated in the Board’s proposal, Subpart H “provides methods for determining the maximum amounts that can be paid from the Fund for eligible corrective action costs.” 35 Ill. Adm. Code 734.800(a) (proposed) (emphasis added). The maximum payment amounts in Subpart H were developed and intended to be used as maximums, not speed bumps. Still, they are not absolutes. The maximum payment amounts can be exceeded via the bidding and the unusual or extraordinary circumstances provisions in the Board’s First Notice Proposal.

Allowing costs to be reimbursed over and above the maximum payment amounts, outside of the bidding and the unusual or extraordinary circumstances provisions, renders the bidding and the unusual or extraordinary circumstances provisions superfluous. Furthermore, based on past experience, the Illinois EPA believes the changes suggested by CW3M would result in frequent if not common attempts to exceed “considered reasonable” or “threshold” amounts set forth in the rules rather than routine requests for reimbursement at or below the “considered reasonable” or “threshold” amounts because of a desire for more expeditious reviews and approvals. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that CW3M or CSD has

provided sufficient justification to warrant a change to the Board's First Notice Proposal.

b. CW3M suggests changing Section 734.800(b) to allow costs not specifically listed under a particular task to be reimbursed separately from the maximum payment amount for the task. CW3M does not provide any additional testimony to support this change.

The suggested change would alter the entire structure of Subpart H, which includes all costs associated with a particular task in the maximum payment amount allowed for the task. Allowing individual costs associated with a task to be reimbursed over and above the maximum payment amount for the task will result in the eventual devolution of Subpart H into reimbursement on a time and materials basis for every item and task not specifically identified in the rules. As the Illinois EPA testified, the development of an all-inclusive list of costs associated with each task identified in Subpart H would be impossible. The Illinois EPA's testimony is echoed in USI's comments, where USI states that "[i]t is reasonable to believe that it would be impossible to capture, in a rule of this nature, a list of all products or services that may be needed during a UST remediation project." PC 59 at 44. The Illinois EPA does not believe that the suggested change is appropriate or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

c. CW3M suggests changing Section 734.800(c) to eliminate the submission of cost breakdowns and invoices for costs paid by "lump sum or unit of production" and to allow reimbursement in excess of the maximum payment

amounts of Subpart H if the reimbursement applicant provides "separate and adequate justification of [cost] reasonableness on a time and materials basis." Exh. 106 at Section 734.800(c). CW3M does not provide any additional testimony to support these changes.

Regarding the first change, a description of the type of supporting documentation the Illinois EPA believes is necessary in a reimbursement application is already in the record of these proceedings. One item that certainly is necessary is an invoice with a minimum amount information to document the costs requested for reimbursement (e.g., the task performed, the amount charged for the task, and the date the task was conducted). Regarding the second change, the Board's proposal already allows an owner or operator to exceed the maximum payment amounts via bidding and the unusual or extraordinary circumstances provisions. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

d. CW3M suggests adding a Section 734.800(d) to provide reimbursement of emergency activities on a time and materials basis. CW3M does not provide any additional testimony to support this change. There is nothing to show that emergency activities need to be reimbursed differently than non-emergency activities. Under the Board's proposal emergency activities will be reimbursed to the same extent and in the same manner as non-emergency activities. The Illinois EPA does not believe the suggested change is necessary or

appropriate, or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

10. Section 734.810

CW3M suggests changing Section 734.810 to exclude several costs from the maximum payment amounts allowed for UST removal and abandonment and to reimburse the costs on a time and materials basis. CW3M also suggests changing the maximum payment amounts for UST removal and abandonment. CW3M does not provide any reasoning for excluding the identified costs from the maximum payment amounts, nor does it explain how its suggested maximum payment amounts were calculated.

CSD also suggests changing the maximum payment amounts in Section 734.810 and suggests reimbursing costs associated with filling USTs abandoned in place on a time and materials basis. The payment amounts suggested by CSD are based upon *RS Means* calculations and are different than the amounts suggested by CW3M.

USI states in its testimony that it "agrees with the Board when they state that the rates should be based upon actual experience in the UST program in Illinois. *RS Means* and other sources that do not specifically track costs associated with the Illinois UST program are not likely to reflect the requirements and costs unique to the Illinois Underground Storage Tank Program and the peculiarities of the Agency's administration of the program." Exh. 109 at 32 (citations omitted). USI further states that it believes the maximum payment amounts set forth in Section 734.810 of the Board's First Notice Proposal "are appropriate," and that it has "no objection to their implementation." *Id.* at

40 (no objection to the maximum payment amounts in Sections 734.810 through 734.840, excluding drilling mobilization costs).

PIPE previously proposed alternative rates for UST removal and abandonment that were based on the 2004 *RS Means Environmental Costs Handling Options and Solutions* publication. See First Notice Proposal at 81. In its First Notice Proposal the Board stated that it "is not convinced that basing rates on *RS Means* in and of itself is appropriate. Although as indicated above, the Agency's method for developing the maximum payment amounts had statistical limitations, the Agency's rates were based on real data from actual sites in Illinois. Therefore, the Board rejects alternative rates, such as *RS Means*, and the Board will propose the rates as developed by the Agency for first notice." Id.

CW3M and CSD have suggested alternative payment amounts for Section 734.810, but they have not provided sufficient additional testimony to show why the Board must adopt their suggested rates over the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner's or operator's costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided. Please see the Illinois EPA's comments on Section 734.800 (above) for a discussion of CSD's suggested change of the maximum payment amounts to "threshold" amounts.

11. Section 734.820

CW3M suggests adding a provision to Section 734.820 to make the maximum payment amounts for travel associated with professional consulting services also applicable to drilling costs to cover drilling contractors' mobilization charges. See Exh. 106 at 21. USI states in its testimony that the maximum payment amounts proposed by the Board in Section 734.820 "are appropriate" and that it "has no objection to their implementation," with the exception of the omission of a maximum payment amount for mobilization. Exh. 109 at 40.

The Illinois EPA testified that mobilization costs were included in the drilling rates it proposed to the Board. Transcript of May 26, 2005, at 46-47. The Board's proposal expressly includes mobilization charges in the maximum payment amounts for drilling. See 35 Ill. Adm. Code 734.820(a) (proposed) ("Such costs must include, but not be limited to, those associated with mobilization."). Furthermore, the travel rates that CW3M proposes to make applicable to drilling costs were developed and intended to be used for travel costs associated with professional consulting services, not drilling costs.

Neither CW3M nor USI provide sufficient additional testimony to show why the proposed maximum payment amounts do not provide reimbursement for reasonable mobilization costs, or why the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs associated with drilling in cases where the owner's or operator's drilling costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

12. Section 734.825

CW3M continues to suggest changing the maximum payment amounts under Section 734.825 based upon amounts approved under Illinois Department of Transportation (“IDOT”) contracts. CW3M also suggests changing the “swell factor” and “weight/volume” conversion factor set forth in Section 734.825, and suggests adding a reimbursement amount of \$14.25 per cubic yard for “additional expenses” associated with the transportation of soil that is temporarily stockpiled on-site or off-site.

USI states that it believes the maximum payment amounts set forth in Section 734.825 of the Board’s First Notice Proposal “are appropriate.” Exh. 109 at 40. It has “no objection to their implementation.” Id. (no objection to the maximum payment amounts in Sections 734.810 through 734.840, excluding drilling mobilization costs).

The Illinois EPA submitted as Exhibit 89 a letter from IDOT that explains the costs in IDOT’s contracts “should not be used to compare or justify cost[s] proposed by IEPA in this rulemaking.” Exh. 89 at 2. The Board has already considered testimony from CW3M regarding IDOT contract costs and decided not to use those costs to determine the maximum payment amounts under Section 734.825. See, e.g., Exh. 29 at 49, Appendix J. CW3M has not provided sufficient additional testimony to show why the Board must adopt its suggested rates over the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner’s or operator’s costs exceed the maximum payment amounts proposed by the Board.

The weight/volume conversion factor now suggested by CW3M is 1.2 tons per cubic yard, lower than the 1.5 tons per cubic yard conversion proposed by the Board.

amount by a sum roughly equal to the transportation charge for hauling contaminated soil to a landfill, even in cases where the soil is stockpiled on-site. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

13. Section 734.830

CW3M suggests changing Section 734.830 by adding a "stop fee" for drum disposal. To accomplish this CW3M suggests making the maximum payment amounts for travel associated with professional consulting services also applicable to drum disposal.

USI states that it believes the maximum payment amounts set forth in Section 734.825 of the Board's First Notice Proposal "are appropriate." Exh. 109 at 40. It has "no objection to their implementation." Id. (no objection to the maximum payment amounts in Sections 734.810 through 734.840, excluding drilling mobilization costs).

