BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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

NOTICE OF FILING

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601-3218
(Overnight Mail)

Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601-3218
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SEE ATTACHED SERVICE LIST
(Regular Mail)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S QUESTIONS FOR UNITED SCIENCE INDUSTRIES REGARDING TESTIMONY SUBMITTED AT THE JULY 27, 2005, HEARING for the above-titled proceeding, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: _____
Kyle Rominger, Assistant Counsel

DATE: August 11, 2005
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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)	)	

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 QUESTIONS FOR UNITED SCIENCE INDUSTRIES REGARDING TESTIMONY SUBMITTED AT THE JULY 27, 2005, HEARING

NOW COMES the Illinois Environmental Protection Agency ("IEPA"), by and through one of its attorneys, Kyle Rominger, and submits the following questions for United Science Industries ("USI") regarding its testimony submitted at the July 27, 2005, hearing. The IEPA would like to thank the Hearing Officer and the Board for the opportunity to submit these questions.

If USI claims that any of the information requested below is confidential or should be withheld from public disclosure for any other reason, the IEPA asks that USI include with its answers appropriate requests for confidential handling and non-disclosure of said information by the Board and the IEPA.

1. Numerous USI employees filed requests for the Board to hold an additional hearing in these proceedings, and specifically requested that the hearing be held in southern Illinois. See PC 10-36. These employees later provided the Board with the dates they would be available for the hearing. See PC 40 (comments of 18 USI employees); Exh. 95, 96. However, most of these employees did not present any

testimony at the hearing or even attend the hearing. Please provide the reasons for each employee's failure to participate in the July 27, 2005, hearing.

2. In its pre-filed testimony for the July 27, 2005, hearing and its amended testimony submitted at the hearing, USI questions the IEPA's motives in this rulemaking. Exh. 107 at 28; Exh. 109 at 29-30. Does USI believe that any of the listed "other motives that have been discussed within industry circles" are true? If so, please state the motive(s) that USI believes to be true and provide evidence to support its belief. If not, please state what USI believes to be the IEPA's "real motives [that] are never likely to be stated publicly" and provide evidence to support its belief.

3. USI states in its amended testimony that PIPE and PIPE's members refrained from providing alternative rates to the Board because "USI and other PIPE members were cautioned prior to the 2004 hearings to not discuss rates amongst one another for legal reasons." Exh. 109 at 32. However, for the July 27, 2005, hearing CSD, CW3M, and USI, who are all PIPE members, each submitted testimony that included alternative rates. In addition, Carol Rowe of CW3M suggested at the hearing that CW3M, CSD, and USI get together and submit a coordinated alternative proposal to the Board. Is it USI's contention that it, as well as others, could not have submitted alternative rates to the Board prior to the July 27, 2005, hearing? If so, please state the reasons why such action was prohibited.

4. USI's amended testimony contains petitions signed by owners and operators asking the Board and IEPA to ensure that the proposed rules meet certain enumerated standards. Exh. 109 at 90-177. Did each owner and operator who signed a petition review the entire record in this rulemaking proceeding and independently conclude that the Board's First Notice Proposal does not meet the standards enumerated in the petition? If not, please state the following:

   a. The name of each person that did not review the entire record in this rulemaking proceeding prior to signing a petition.

   b. Whether the named person has concluded that the Board's First Notice Proposal does not meet the standards enumerated in the petition.

   c. If the named person has concluded that the Board's First Notice Proposal does not meet the standards enumerated in the petition, the standard or standards that the person believes the Board's First Notice Proposal does not meet.

   d. The basis for the named person's conclusions regarding the Board's First Notice Proposal.

5. USI's amended testimony contains "Request[s] for Representation" signed by owners and operators. Exh. 109 at 181-263. Did each owner and operator who signed a request for representation review USI's amended testimony in its entirety

and express full agreement with it prior to signing the request? If not, please state the names of the owners and operators that did not review USI's amended testimony in its entirety and express full agreement with it prior to signing the request.

6. USI states in its amended testimony that it was paid approximately $30,765,541 from UST Fund reimbursements to owners and operators for the period of January 1, 2002, to December 31, 2004. Exh. 109 at 283. According to USI's testimony that figure represents 14.7% of all amounts requested for reimbursement from the UST Fund and 15.1% of all amounts paid for the same period. (Id.) USI also indicates in its amended testimony that it represents 3.6% of the open incidents in the LUST Program, or 2.6% of all incidents in the LUST Program. Exh. 109 at 76. Please explain the large discrepancies between the percentage of sites represented by USI and the percentage of UST Fund reimbursements paid to USI.

7. USI states in its amended testimony that it was paid approximately $30,765,541 from UST Fund reimbursements to owners and operators for the period of January 1, 2002, to December 31, 2004. Exh. 109 at 283. It also testified about the low profit margin and the low growth rate of UST remedial work compared to other business sectors. See, e.g., Exh. 110 and 111. For the period of January 1, 2002, to December 31, 2004, please state the following (in dollars):

   a. The amount of revenue USI received for environmental consulting services it provided to UST owners and operators that are not eligible for reimbursement from the UST Fund.

   b. The amount of revenue USI received for environmental consulting services it provided to UST owners and operators eligible for reimbursement from the UST Fund for costs that have not, and will not, be reimbursed from the UST Fund. Please also state the portion of this amount (in dollars) that is attributable to the payment of UST Fund deductibles and the portion that is not attributable to the payment of UST Fund deductibles.

   c. The amount of revenue USI received for environmental consulting services it provided to remedial applicants for sites in the IEPA's Site Remediation Program.

   d. The amount of revenue USI received for environmental consulting services it provided to RCRA owners and operators for sites in the IEPA's RCRA program.

   e. The amount of revenue USI received for environmental consulting services it provided to municipalities for sites in the IEPA's municipal brownfield grants program.

f. The amount of revenue USI received for environmental consulting services it provided to Superfund generators, transporters, owners, and operators for sites in the federal Superfund program.

g. The amount of revenue USI received for environmental consulting services it provided for sites in a program administered by the IEPA's Bureau of Water or Bureau of Air. For this amount, please do not include sites in (a) through (f) above where there is regulatory overlap with a Bureau of Water or Bureau of Air program (e.g., a LUST site that requires an NPDES permit).

