

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

RECEIVED
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MAY 11 2004
STATE OF ILLINOIS
Pollution Control Board

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

NOTICE OF FILING

TO: ALL COUNSEL OF RECORD
(Service List Attached)


PLEASE TAKE NOTICE that on May 11, 2004, filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of CW³M Company, Inc.'s Prefiled Testimony and General Comments on the Environmental Protection Agency's Proposal to Adopt 35 Ill. Adm. Code 734 and to Adopt Amendments to 35 Ill. Adm. Code 732; and Testimony of Vince E. Smith for the Environmental Protection Agency's Proposal to Adopt Amendments to 35 Ill. Adm. Code 732 and the Environmental Protection Agency's Proposal to Adopt 35 Ill. Adm. Code 734 in the above-captioned matter.

Dated: May 11, 2004

Respectfully submitted,

CW³M Company

By:


One of Its Attorneys

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[This filing submitted on recycled paper as defined in 35 Ill. Adm. Code 101.202]

CERTIFICATE OF SERVICE

I, on oath state that I have served the attached CW³M Company, Inc.'s Prefiled Testimony and General Comments on the Environmental Protection Agency's Proposal to Adopt 35 Ill. Adm. Code 734 and to Adopt Amendments to 35 Ill. Adm. Code 732; and Testimony of Vince E. Smith for the Environmental Protection Agency's Proposal to Adopt Amendments to 35 Ill. Adm. Code 732 and the Environmental Protection Agency's Proposal to Adopt 35 Ill. Adm. Code 734 by placing a copy in an envelope addressed to the Service List Attached from CW3M Company, Inc., 701 West South Grand Avenue, Springfield, IL 62704 before the hour of 5:00 p.m., on this 11th Day of May, 2004.

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**TESTIMONY OF VINCE E. SMITH FOR THE ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSAL TO ADOPT AMENDMENTS TO
35 ILL. ADM. CODE 732 AND THE ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSAL TO ADOPT 35 ILL. ADM. CODE 734**

My name is Vince Smith. I am employed with the CW³M Company as the senior environmental engineer. I have been in my current position since June 2000. Prior to assuming my current position, I was employed by the City of Springfield, Illinois, Department of Public Works, the Illinois Department of Nuclear Safety, and Alpha Testing, Inc. I received a B.A. in Mathematics from Culver-Stockton College in 1984 and a B.S. in Civil Engineering from the University of Missouri – Rolla in 1985. I am a Registered Professional Engineer in the State of Illinois. My resume is attached.

The testimony was prepared with the assistance of Carol L. Rowe and Jeffrey Wienhoff of CW³M Company who are available to assist with providing information during today's proceedings. Ms. Rowe is an Illinois Licensed Professional Geologist and Mr. Wienhoff is an Illinois Enrolled Professional Engineer Intern. Their resumes are also attached.

CW³M Company, Inc. is an environmental consultant, which has been doing LUST work since the company was created in 1991. CW³M has the equipment and abilities to perform tank removals, excavations, groundwater treatment and soil vapor plant construction and operation, bioremediation, landfarming, and demolition work in-house. Typically, CW³M subcontracts laboratory services, drilling, a portion of the trucking, and landfill disposal. Many of our clients own a single facility, and are located in remote parts of the state, not close to landfills, consultants, or other services.

The pre-filed testimony offers comments on the proposed technical modification of 732, creation of 734 and extensive testimony against Subpart H: Maximum Payment Amounts. The basis for our testimony against the rates proposed stems from serious concerns regarding the collection and evaluation of data utilized to support the rates as well as a concern that the streamlined approach misses payment for vital components of LUST work. The spreadsheets that have been made available for inspection have revealed serious flaws in the selection criteria, the age of the data, the input of data and the statistical evaluation. The Agency has not presented a clear rationale for its statistical formulas. In some cases that were used to develop rates in the proposed rules, the Agency only uses an average, while other times, the median value is selected, or the average plus one standard deviation is used as the basis for rate setting. From the Agency's pre-filed testimony and discussion during the March 15, 2004 hearing, it appears that the agency's intent was to use rates consistent with historically approved rates and that 90% of costs would fall into the approvable range. However, our evaluation of the rates and supporting data indicates the opposite is in fact true.