The Board's proposal already includes any "stop fees" or other travel fees associated drum disposal in the maximum payment amounts for drum disposal. See 35 Ill. Adm. Code 734.830 (proposed) (maximum payment amounts include payment for costs associated with drum purchase, transportation, and disposal). Furthermore, the maximum payment amounts for travel set forth in Section 734.845(e) were developed and intended to be used for travel costs associated with professional consulting services, not drum disposal. CW3M has not provided any additional testimony to show why the Board must adopt a "stop fee" in addition to the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner's or

operator's costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

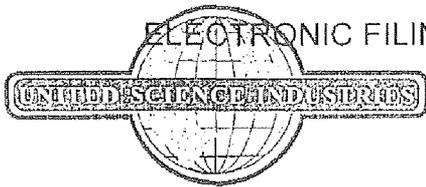
14. Section 734.840

CW3M suggests changing the maximum payment amounts in Section 734.840 for costs associated with concrete, asphalt, and paving. In support of the changes it references its prior testimony in this rulemaking and states that the suggested rates are consistent with prevailing rates. Exh. 106 at 25.

USI states that it believes the maximum payment amounts set forth in Section 734.840 of the Board's First Notice Proposal "are appropriate." Exh. 109 at 40. It has "no objection to their implementation." Id. (no objection to the maximum payment amounts in Sections 734.810 through 734.840, excluding drilling mobilization costs).

The Board has already considered the prior testimony submitted by CW3M and others regarding the maximum payment amounts for concrete, asphalt, and paving, and declined to make any changes to the amounts proposed by the Illinois EPA. See First Notice and Opinion at 81. CW3M has not provided any additional testimony to show why the Board must adopt CW3M's suggested rates over the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary

circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner's or operator's costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.



ELECTRONIC FILING, RECEIVED, CLERK'S OFFICE, MAY 3, 2005

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R04-22,23

May 3, 2005

Ms. Marie E. Tipsord
Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

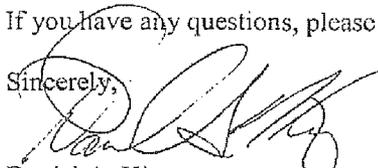
Re: **Prefiled Questions and Availability**

Dear Ms. Tipsord:

In regard to the April 20, 2005 Hearing Order, please find attached a copy of the prefiled questions submitted on behalf of United Science Industries, Inc (USI) for the Agency's review. USI appreciates the opportunity to have additional hearings in the Southern Illinois area. Currently, USI is *unavailable* for hearings on the following dates: 6/6, 6/7, 6/8, 6/9, 6/14, 6/15, 7/1, 7/4, 7/5, 7/6, 7/28 and 7/29.

If you have any questions, please feel free to contact me at (618)735.2411.

Sincerely,


Daniel A. King
Manager of Business Development
United Science Industries, Inc.

Encl (1)



ELECTRONIC FILING, RECEIVED, CLERK'S OFFICE, MAY 3, 2005

Questions:

(NOTE: All questions and regulations references have been asked relative to the proposed 734 regulations, where applicable questions would also apply to corresponding sections of 732 and possibly 731 regulations as well)

1. Pursuant to 734.210(a) there are activities that are required to be performed within 24 hrs of the confirmation of the release. Pursuant to 734.625(a)(1) Early Action activities conducted pursuant to Subpart B are eligible for reimbursement. However, Subpart H does not include a pay item inclusive of these tasks.

Does the Agency intend to revise Subpart H to include a pay item for the completion of activities pursuant to 734.210(a)?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

2. Pursuant to 734.210(b) there are six (6) activities that are required to be performed within 20 days of the notification of the release to IEMA.

- 734.210(b)(1) Remove Petroleum to prevent further release
- 734.210(b)(2) Visually inspect Release and prevent further migration
- 734.210(b)(3) Monitor/mitigate fire, explosion, & vapor hazards
- 734.210(b)(4) Remedy hazards posed by excavated or exposed soils
- 734.210(b)(5) Measure for the presence of a release
- 734.210(b)(6) Determine the possible presence of free product

However, Subpart H does not include a pay item inclusive of these tasks.

Does the Agency intend to revise Subpart H to include a pay item for the completion of activities pursuant to 734.210(b)?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

3. Pursuant to 734.210(d) the owner/operator is required to prepare a 45-day report.

In the event of an Early Action extension (734.210(g)) is it necessary and required to submit a 45-day report within 45+14 days from notification to IEMA if all Early Action activities are not yet complete?

Doing so would require the submission of an amended 45-day report at the conclusion of early action activities and potentially result in an unnecessary duplicated effort.

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Does the early action extension provided for in 734.210(g) also extend the submission deadline for the report that is required in 734.210(d) to the end of the early action period?

If not, and two reports are required to be submitted under this circumstance, would the preparation of the second 45-day report be considered an extenuating circumstance and therefore reimbursable on a time and materials basis pursuant to 734.850?

4. Pursuant to 734.210(g) an owner/operator may request in writing that activities continue beyond the 45+14 day period.

Are the costs associated with performing this activity eligible and reimbursable?

If yes, is this activity considered an extenuating circumstance and therefore reimbursable on a time and materials basis pursuant to 734.850?

If not, what applicable Subpart H pay items would apply to performing this task?

5. Section 734.810 of Subpart H allows for reimbursement of tank removal and abandonment costs, performed pursuant to 734.210(f), on a per UST basis based on the relative size of the tank.

Is it the Agency's intent that this cost would include the cost for abandonment slurry?

6. Taking into consideration that a waiver of the removal requirements set forth by the Office of the State Fire Marshall (OSFM) to allow abandonment-in-place may only be granted when unusual situations, determined by OSFM, are present that make it infeasible to remove the UST(s), and as such no typical situation exists, should all tank abandonment activities be considered as extraordinary circumstances?

7. Section 734.845(e) allows for reimbursement of costs associated with travel time, per diem, mileage, transportation, vehicle charges, lodging and meals for professional personnel. However, there is not a complimentary section within Subpart H to allow for travel costs associated with field personnel.

Would the Agency consider adding a Subpart H Pay Item for field equipment mobilization charges as an hourly rate, by the mile, or a mileage scale in addition to a field equipment mobilization permitting item on a time and materials basis?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay items are these costs associated?

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8. Section 734.845(a)(1) allows \$960.00 for professional services associated with the preparation for abandonment or removal of USTs, however, professional services are also required but not limited to the following:

Preparation for Early Action Soil Abatement
Preparation for a Drilling Event
Preparation for Implementation of Conventional Corrective Action
Preparation for Implementation of Alternative Technologies

Would the Agency consider the addition of \$960.00 for preparation for an Early Action soil abatement, preparation for a drilling event, preparation for implementation of conventional corrective action, and preparation for implementation of alternative technologies?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

9. Pursuant to 734.845 costs associated with professional consulting services must include project planning and oversight, field work, field oversight, travel, per diem, mileage, transportation, vehicle charges, lodging, meals, and the preparation, review, certification, and submission of all plans, budgets, reports, and applications for payment, and other documentation. Sections 734.845(a-f) include provisions for each of the above mentioned, with the exception of costs associated with applications for payment pursuant to 734.625(a)(14)

Does the Agency intend to revise Subpart H to include a pay item for the owner/operator's reimbursement of the costs associated with the preparation, certification, and submission of a payment application for the following?

Early Action?
Site Investigation Stage 1?
Site Investigation Stage 2?
Site Investigation Stage 3?
Corrective Action?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

10. In accordance with section 734.845(a)(2)(A-C) owner/operators may be reimbursed for professional oversight of field activities when one or more of the following circumstances is taking place: removal/abandonment of UST's, ETD&B of contaminated backfill, soil sampling around abandoned UST's, and when a UST line release is repaired.

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This allowance does not account for professional supervision for the confirmation of the release, the immediate actions taken to prevent any further release, and the identification and mitigation of fire, explosion and vapor hazards.

Would the Agency entertain the addition of language to section 734.845(a)(2)(B) which would allow for the reimbursement of professional oversight of these activities on a time and materials basis pursuant to 734.850?

11. Pursuant to section 734.605(b)(3), an Eligibility & Deductibility letter is required to complete an "application for payment". Pursuant to 734.625(a)(15) the costs associated with obtaining an Eligibility & Deductibility letter are considered to be eligible and reimbursable. However, Subpart H does not include a pay item inclusive of this task.

Does the Agency intend to revise Subpart H to include a pay item for the preparation and submission of an Eligibility & Deductibility letter?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

12. Pursuant to 734.345(b), an owner/operator as a minimum requirement must conduct "best efforts" to obtain off-site access in accordance with 734.350. However, Subpart H does not include a pay item inclusive of this task.

Does the Agency intend to revise Subpart H to include a pay item for conducting "best efforts" to obtain off-site access?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

13. Pursuant to 734.210(f) the owner/operator may, as a part of early action, perform ex-situ treatment of contaminated fill material. Will the owner/operator be reimbursed for these activities in accordance with 734.850, on a time and materials basis?

14. What technologies does the Agency consider "conventional" for the ex-situ treatment of contaminated fill material?

15. In our experience, UST removal rates vary depending upon the equipment required to remove said UST. For instance, tanks from 110-2000 gallons may be removed with a backhoe, however, tanks with capacities from 2,001 - 10,000 gallons require a larger piece of equipment, such as an excavator, to be removed. Any tanks larger than 10,000 gallons must be removed with a crane. Each of these graduations increase the cost for the required personnel and equipment to carry out the removal.

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Would the Agency be willing to restructure the UST volume pay item schedule to account for these equipment limitations?

16. The titles listed within 734.APPENDIX E do not include a job description for the personnel.

When performing a task where payment will be in accordance with Appendix E, will reimbursement be based solely on the educational degree and experience of the person performing the task, regardless of the task performed, the efficiency of completing the task, and/or the success of regulatory compliance achieved by the owner/operator by performing the task?

If not, would the Agency consider adding a section which would briefly describe the tasks to be performed by each of the personnel listed in Appendix E?

17. Pursuant to Section 734.340(d) remote monitoring may be required during an alternative technology.

How will costs associated with Agency required remote monitoring be reimbursed?

18. In accordance with section 734.315(a)(2)(E) a hydraulic conductivity test must be completed during Stage I Site Investigation activities. However, Subpart H does not include a pay item for costs associated with performing and analyzing a hydraulic conductivity test.

Does the Agency intend to revise Subpart H to include a pay item for costs associated with performing and analyzing a hydraulic conductivity test?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

19. Pursuant to 734.315(a)(3) an initial water supply well survey must be conducted in accordance with 734.445(a). Currently 734.845(b)(7) of Subpart H provides for the reimbursement of costs associated with water supply well surveys conducted pursuant to 734.445(b & c). However, there is no Subpart H pay item associated with activities conducted in accordance with 734.445(a).

Does the Agency intend to revise Subpart H to include a pay item for costs associated with conducting an initial water supply well survey?

If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

20. In accordance with section 734.845(b)(7), a lump sum rate of \$160 will be allotted for potable water well surveys which must be conducted pursuant to

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sections 734.445(b) or (c). The external costs associated with completing a typical well survey are approximately \$100 for ISGS and ISWS provided information. Given this typical situation, labor costs associated with this task would amount to \$60.

Does the Agency feel that \$60 is sufficient for the professional labor to comply with the requirements set forth in section 734.445?

Is it also expected that this amount would account for time allotted for the Professional Engineer's review and certification, as required by 734.445(d)(4)?

21. Pursuant to 734.825(a)(1), for the purposes of reimbursement, the volume of soil removed and disposed of must be determined by the dimensions of the excavation plus 5%.

Will a site map with a cross section showing varying depths be sufficient to verify this volume?

If yes, will it continue to be necessary to provide the following to the Agency:

- a. Copies of the weight tickets from the landfill accepting the waste?
- b. Copies of the special waste manifest?
- c. Copies of the landfill invoice (provided that the landfill acted as a subcontractor to the primary contractor)?

Would the additional cost of collecting GPS coordinates to determine the volume of the excavated material be considered reimbursable on a time and materials basis pursuant to section 734.850?

22. It is USI's experience that offsite investigations often require widely varying and unknown scopes of work.

Would the Agency consider revising the Subpart H pay item associated with preparation and submittal of a Site Investigation Completion Report pursuant to 734.845(b)(8) to T&M if completed during Stage III due the variability and inconsistencies within this stage of work?

23. Pursuant to 734.320(b)(3)(A) the owner/operator is required to include within their Stage 2 Site Investigation Plan one or more maps detailing hydraulic gradient and groundwater flow direction. In order to obtain this information, an additional site visit, apart from the installation of groundwater monitoring wells, is required to collect the necessary data.

Does the Agency intend to revise Subpart H to include a pay item for costs associated with completing a survey of groundwater flow direction and gradient?

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If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

24. In addition to the half-day for each monitoring well drilled in accordance with section 734.845(b)(2)(B) and 734.845(b)(6)(B), would the Agency entertain the addition of one (1) additional half-day for each required trip to the site including: well development, well surveying, and well sampling?
25. It is mentioned within the Illinois Pollution Control Board's "Discussion" notes, page 80, that section 734.845(b)(5) and (6) will be deleted from the regulations and that the language "payment for costs associated with Stage 3 site investigations will be reimbursed pursuant to Section 734.850" will be added in its place, however, this language has not been included in the Board's proposed section 734.845 (b).

Is this omission an error?

26. In Brian Bauer's Prefiled Testimony submitted March 5, 2004, Mr. Bauer indicates that "neither incidental expenses nor decontamination charges" were necessary, thus the rate for direct push injections is substantially lower than direct push soil borings (\$15/ft vs. \$18/ft). Based on our experience, costs associated with expendable items will not change drastically between investigation and injection activities. Although investigation activities utilize expendable materials used only for sample collection, injection activities utilize expendable points to prevent soil from clogging the injection rod. As a result, the cost differential between these two activities is insignificant. Additionally, decontamination between injection points is still necessary to prevent cross contamination.

Would the Agency be willing to increase the per foot rate for Direct Push injections listed in 734.820(a) to \$18.00/foot.

27. Is the cost for the placement of an engineered barrier pursuant to 742.1105 eligible for reimbursement? For the purposes of reimbursement, is it required that the design of said barrier be approved by the Agency prior to implementation? If yes, why then would the same proposed rates not apply for engineered barriers as they do for replacement of surface materials?
28. It is our understanding that conventional groundwater remediation strategies include the use of institutional controls.

What other groundwater remediation mechanisms are characterized as "conventional" by the Agency? Subpart H does not include a pay item inclusive of these tasks.

Does the Agency intend to revise Subpart H to include a pay item for the completion of activities pursuant to 734.210(a)?

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If the Agency does not intend to revise Subpart H to include a pay item for these costs, with what current Subpart H pay item are these costs associated?

29. Pursuant to 734.340 an owner/operator may choose to use an alternative technology for corrective action in response to a release.

In the event the cleanup strategy utilizes both conventional and alternative remedial methods, and the owner/operator elects to submit a single corrective action plan (CAP) inclusive of both technologies, will the costs associated with the preparation and submission of the CAP be reimbursed pursuant to 734.850 on a time and materials basis?

Or will the owner/operator be required to submit two (2) CAPs?

If two (2) CAPs must be submitted, will the Agency consider the cost for the conventional technology CAP reimbursable pursuant to 734.845(c)(1) and consider the cost for the alternative technology CAP reimbursable pursuant to 734.850?

30. It is USI's experience that an Agency project manager may request a groundwater remediation CAP be proposed after soil remediation has been completed. Would the submission of two (2) separate CAPs be reimbursed pursuant to 734.845(c)(1) for each submittal independently?

31. In accordance with 734.355(e) any action by the Agency to require a revised CAP pursuant to 734.355(b) must be subject to appeal to the board with 35 days after the Agency's final action.

Should 734.355(c) be revised to include budgets as well as plans?

32. The competitive bidding requirements provided in 734.855 provide an alternative means for establishing the maximum payment amounts. One of the requirements of 734.855 (a) is that any bid solicited under 734.855 be based upon the same scope of work as the applicable Subpart H maximum payment amounts. Since the scopes of work have not been defined as part of Subpart H, maximum payment amounts, how are the owners/operators to use 734.855 as a reasonable alternative to determine maximum payment amounts?

33. Section 734.860 provides that the Agency may reimburse an amount in excess of Subpart H, maximum payment amounts, if an owner or operator incurs or will incur eligible costs that exceed the maximum payment amounts set forth in Subpart H. Since no scope of work is defined in relation to Subpart H, maximum payment amounts, is an owner/operator to assume that all costs incurred in response to a release above the maximum payment amount are extraordinary or unusual in the definition of eligible under 734.675?

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34. How will the Agency determine prevailing market rates pursuant to 734.875?
35. How does the Agency intend to collect the data needed to require with 734.875?
36. Would the Agency consider adjusting the maximum payment amounts on January 1 of each year instead of July 1 of each year so that it would be more consistent with the fiscal year most often utilized by private businesses (owners/operators and consultants)?
37. If the inflation factor in a given year is greater than 5.0% the adjustment in the maximum payment amount under 734.870 would be limited to 5.0%.

Why not adjust by the increase in the CPI since it is reflective of actual market conditions?

38. When engineering a remedial strategy for an active station, conventional technologies are often not applicable (ex. a dig and haul is not possible when a live system is in place), therefore one must look to alternative remedial designs. In reference to Section 734.340(b), an owner/operator must submit a budget that demonstrates that the cost for said alternative technology will not exceed the cost of conventional technologies.

Is it the Agency's intent to hold an owner/operator liable for costs in excess of the conventional technology amount when a conventional technology is not feasible? Would this circumstance be considered extraordinary?

39. Pursuant to section 734.340(c) what is the Agency's intent in rendering an owner/operator "ineligible to seek payment for the subsequent performance of a corrective action using conventional technology" when prior approval for implementing an alternative technology is not first attained?

Would the owner/operator be considered ineligible to seek payment for the subsequent performance of an alternative technology as well?