CW³M acknowledges that the data, in the form of budgets and reimbursement requests, is presented to the Agency in various formats and that they have had difficulty in correctly

extrapolating the information. Errors have been carried forward in the rate calculations. The collection of meaningful data and proper evaluation of the data is an essential element to establishing a means of determining reasonableness.

In the Agency's attempt to streamline the review process, they have created a system that is discriminatory to owners/operators across the state who are not located in close proximity to consulting or clean-up contractors, landfills, etc. The effort to simplify the process resulted in the Agency's creation of lump sum maximum values for activities conducted to meet the technical requirements of 732 and 734. The lump sum values are arbitrary, lack understanding or consideration of site variations, and actual clean-up costs and are based upon severely flawed methods with no supporting evidence. The lump sum values exacerbated the already flawed underlying maximum rates, which incorrectly represents true costs and were improperly calculated. Even when the Agency relied on published estimator guides, they miss-used the guides.

While we agree that efforts to streamline the program are beneficial to the Fund, the Agency's oversight efforts, and consultant's compliance work, the means of streamlining has not been well thought out and we believe will have long term negative effects on the entire program. The rate structure as proposed, will ultimately lead to failure of the program. Smaller owners and operators who must rely on the Fund to afford corrective action would no longer be able to clean up their sites if the proposed rates are adopted because too many of their costs would not be reimbursable. Illinois has come a long way and has achieved technical superiority in compliance with LUST regulations. Cost cutting will result in less field oversight to assure compliance and technical reports which are less comprehensive than those the Agency reviews today. The old adage, "you get what you pay for" is applicable to this program.

OSHA requirements dictate that all excavations be conducted under the supervision of an excavation competent person. CW³M's field practices have combined the requirements to incorporate the excavation-trained person's responsibilities with those of technical oversight. Such person cannot be performing equipment operations or other activities, which require their undivided attention and would not allow them to be observing all on-site activities. UST removal operations require considerably more observance of all activities being conducted, including excavation and confined space activities. If consultants, UST removal contractors, and excavation contractors are required to limit required personnel from the job sites to meet the Agency's budgetary numbers, serious violations of OSHA and other regulations will occur and could result in serious injuries, death and penalties.

During the March 15, 2004 presentation of Agency testimony and the subsequent question period, Mr. Jay Koch of United Science Industries, Inc. suggested that the Agency, in conjunction with the consulting industry, develop a means of gathering cost data in a format that could be accurately and statistically analyzed. The Agency responded that there was not time for such an exercise because, due to Fund solvency concerns, actions were needed immediately. This statement is in conflict with various other statements and facts regarding the proposed rates and Fund solvency.

The Agency's emergency need for rate setting is self-inflicted. By and large, the consultants who perform LUST work have been good stewards of the Fund. Large drops in the balance of the Fund have not been caused by consultants, but by State reallocation of the money. We understand the State's budgetary crisis, but please don't blame Fund declines on abuse caused by consultants. The Illinois State Legislature increased the maximum amount payable from the Fund for each occurrence from \$1 million to \$1.5 million. Increased costs associated

with remediation of LUST sites were the driving force for increasing the maximum amount. However, the Agency's proposal further reduces the amounts payable, in direct conflict with the intention of the State Legislature.

CW³M has serious concerns regarding the Agency's proposed auditing procedures. The language in the Act allows the IEPA to audit information that was submitted to IEPA, as necessary, to determine that the document under review is complete and accurate. The language in the proposed rule indicates that the IEPA's interpretation of the Act is that they can do whatever, to whomever, whenever. CW³M concurs that some records should be retained, but contend that the regulated entity, which is the owner / operator, should be the keeper of the records. If the Agency wishes to periodically verify hours or other costs, particularly if they have reason to suspect illegal activities, the Agency already has the ability to obtain the information. There are currently mechanisms available for the Agency to collect necessary documentation (i.e. deny payment or approval until the proper documentation is submitted), or investigate possible fraud. If fraud or criminal acts are suspected, they should be investigated through the Illinois Attorney General's office and the Illinois State Police, who are authorized, qualified, and trained to conduct such investigations.

Detailed discussions regarding the technical and fiscal components of the proposed 734 regulations and modifications Part 732 have been presented in CW³M's pre-filed testimony for the May 2004 hearing. My colleagues and I are available to answer questions regarding our opinions as presented in our testimony. We thank the Board and parties present for their time and efforts dedicated to this rulemaking procedure.

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