40. Pursuant to section 734.320(b)(3)(A-D) and 734.325(b)(2)(A-D) an owner/operator is required to produce one (1) or more maps, however, no limit is placed on the number of maps which may be required. Is it assumed that map preparation costs are to be included within the primary reporting lump sum task for each phase (ex. EA-\$4800, SI-\$1600/\$3200, CA-\$5120)?

If so, how can a lump sum amount be determined if the scope of work (one (1) or more maps) cannot be determined?

41. Pursuant to 734.835 Sample Handling and Analysis, costs associated with transportation, delivery, preparation, analysis and reporting of samples are

ELECTRONIC FILING, RECEIVED, CLERK'S OFFICE, MAY 3, 2005

reimbursable costs and should be billed in accordance with the rates listed in 734.APPENDIX D. Is it the Agency's intent that the per sample rates listed may be divided up between the entity doing the transportation, deliver, analysis, etc.?

42. When determining acceptable depths for well installation activities, what entity, Agency or consultant, decides what depth is sufficient?
43. Are Subpart H unit rate reimbursable amounts billable within all applicable phases of work?
44. Pursuant to 734.315 Stage 1 Site Investigation, 734.320 Stage 2 Site Investigation, and 734.325 Stage 3 Site Investigation, an owner/operator may be required to advance soil borings in an attempt to fully delineate soil contamination present on-site. As a result, what constitutes a "soil boring"? i.e. are minimum depths required or must specific tooling be utilized?
45. Pursuant to 734.815 Free Product or Groundwater Removal and Disposal and 734.830 Drum Disposal, an owner/operator may be reimbursed for costs associated with disposal of petroleum contaminated soil and/or groundwater as a result of drilling activities. Who determines, however, whether media should drummed or disposed of in bulk?
46. Pursuant to 734.845 Professional Consulting Services, how many submittals are included in each unit rate reporting pay item?
47. Have all rates associated with Subpart H pay items been historically evaluated against actual reimbursement submittals?

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CLERK'S OFFICE

MAY 04 2005

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

STATE OF ILLINOIS
Pollution Control Board

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

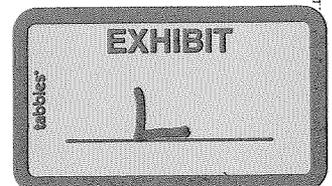
Proposed Rule. First Notice

PRE-FILED QUESTIONS FROM Jay P. Koch FOR THE ILLINOIS POLLUTION CONTROL BOARD'S 1st NOTICE OF AMENDMENT TO 35 ILL. ADM. CODE 734 AND 35 ILL. ADM. CODE 732.

Below are questions proposed by Jay P. Koch in response to the Illinois Pollution Control Board's request for pre-filed questions. These questions are presented in order to gain a better understanding of the Agency's intent and approach to the implementation and administration of the proposed rules and the UST program subsequent thereto in order to facilitate the preparation and development of accurate, factual and meaningful testimony for the hearing(s) to be held this summer in the above referenced matters.

Questions:

1. In Mr. Clay's testimony, he stated that groundwater remediation is, by definition, considered to be an alternative technology. Some, but not all, IEPA technical reviewers require that a Corrective Action Plan, in order to be acceptable, address both soil and groundwater remediation. In a situation where the owner/operator is proposing a corrective action to the agency for both soil and groundwater remediation and assuming that the proposed method of soil remediation would be excavation, transportation and disposal, how would the Agency administer the Subpart H maximum payment amounts? Would this be treated as a conventional cap (maximum lump sum payment amount) or an alternative technology CAP (Time & Materials) or would it be a hybrid?
2. Several consultants have recently mentioned that it is very difficult to have alternative technology CAPS (for soil remediation) approved by the Agency. If an alternative



technology CAP is submitted to the Agency and it is not approved, how does the Agency intend to deal with associated reimbursement issues under Subpart H? Specifically, if an alternative technology CAP is rejected one or more times, but is eventually approved by the Agency, will the Agency reimburse all professional service hours that are reasonable and justified so long as the rates for professional services are consistent with Appendix E? If the alternative technology Corrective Action Plan was rejected by the Agency reviewer on one or more occasions, and as a result the owner/operator elects to subsequently submit a CAP for a conventional technology, will the costs associated with the development of the alternative technology CAP be paid pursuant to Subpart H on a time and materials basis with the costs of the subsequently prepared conventional technology CAP being reimbursed on a maximum lump sum payment basis in accordance with 734.845 (c) (1)?

3. How does the Agency intend to administer the "extraordinary circumstances" provision? In order to avoid the landslide of questions and conflicts that are almost certain to arise after the implementation of any rule changes of the magnitude represented by Subpart H, is the Agency, prior to the final implementation of the rule, willing to publish on a regulation by regulation basis, examples of the types of situations that it believes will warrant a claim for "extraordinary circumstances"?

4. Market research and analysis performed by USI indicates that nearly ninety-five percent of the owners/operators that are currently engaged in LUST clean-ups in Illinois are individuals or very small businesses. Many of these individuals and small businesses do not belong to the organizations that are listed as being the parties that will appoint the Members of the LUST Advisory Committee. Will the IEPA consider allowing an additional seat or seats on the LUST Advisory Committee in order to assure the representation of this category of owner/operator?

5. The Agency is proposing revisions that would allow the Agency to remotely monitor alternative technologies? Is reimbursement for these activities to be handled on a time and material basis?

6. Subpart H, Appendix D provides rates for Sample Handling and Analysis. Section 734.835 indicates that these rates are for transportation, delivery, preparation, analysis and result reporting. Often times analytical samples are transported to a central shipping location by one party, delivered to the laboratory by another and then analyzed by the lab (a third party). Are the rates provided in Appendix D to cover the activities of all three parties described above?

7. In numerous instances in the Agency's testimony, the Agency testified that the proposed rules were being presented in order to "reform the budget and reimbursement process" and to "streamline the approval of budgets and the processing of reimbursement claims". An additional goal stated by the Agency was to "streamline the UST remediation process". Does this mean that the Agency's intentions are to improve upon (reduce to the greatest extent practicable) the amount of time that it takes for the various reviews, approvals and/or reimbursements?

8. The Agency testified that the rates are generally consistent with the rates the Agency currently approves. The Board accepted the Agency's position on this matter as part of the rule that was published at 1st notice. The consulting community, on the other hand, believes that the rates that are provided in the proposed regulations are not consistent with those that have historically been reimbursed. Instead the consulting community is confident that the amount of time that has been allowed for various professional service tasks and by extension the maximum lump sum payment amounts are substantially below those which have been historically reimbursed by the Agency. This has been a significant point of contention during this rulemaking and represents a conundrum. A simple answer to this conundrum would be to have a qualified and reputable independent third party audit the historical reimbursement records of the Agency with regard to the average costs for professional services per hour as well as the average number of professional service hours incurred per labor classification per task and to allow the audit report to be published, available to the public and placed on the record in this rulemaking. Is the Agency willing to allow an independent auditor to perform a statistically valid review of the Agency's historical files and to provide the results of that audit to be entered into the record in this proceeding?

9. The Board has acknowledged that the method that the Agency used to establish the rates provided in Subpart H was not based upon scientific or statistically valid means. The Board has further acknowledged that it is largely relying upon the experience of the Agency and that the Board finds the rates proposed by the Agency in Subpart H to be reasonable. I would generally agree with the Board's assessment and opinion with the exception that I believe that the number of hours that have been allotted for professional and consulting service tasks that are subject to the maximum lump sum payment amounts and therefore, by extension the maximum lump sum payment amounts themselves are substantially inaccurate. For those services the rates that have been established for professional services and consulting. It appears that the number of hours that the Agency has allotted to professional service tasks is woefully inadequate. Since the Board has acknowledged that the Agency did not use statistically valid means to establish the rates, what independent validation steps has the Board taken, or does it plan to take, in order to assure that the number of hours that the Agency has allotted for professional and consulting services is sufficient to allow a reasonably proficient professional to complete each of the necessary tasks?

10. Can the Agency please provide a list of the governmental fees and permits that it is considering not being eligible for reimbursement? Can the Agency provide a list of examples of the types of payments to other persons that it considers to be ineligible for reimbursement?

11. Because this rulemaking is likely to be the most momentous in the history of the Illinois LUST program and is likely to have a profound financial impact on numerous owners/operators and consultants across the State of Illinois, is the Board willing to make a second request for the Illinois Department of Commerce and Community Affairs to perform an economic impact study of these proposed regulations? It is my understanding

that, when requested to do so last year, the DCEO declined to provide this assessment for budgetary reasons.

12. In their 2004 testimony, the Agency indicated that 375 consultants performed work on LUST Sites in the last three years. Can the Agency provide a list of the names of the consulting firms that, in the aggregate, submitted fifty percent (50%) of the work plans, budgets and reports to the Agency from the period January 2003 to the present?

13. The Agency objected to the notion of providing a "Defined Scope of Work" for the Subpart H payment items. The Board, at first notice, agreed with the Agency's position on this matter. On page 78, the Board seems to suggest that the consulting community wanted a defined scope of work to be separately developed for each project and also suggest that such a requirement would result in a highly cumbersome rule. I agree with the Board in that regard. As a point of clarification it has not been USI's desire that a detailed scope of work be prepared for each project. Rather, USI would like some definition to be set forth, on a task by task or regulation by regulation basis, that will help everyone understand what is to be considered "typical" and what is to be considered "extraordinary". Would the Agency consider publishing, in advance of the effective date of this rule, some broad guidelines as to what is "typically required" on a task by task or regulation by regulation basis?

14. Is it the Agency's intention that upon satisfaction of the deductible, and provided that the limitations on total payments provided for in 734.620 have not been exceeded, that the LUST Fund reimburse all corrective action costs that are eligible under 734.625?

15. If funds are not available under the LUST Fund program, or as a result of the implementation of Subpart H, the Agency is unable to pay for all of the eligible (pursuant to 734.625) corrective action costs incurred by an owner/operator in excess of the deductible, does this in any way relieve the owner/operator of the responsibility to comply with IEPA regulations and remediate the site?

16. If the answer to the above question is "no" then, does the Agency intend to enforce the Act and the LUST regulations, including the levying of fines and penalties, against owners/operators that are unable to comply?

17. A practice, which has become common in the industry in Illinois, and which is necessitated by long reimbursement cycles, is for consultants and/or contractors to perform corrective action work for the owner/operator and to generally wait for payment for their services until such time that the owner/operator has been reimbursed by the LUST Fund. What is the Agency's opinion on consultants/contractors deferring payment for their services in excess of the deductible until such time that the owner/operator is reimbursed? What is the IPCB's opinion on this issue? Do the Agency and the Board believe that the proposed regulations, or any portion thereof have any bearing on this practice on the part of the consultant's/contractors?

18. In the late 1980's and the early 1990's the Agency administered a Joint Payment Program whereby the Agency would make joint reimbursement payments to the Owner/Operator and their primary consultant/contractor. Why did the Agency do away with this program?

19. In Mr. Chappel's testimony, he indicated that the activities conducted by a consultant in each step of the LUST process and the estimated personnel time required for each activity were provided to the Agency by ACECI. Who, at ACECI or from other organizations, participated in this process? What are their qualifications and credentials? How much experience, do they have in Illinois LUST work and in what capacity? What scope of work was given to them in order for them to determine what was required at each step in the process? After receiving the estimated personnel titles and the estimated number of hours from ACECI did the Agency make any modifications or additions to the information provided by ACECI before incorporating the information into the proposed rule? Why in this instance did the Agency rely on a third party to estimate the appropriate staffing and level of effort required instead of using information from its historical experience? When was the information provided to the Agency by ACECI?

20. Is the Agency familiar with a USEPA initiative referred to as TRIAD?

21. Is it the Board or the Agency's intention that personnel that do not meet the degree, licensing or experience requirements of Appendix E. but that have been previously employed in their respective positions prior to the effective date of the rules, be grandfathered into their current positions? In the alternative will these personnel be disqualified from their positions and subject to layoff? If a person does not meet the degree, licensing and experience requirements for the Project Manager labor category, but can demonstrate that it has been able to successfully develop work plans and budgets, gain Agency approval of those work plans and budgets and successfully manage the project with a high level of reimbursement by the Agency, can is it the intent of Subpart H and the Agency that this person will no longer be considered qualified to perform their job and therefore be subject to potential layoff by their employer?

22. If a person does not strictly meet the degree, licensing or experience requirements of Appendix E how would the Agency go about determining what T&M billing rate would be applicable to the individual?

23. 734.850 indicates that the reimbursement of personnel costs will be based upon the work being performed and not the classification or title of the person performing the work. Can the Agency provide a list of the classifications/titles that it considers to be appropriate to the various tasks/regulations?

24. Does the Agency consider consulting/professional services to be subject to the bidding requirements in Subpart H 734.855 as an alternative means of establishing the maximum payment amount? I assume the bidding requirement only pertains to contractors since the rule clearly delineates that consultants will be paid for bid

solicitation preparation and bid review on a time and materials basis. Please clarify the Agency's intentions with regard to this matter.

25. If the answer to the question above is "yes" what scope of work should be used in the bid solicitation since the scope of work associated with professional services is usually unknown at the time that the owner/operator hires the consultant?

26. By what means is the owner/operator and his or her consultant required to solicit bids? If a bid solicitation results in less than three bids, how many rounds of solicitation are required?

27. As an example, an owner/operator has an approved budget for a corrective action to excavate, transport and dispose of 2,000 yards of contaminated soil. One evening during the corrective action work it rains two inches and the excavation fills with water which becomes contaminated when it comes into contact with soils in the excavation. The costs of the water disposal was not in the budget. How would the Agency administer this type of situation, assuming that the owner/operator makes a claim for reimbursement of the water disposal costs from the LUST Fund?

28. As an example, an owner/operator hires a consultant to perform consulting and professional oversight services at its LUST site. The consultant performs the work required to obtain Agency approval of a Corrective Action Plan for conventional technology. The consultant bills the owner/operator for the service and the owner/operator is reimbursed. The owner/operator pays the consultant. After the completion of the excavation work stipulated in the approved CAP, the Agency reviewer requests a groundwater remediation to be performed. How will Subpart H be applied to this situation? Will the time necessary to develop the groundwater CAP be reimbursed on a time and materials basis.

29. In calculating the maximum lump sum payment amounts for the various plans and reports required as part of Early Action, Site Investigation and Corrective Action phases of a project, did the Agency assume that the various plans and reports would be approved by the Agency reviewer on the 1st submission? I assume this is the case since \$640 is provided for Amended Plans and Amended Reports?

30. 734.845 (f) provides \$640 for the amendment of a plan or report. It would appear that this amount could be excessive in some instances and insufficient in other instances. Because the degree of modification or amendment to a plan or report can vary widely, it seems more appropriate and cost effective for the LUST Fund for this task to be performed on a time and materials basis. Would the Agency consider the use of a T&M billing method for the development of amended plans and reports?

31. 734.800 (b) states that only some of the costs associated with each task are provided in Section 734.810 through 734.850 and that they are not intended as an exclusive list of all of the costs associated with each task for the purposes of payment from the Fund. 734.800 (c) goes on to state that Subpart H sets forth only the methods that can be used to

determine the maximum amounts that can be paid from the Fund for eligible corrective action costs. The rules go on to state that whether a particular cost is eligible for payment must be determined in accordance with Subpart F. If a cost item that is typically incurred on a LUST project has been accidentally omitted from Subpart H, how would the owner/operator go about seeking reimbursement for that costs?

32. If an owner/operator engages the services of a professional consultant and the consultant, in good faith, initiates the development of a corrective action plan, only to find out after the work was initiated and a substantial amount of time, energy and money had been expended that the project conditions warrant a level of effort that is likely to cause its charges for the professional/consulting services to greatly exceed the maximum payment amount provided in Subpart H. In this instance, does the Agency prefer to be notified immediately of the potential "extraordinary circumstance"? It seems as though all parties involved would want to know whether the Agency would consider the situation to be extraordinary or not before continuing to proceed with the work. In the example provided above, how should the owner/operator and his or her consultant handle this situation with the Agency?

33. Does the Agency intend to develop internal standard operating procedures to help improve and ensure uniformity, consistency and objectivity in its technical review of work plans, budgets and reports?

34. The time to prepare and submit an application for reimbursement is an eligible cost under 734.625 (a) (14). No maximum lump sum payment amount is provided for these activities. Will a maximum lump sum payment amount be provided for this activity?

35. Under 734.445 (c) the Agency may require additional investigation of potable water supply wells. From reading this provision within the regulations, this requirement is contingent and at the discretion of the individual Agency reviewer. Does the Agency consider wells surveys conducted pursuant to this paragraph to be typical or extraordinary?

36. Historically, the Agency has reimbursed on a time and materials basis the costs for field instrumentation, equipment, materials and supplies (field purchases), materials and supplies (stock items) and subcontractors related to professional and consulting services. Subpart H provides Appendix D which deals with acceptable rates for sample handling, transportation, delivery, analysis and reporting and Appendix E which provides personnel titles, qualifications and acceptable hourly rates. However, Subpart H does not provide a list of field instrumentation, equipment and materials and supplies that are acceptable in situations where the rules call for time and materials billing. Will the Agency be providing time and materials rates for field instrumentation, equipment and materials and supplies that will be considered to be the maximum payment amounts for those items when the work is associated with a time and materials task?

ILLINOIS POLLUTION CONTROL BOARD

February 17, 2005

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

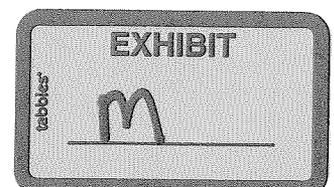
IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO:) R04-23
REGULATION OF PETROLEUM LEAKING) (UST Rulemaking)
UNDERGROUND STORAGE TANKS (35) Consolidated
ILL. ADM. CODE 734)

Proposed Rule. First Notice.

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

Today the Board will proceed to first notice under the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et. seq.* (2002)) with a rulemaking proposed by the Illinois Environmental Agency (Agency). The Agency originally proposed amendments to the regulations concerning the leaking Underground Storage Tank (UST) program in January 2004. The Board has held seven days of hearings and received substantial comment on the Agency's proposal. The Board received comments from industry, trade groups, and professional organizations including a group formed as a result of the proposal called Professionals of Illinois for the Protection of the Environment (PIPE). The Board has evaluated the comments in this proceeding and the additional language changes suggested by both the Agency and the participants. The first-notice proposal adopted by the Board today reflects the Board's consideration of all the comments and testimony the Board has received.

During this process, which began over a year ago, the Agency has submitted three *errata* sheets reflecting changes based on the questions and comments at the hearings. In addition, PIPE and other participants have suggested changes to the proposal. Based on all the suggestions and the record of this proceeding, the Board proposes for first notice a rule that includes lump sum maximum payments for certain tasks, but not a scope of work for those tasks. The Board is proposing the maximum payment amounts proposed by the Agency in most cases. The Board is cognizant that the methods used to develop the rates by the Agency were not scientifically or statistically recognized methods. However, the Agency's experience in the UST program is also an element to be taken into consideration. In addition, the first-notice proposal will include provisions for bidding, extraordinary circumstances, and an annual inflation adjustment. The Board is convinced that the first-notice proposal, as a whole, will allow for reimbursement of reasonable remediation costs.



also proposes amendments to subsection (h) to require the Agency to provide notice of the UST Fund's balance to owners and operators. *Id.*

Section 732.601/734.605

The Agency's proposes changes to this section are necessary because of changes made throughout Part 732. R04-22Prop. at 21. For example, references to "materials, activities, or services" are deleted because pursuant to the proposed Subpart H, payment from the UST Fund will generally no longer be made based on "materials, activities, or services". *Id.* The Agency proposed new subsections (b)(9) and (b)(10)² requiring certain information be a part of the application for reimbursement. *Id.* The Agency seeks amendment of subsection (f) to require the submission of a budget plan prior to the Agency's review of a corresponding application for payment. *Id.*

Subsection (g) is amended to include a general reference rather than a reference to revised budget plans. R04-22Prop. at 22. The Agency recommends the addition of subsection (i) and (j) as well. *Id.* Subsection (i) would prohibit submission of applications for payment of deferred costs prior to the submission of a completion report. *Id.* Subsection (j) would require the submission of applications for payment of corrective action costs no later than one year after the issuance of a no further remediation (NFR) letter. *Id.*

Section 732.602/734.610

The Agency proposes revisions to this section in combination with other changes proposed in Part 732. For example, the Agency proposes amendments to reflect that: (1) the Agency performs "full" reviews of all applications for payment; (2) budget plans are not required for early action other than free product removal; and (3) line item estimates are no longer required as a part of the budget plan. R04-22Prop. at 22.

Section 732.603/734.615

The Agency proposes changes for consistency and also language to provide that the Board or a court may order payment from the UST Fund. R04-22Prop. at 22-23.

Section 732.604

Because of changes made in P.A. 92-0554, the Agency undesignated subsections (a) and (b) as statutory language; but retained the wording in the rule for releases reported prior to the effective date of P.A. 92-0554. R04-22Prop. at 23.

Section 732.605/734.625

² The Agency in the original proposal included a new subsection (b)(11); however, in the third *errata* sheet, the Agency withdrew subsection (b)(11). Exh. 87 at 20.

Section 732.612/734.660

The Agency proposes amendments to clarify that payment of an ineligible cost constitutes an “excess payment” from the UST Fund. R04-22Prop. at 28.

Section 732.614/734.665

The Agency’s proposal adds this new section to set forth record retention requirements and auditing procedures. R04-22Prop. at 28. In both the second and third *errata* sheets the Agency suggests changes to the proposed language. Exh. 15 at 11; Exh. 87 at 22.

Section 732.701/734.705

The proposal amends this section to correct a cross-reference and to reference reports submitted pursuant to Section 732.202(h)(2). R04-22Prop. at 28.

Section 732.702/734.710

The Agency proposes amending this section to clarify that an owner or operator is not relieved of the responsibility for cleaning up contamination that migrates off-site where a NFR letter has been issued. R04-22Prop. at 28.

Section 732.703/734.715

The Agency’s amendment would ensure that attachments to a NFR letter are filed with the letter. R04-22Prop. at 28. In addition, the amendatory language would allow a site located along a right-of-way of any highway authority to perfect a NFR letter via a Memorandum of Agreement with the highway authority. R04-22Prop. at 29.

Section 732.704/734.720

The Agency proposes clarifying language to this section as well as requiring owners or operators to complete groundwater-monitoring programs prior to the issuance of a NFR letter. R04-22Prop. at 29.

Subpart H

The Agency proposes a new subpart that proposes maximum amounts that will be paid from the UST Fund for certain activities. R04-22Prop. at 29. The Agency proposes the new subpart to “streamline payment from the UST Fund.” *Id.* The Agency proposes lump sum or unit rates for some activities while other rates will be determined on a time and materials basis. *Id.* The following paragraphs will more completely summarize the Agency’s proposed new subpart.

Section 732.800/734.800. This section explains what the subpart contains and noted that the subpart enumerates only the “major costs” associated with a task. R04-22Prop. at 30. The section clarifies that the maximum payment amount is intended to include all costs associated with an activity and the subpart does not enumerate eligible costs. *Id.*

Section 732.810/734.810. This section establishes the maximum payment amounts for costs involved in removing or abandonment of a UST. R04-22Prop. at 30.

Section 732.815/734.815. The maximum payment amounts for removal of free product are set forth in this section. R04-22Prop. at 30; Exh. 87 at 23.

Section 732.820/734.820. The maximum payment amounts for costs of drilling, well installation, and well abandonment are set forth in this section. R04-22Prop. at 30. The Agency proposes the addition of direct-push platform drilling in the first *errata* sheet. Exh. 1 at 4.

Section 732.825/734.825. The maximum payment amounts for costs of soil removal, transportation, and disposal are set forth in this section. R04-22Prop. at 31.

Section 732.830/734.830. The maximum payment amounts for costs associated with disposal of material using 55-gallon drums are set forth in this section. R04-22Prop. at 31.

Section 732.835/734.835. This section addresses the cost associated with handling and laboratory analysis of samples. R04-22Prop. at 31. The specific maximum payment amounts are set forth in Appendix D of the proposal.

Section 732.840/734.840. The maximum payment amounts for costs of replacement of concrete, asphalt, and paving are set forth in this section. R04-22Prop. at 31. The maximum payment for dismantling of concrete, asphalt, or paving is also included. *Id.* In the second *errata* sheet the Agency proposes language to increase the maximum payment for replacement. Exh. 15 at 9.

Section 732.845/734.845. In the proposal, the Agency included this section setting forth maximum payment amounts for consulting services. R04-22Prop. at 31-32. The Agency recommended several changes to the proposal in the third *errata* sheet. Exh. 87 at 24-25.

Section 732.850/734.850. The language of this section delineates the procedure for the Agency to determine rates based on time and material. R04-22Prop. at 32. Personnel costs cannot exceed the rates included in Appendix E and are determined based on the work being done, not the title of the person performing the work. *Id.* The Agency suggests an amendment to reflect other changes proposed in the third *errata* sheet. Exh. 87 at 35-36.

Section 732.855/734.855. In the proposal, the Agency proposed language to address the circumstance where the costs associated with an activity exceeded the maximum payment amount. R04-22Prop. at 32. In the third *errata* sheet, the Agency suggests renumbering this section to Section 732.860 and adding a new Section 732.855. Exh. 87 at 36-38.

Mr. Clay testified that the provisions in Section 732.614/734.665 are based upon other Board and Agency rules addressing retention and inspection of records. Exh. 3 at 9. Mr. Clay stated that the Agency plans to perform periodic audits of owners, operators, and consultants. *Id.* Mr. Clay further testified that the Agency does not intend to look at a company's financial statements; rather the Agency will review documents related to payments from the UST Fund. Exh. 88 at 26. Mr. Clay explained that the Agency needs to ensure that records related to reimbursement are retained for a certain period of time in case the Agency needs to review the records. *Id.*

Response to Testimony by Participants. Mr. Clay testified that PIPE submitted agendas from meetings between the Agency and PIPE. Exh. 88 at 3. Mr. Clay wanted to clarify that the agendas were prepared by PIPE and did not necessarily reflect what was actually discussed at the meetings. *Id.* Mr. Clay also sought to clarify the reason the Agency has proposed these revisions to the UST rules. *Id.* Mr. Clay emphasized that the changes were brought about because of statutory change and in order to streamline the preparation and review of budgets and applications for payment. Exh. 88 at 3-4. In addition, the Agency believes the proposal will allow for more efficient use of consultant, Board, and Agency resources while improving consistency in the Agency's decisions. Exh. 88 at 4. Mr. Clay stated that the Agency further believes that the proposed changes could help control cleanup costs, expedite cleanups, and ultimately allow owners and operators to be reimbursed in a more efficient and timely manner. *Id.*

Regarding the economic savings that may be expected because of this proposal, Mr. Clay stated that the Agency has not performed a formal economic analysis to determine the savings that may be generated by the proposal. Exh. 88 at 4. Mr. Clay noted that based on recent data, \$25 million more a year is being paid out from the UST Fund than is being received and if this difference is not reduced, delays in payments could occur. *Id.* Under this proposal, the Agency believes there will be significant savings in cleanup costs with reasonable rates being established in regulations. *Id.* Mr. Clay testified that there will be less time needed for consultants to prepare budgets and reimbursement packages and less time required for Agency review. *Id.* Mr. Clay also stated that limiting reimbursement to Tier 2 remediation objectives and requiring use of groundwater ordinances "will significantly reduce" the cost of cleanup. Exh. 88 at 4-5.

In response to testimony concerning the time the Agency takes to make a decision under the UST program, Mr. Clay pointed out that the Act provides the Agency with 120 days to respond to submittals. Exh. 88 at 5. Mr. Clay opined that "any change to that timeframe would need to be a statutory change" and a reduction of that timeframe would impact the Agency's administration of the UST program. *Id.* Secondly, Mr. Clay noted that the Agency's actual time for review is often less than 120 days. Exh. 88 at 6. In the period from May 2003 through May 2004, the Agency completed review of more than half the submittals within sixty days. Exh. 88 at 6. Mr. Clay further pointed out that 25% of the submittals were decided within thirty days. *Id.* Mr. Clay opined that the amount of time the Agency takes to review a submittal is largely based on the quality of the submittal. *Id.*

The Agency is also opposed to the concept of requiring the Agency to prepare a draft denial letter prior to the Agency decision. Exh. 88 at 13. Mr. Clay testified that such a process

For Section 732.840/734.840(b), Mr. Bauer indicated that the limit has been established at \$10,000 per occurrence. Exh. 9 at 12. For reimbursement the activities must be submitted on a time and materials basis to the Agency. *Id.*

Mr. Bauer testified concerning the rates for professional consulting services in Section 732.845/734.845. Exh. 9 at 12-15. Mr. Bauer stated that after consultation, the American Consulting Engineers Council of Illinois³ (ACECI), the Agency determined that fieldwork should be billed on a half-day rate, which is five hours billed at \$80 per hour. Exh. 9 at 12. The Agency included additional expenses for vehicles or mileage, photo ionization detector (PID), and miscellaneous supplies to develop the maximum of \$500 per half-day. Exh. 9 at 12-13. Mr. Bauer testified that maximum half-day increments had been established for oversight of UST removal, removal of contaminated soil, soil borings, line release repair, free product removal, and groundwater sampling event. Exh. 9 at 13-15.

Mr. Bauer testified that Section 732.Appendix E/734.Appendix E establishes personnel titles and rates to be used when submitting activities on a time and materials basis. Exh. 9 at 15. The titles must be used and the consultant's personnel must be able to meet the title requirements. *Id.* The rates are based on the task performed and not the title of the person performing the task. *Id.* Mr. Bauer stated that the consolidation of titles is essential to maintain consistency in Agency reviews and to expedite the review process. *Id.* Mr. Bauer indicated that the maximum hourly rates are based on the average rate the Agency has seen on budgets and reimbursement claims. Exh. 9 at 16.

Harry Chappel

Mr. Chappel is a unit manager in the leaking UST section within the Bureau of Land and has been in his current position since 2002. Exh. 11 at 1. Mr. Chappel was previously employed by the Agency from 1976 to 1995 and was in private practice from 1995 to 2002. *Id.* Since 1979, Mr. Chappel has been a registered professional engineer. *Id.* Mr. Chappel's testimony supports the proposed language in Subpart H. Mr. Chappel testified that the proposal is a result of modifications to the Act and "the need to reform the current reimbursement procedures." *Id.*

Mr. Chappel testified that Section 732.800/734.800 specifies all reimbursable tasks will be limited to the maximum amounts set forth in Subpart H. Exh. 11 at 2. The Agency grouped reimbursable activities into eleven categories. *Id.* Mr. Chappel's testimony includes several attachments in support of the proposed maximum allowable rates. Exh. 11 at 3.

For Section 732.825/734.825, Mr. Chappel testified that the rate for soil excavation, transportation and disposal was developed using randomly selected projects. Exh. 11 at 3. The maximum rate for the cost to excavate, transport, and dispose (ETD) is the sum of costs for each activity plus one standard of deviation rounded up to a whole dollar amount. *Id.* The result is \$57 per cubic yard. *Id.* Mr. Chappel indicated that the rate for backfill would be \$20 per cubic yard. *Id.* This maximum rate was developed by using the sum of the costs to backfill plus one

³ On July 1, 2004, the Consulting Engineers Council of Illinois became the American Consulting Engineers Council of Illinois. Tr.6 at 7-8.

Use of Phrase "Maximum Payment Amounts"

PIPE argues that the Agency's use of the phrase "maximum payment amount" is inconsistent with Section 732.860/734.860 and Section 734.800(b). PC 6 at 9. PIPE notes that those sections of the proposal indicate that the amount in Subpart H may be exceeded and are not exclusive. *Id.* PIPE suggests that the phrase "reasonable costs" or "usual and customary costs" as alternatives. PC 6 at 10.

The Board agrees that "maximum payment amount" is a phrase which denotes the highest amount payable for a task. However, the Board believes that in the context of the rules, the phrase is appropriate and the Board declines to make a change.

Compaction (Section 732.606/734.630(w))

PIPE raised the issue of compaction and backfill in PIPE's public comment. PIPE suggests that compaction of backfill material should be an eligible cost. The Board disagrees with PIPE. Section 732.606(w), which is identical to Section 734.630(w), is existing language. The Board is not convinced that this record supports removing compaction of backfill material from the list of costs which are currently ineligible for reimbursement.

CONCLUSION

The Agency originally proposed amendments to the regulations concerning the leaking UST program in January 2004. The Board has held seven days of hearings and received substantial comments on the proposal. The Board has evaluated the comments in this proceeding and the additional language changes suggested by both the Agency and the participants. The first-notice proposal adopted by the Board today reflects the Board's consideration of all the comments and testimony the Board has received.

Based on the record of this proceeding, the Board proposes for first notice a rule that includes lump sum maximum payments for certain tasks, but not a defined scope of work for those tasks. The Board is proposing the maximum payment amounts proposed by the Agency in most cases. The Board is cognizant that the methods used to develop the rates by the Agency were not scientifically or statistically recognized methods. However, the Agency's experience in the UST program is also an element to be considered. In addition, the first-notice proposal will include provisions for bidding, extraordinary circumstances, and an annual inflation adjustment. The Board is convinced that the first-notice proposal, as a whole, will allow for reimbursement of reasonable remediation costs.

As noted above the proposal includes a provision for bidding, and further, the proposal allows for the preparation of a request for bids and the review of the bids to be reimbursed on a time and materials basis. The Board is also proposing that Stage 3 investigations be reimbursed based on time and materials. The Board will also propose for first notice a definition for "financial interest" and language prohibiting reimbursement for handling charges when the primary contractor has a financial interest in the subcontractor. The Board will also retain the

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ILLINOIS POLLUTION CONTROL BOARD
August 9, 2004

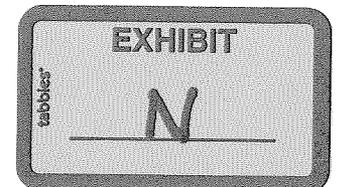
IN THE MATTER OF:
PROPOSED AMENDMENTS TO:
REGULATION OF PETROLEUM
LEAKING UNDERGROUND STORAGE TANKS
(35 ILL. ADM. CODE 732) R04-22
(UST Rulemaking)

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(35 ILL. ADM. CODE 734) R04-23
(UST Rulemaking)

The following proceedings were held before the Illinois
Pollution Control Board, August 9, 2004, at the Department
of Natural Resources Building, One Natural Resources Way,
Springfield, Illinois, before Ann Marie Hollo, CSR, RMR.

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APPEARANCES:

OFFICE OF THE ILLINOIS POLLUTION CONTROL BOARD
James R. Thompson Center, 100 W.
Randolph Street, Suite 11-500
Chicago, Illinois 60601

By: Marie Tipsord, Esq.
Hearing Officer

ILLINOIS POLLUTION CONTROL BOARD MEMBERS:

G. Tanner Girard, Ph.D, Thomas E. Johnson, Esq.,

AND

Alisa Liu, P.E., Technical Staff Member

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
1021 North Grand Avenue East
Springfield, Illinois 62794

By: M. Kyle Rominger, Esq.

Posegate & Denes, P.C.
111 North Sixth Street, Suite 200
Springfield, Illinois 62701

By: Claire A. Manning, Esq.
On behalf of PIPE

1 is not consistent with the Act.

2 A few issues have been raised regarding
3 the applications for payment. One is that the
4 requirement that applications for payment
5 include proof of payment to subcontractors.
6 There has been requests to strike this
7 requirement because of hardship of obtaining
8 canceled checks. Canceled checks are not the
9 only proof of payment that may be submitted.
10 Applications for payment may also contain lien
11 waivers or affidavits from subcontractors. One
12 of these methods of proof of payment should be
13 reasonably obtained.

14 Proof of payment of subcontractors' costs
15 is necessary to show the consultant is entitled
16 to handling charges. Handling charges, by
17 definition, means administrative insurance and
18 interest costs as -- and the reasonable profit
19 for procurement, oversight and payment of
20 subcontractors and field purchases. If the
21 consultant paid the subcontractor's bill, he or
22 she is entitled to handling charges. However,
23 many consultants have the owner/operator pay
24 the subcontractors directly, and therefore are

1 HEARING OFFICER TIPSORD: You have a
2 follow-up on that?

3 BOARD MEMBER JOHNSON: No.

4 HEARING OFFICER TIPSORD: Go ahead.

5 BOARD MEMBER JOHNSON: I was looking over
6 this, Doug, the new Section 855, which bothers
7 me. I was used to calling it ordinary,
8 extraordinary, an unusual expenses 855.

9 But I assume that that was going to be the
10 addition that was going to engender the most
11 interest or most questions.

12 QUESTIONS BY BOARD MEMBER JOHNSON:

13 Q The biggest question I had was in Section
14 C, in part, in 855, your proposed language is the
15 maximum payment amount for the work bid shall be the
16 amount of the lowest bid, unless the lowest bid is
17 less than the maximum payment amount set forth in
18 Subpart H, in which case the maximum payment amount
19 set forth in Subpart H shall be allowed.

20 And this goes back, I guess, to
21 essentially our first hearing when we talked about
22 your Subpart H maximum payments is -- to me this
23 implies that no longer is going to be -- I mean,
24 it's implying that regardless of what the bids are,

1 you get three of them, they're all under the amount
2 that you've defined as the maximum number, payment
3 allowed. We're going to get the maximum payment
4 allowed. Am I reading that right?

5 A (By Mr. Clay) Yes.

6 Q Do you recall the question somebody asked
7 in the first hearing that these are maximum amounts,
8 and if in fact the amount comes in underneath that,
9 that's what's going to be reimbursed, rather than
10 the amount delineated in Subpart H?

11 A Because someone could, without bidding, go
12 in and do the work for the amounts in Subpart H, we
13 put it in C that way to allow them to go ahead and
14 use Subpart H.

15 And I would have to agree with you;
16 that would be reasonable to take the lowest bid,
17 since we've also stated in testimony that someone
18 who's conducting this bidding has already
19 predetermined or prequalified these bidders as
20 someone that would be acceptable to them.

21 Q And you're going to require not only if I
22 get five bids, I'm going to want all five of them so
23 I can't pick and choose which ones I submit to you,
24 then this seems to imply as well that if I go out

1 Q You do a cleanup for 200,000. You get
2 done Monday. You went to submit the reimbursement
3 on a Friday for your reimbursement. Obviously you
4 haven't paid the trucker, you haven't paid the
5 landfill, you haven't paid anybody yet. So you're
6 not going to have the waiver or anything.

7 MS. DAVIS: That is a problem.

8 HEARING OFFICER TIPSORD: Excuse me,
9 excuse me. We're drifting into testimony.

10 MS. DAVIS: Okay.

11 HEARING OFFICER TIPSORD: Please stick to
12 questions. If you want to comment on this at
13 the end of the day, I'll be more than happy to
14 let you testify.

15 MS. DAVIS: That was my -- that was the
16 end of the question.

17 QUESTIONS BY MS. DAVIS:

18 Q And the next question I have is, in the
19 case of a drilling aspect where I own my own
20 drilling company, and let's say a particular site I
21 can't do a drilling for the set price. So I go out
22 and I get three bids as the Agency has allowed me.
23 And it also allows me that if I wanted to, I could
24 do the work for the lowest bid. How do I get paid

1 for my handling for my time to go get those bids for
2 the scope of work? Because I'm a person who is
3 using a subcontractor with the indirect financial
4 interest. I mean, how do I get paid?

5 A (By Mr. Clay) In that case, I think you
6 would be entitled to that lump sum as if the owner
7 and operator were paying for the subcontractor. And
8 then, you know, that's sort of a business decision.
9 That's a decision you're making, that you want, in
10 your case, your company to do the work as opposed to
11 the low bidder.

12 MS. DAVIS: Okay.

13 HEARING OFFICER TIPSORD: Go ahead.

14 MR. SCHUMACHER: Brad Schumacher.

15 QUESTIONS BY MR. SCHUMACHER:

16 Q I didn't get an answer. If I sent in my
17 reimbursement claim, I am not going to have any
18 waivers, cancelled checks, affidavit, because I
19 haven't paid my contractor yet. So are you going to
20 deny my claim? Or how does that work? Obviously,
21 we're going to pay our subcontractor, but what if my
22 terms are 90 days, I submit a claim, and you're
23 going to not process the claim because I don't have
24 the waivers? Or backups that I'm paying the

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SEP 23 2004

STATE OF ILLINOIS
Pollution Control Board

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

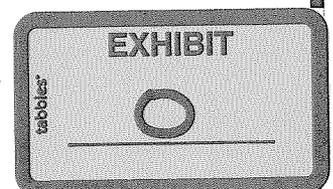
IN THE MATTER OF:)	
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PROPOSED AMENDMENTS TO:)	R04-23
REGULATION OF PETROLEUM)	(Rulemaking – Land)
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TANKS (35 ILL. ADM. CODE 734))	

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
POST HEARING COMMENTS

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through one of its attorneys, Kyle Rominger, and submits the following post-hearing comments:

The Illinois EPA would like to thank the Board, Hearing Officer Tipsord, and the Board staff for their attention and patience in this rulemaking proceeding. The Illinois EPA would also like to thank all of the parties that contributed to this proposal through discussions with the Illinois EPA and through comments and testimony provided to the Board.

As stated in the hearings held in this rulemaking, a portion of the outreach process that the Illinois EPA normally conducts prior to submitting proposed rules to the Board did not occur in this rulemaking due to anti-trust concerns expressed by outside parties. This uncommon curtailment of the Illinois EPA's outreach meant that many issues usually discussed and settled prior to the submission of rules to the Board were raised in



investigation statute up to date.” Id. Copies of the legislative transcript pages cited above are provided in Attachments A, B, and C of this document.

As noted in the legislative record, Public Acts 92-0554 and 92-0735 were passed to amend Title XVI for distinctly different reasons. There is not such total and manifest repugnance between the two Public Acts that they cannot stand together. Because the two Public Acts make changes to Title XVI that do not irreconcilably conflict, they must be construed together in a manner that gives each its full effect. Specifically, the site classification system was replaced with the site investigation and remediation requirements of Public Act 92-0554, and Licensed Professional Geologists were added to the Licensed Professional Engineer supervision and certification requirements as provided in Public Act 92-0735.

After the Public Acts were signed into law, the Illinois EPA carefully researched and studied how the amendments to Title XVI must be interpreted and applied. The Illinois EPA has been very careful to ensure that both its proposal and its implementation of Title XVI are consistent with the changes made by the Public Acts and the legislature’s intent.

2. The Proposed Maximum Payment Amounts.

As explained in the hearings, the Illinois EPA believes the maximum amounts set forth in its proposal are reasonable for the work being performed, unless a higher amount is justified through bidding or because of unusual or extraordinary circumstances. Several questions were raised about the Illinois EPA’s development of the proposed maximum amounts. Many of these questions concerned the use of historical information and whether the amounts developed from such information reflect current market prices.

Although the Illinois EPA used historical information in its development of some of the maximum amounts, the amounts set forth in the proposal are generally consistent with the amounts owners and operators request for reimbursement and the amounts the Illinois EPA approves for payment from the Underground Storage Tank Fund ("UST Fund"). See, e.g., Exhibit 4 at.3; Exhibit 10 at 2; Exhibit 12 at 6. The Illinois EPA believes the maximum amounts set forth in its proposal are not out of date and do not need to be increased by any inflationary rate to make them consistent with current market prices. The amounts proposed are already consistent with the current market.

While there has been much discussion about the development of the proposed maximum amounts, very little has been said about the amounts themselves. Some evidence has been presented to show that the maximum amounts should be something other than what the Illinois EPA proposes. So far, however, neither alternative amounts (other than personnel and lab rates listed in the appendices) nor adequate justification for alternative amounts have been submitted to the Board. While the Illinois EPA has remained open to discussing alternative amounts with interested parties as long as the amounts can be justified, it too has not been provided with alternative amounts (other than personnel and lab rates listed in the appendices) or adequate justification for alternative amounts.

Although the proposed rules set forth maximum amounts that will be paid for certain tasks, owners and operators are not constrained by these amounts. These "default" maximum amounts can be exceeded through bidding or through site-specific approval when unusual or extraordinary circumstances are encountered. The addition of bidding, which the Board suggested as an option, is one of the most significant changes