8. At the July 27, 2005, hearing and on page 402 of its amended testimony (Exh. 109), USI testified with regard to information on EFCG Historical Industry Profitability for the years 1999 through 2003. USI's testimony indicates that historical industry profitability ranges from 8.8% to 9.9% during these years.

a. Please state USI's net profit rate for each of the years 1999 through 2003.

b. Please provide a breakdown of the revenues and expenses from which USI's net profit rates for each of these years are calculated (e.g., salaries of USI employees, payments to subcontractors, overhead, profit, etc.).

9. USI states in its amended testimony that, having reviewed Sections 734.810 through 734.840 of the Board's First Notice Proposal, "USI is not objectionable in concept to the language of any of those provisions." Exh. 109 at 37. However, USI has completely re-written Sections 734.810 through 734.840 in its proposed rules (PC 55). Please explain this inconsistency.

10. The legal memos included in USI's pre-filed testimony and amended testimony criticize the use of any competitive bidding under the LUST Program. Exh. 107; Exh. 109 at 588-595. However, USI included a competitive bidding provision in its proposed rules. See PC 55, Section 734.855. Please explain these inconsistencies.

11. In the legal memos included in USI's pre-filed testimony and amended testimony there are several statements concerning 35 Ill. Adm. Code 742 ("TACO"). Exh. 107; Exh. 109 at 595-600.

a. Is it USI's contention that a remediation that achieves corrective action objectives developed in accordance with Tier 2 of TACO will not protect human health and the environment? If so, please state the scientific basis for such a conclusion and provide citations to documents supporting such a conclusion.

b. The legal memos criticize using remediation in accordance with TACO as the only objective of the LUST Program. However, in its proposed rules

USI uses compliance with TACO as the standard for remediation. See, e.g., PC 55, Section 734.710(c) and (d). Please explain these inconsistencies.

c. Please state and provide the citation for the express language in the Environmental Protection Act that prohibits the Board from adopting a rule limiting reimbursement from the UST Fund to costs incurred in meeting Tier 2 objectives as set forth in 734.410 and 734.630(bbb) of the Board's First Notice Proposal.

d. The legal memos criticize the Board's proposed limitation on reimbursement from the UST Fund to costs incurred in achieving Tier 2 remediation objectives. However, USI's proposed rules include the same limitation. See PC 55, Sections 734.410 and 734.630(bbb). Please explain these inconsistencies.

12. The legal memo included in USI's amended testimony criticizes the audit provision proposed by the Board. Exh. 109 at 600-603. However, USI included the same audit provision in its proposed rules. See PC 55, Section 734.665. Please explain this inconsistency.

13. The legal memo included in USI's pre-filed testimony criticizes the IEPA's submission of amendments at the August 9, 2005, hearing. Exh. 107. The amendments to which the memo refers, Exhibit 87, were pre-filed with the Board on August 2, 2005, as required by the hearing officer's June 25, 2004, order and were entered into the record at the August 9, 2005, hearing. Is it USI's contention that, beginning at least one week prior to a hearing, the Board should not accept any changes to testimony or other information that has already been filed with the Board?

14. USI states in its amended testimony that "[i]n the case of Subpart H inaccurate estimates that are too low could costs jobs and bankruptcies and in the case of Subpart H if these inaccuracies result in estimates that are too high it could cost the UST program millions in wasteful spending." Exh. 109 at 60-61.

a. Does USI plan to layoff any of its employees or file for bankruptcy if the Board adopts its First Notice Proposal as final rules? If so, please state what actions USI plans to take and the reasons USI will be taking those actions.

b. Does USI believe that any of the reimbursement amounts set forth in the Board's First Notice Proposal are too high, such that they will cost the UST program millions of dollars in wasteful spending? If so, please state the amounts that USI believes are too high, the reasons for USI's belief, and the lower amounts that USI believes will not result in millions of dollars in wasteful spending.

15. USI states in its amended testimony that, if the Board adopts its First Notice Proposal as final rules, "consulting firms will either no longer provide services to UST owners/operators or be required to recover costs in excess of the 'Maximum Payment Amounts' directly from the owner/operator." Exh. 109 at 64. If the Board adopts its First Notice Proposal as final rules,

    a. Does USI plan to stop providing services to UST owners/operators?

    b. Does USI plan to recover costs in excess of the 'Maximum Payment Amounts' directly from owners/operators?

16. USI states in its amended testimony that "[a]s long as 'maximums', whatever they may be, are published some firms will be tempted to raise prices to the maximum thereby increasing the cost to the program." Exh. 109 at 65.

    a. If the Board adopts its First Notice Proposal as final rules, will USI be charging UST owners and operators the maximum payment amounts set forth in the rules, or will it be charging lower amounts? If USI will be charging lower amounts, please identify the amounts and state the lower amounts it will be charging.

    b. In contrast to the statement quoted in the first paragraph of this question, USI states in its amended testimony that the use of published "expedited" unit rates that are lower than maximum unpublished unit rates will "encourage [the expedited units rates'] use and effectively drive down the costs of doing LUST work, because consultants will desire a quick and painless pricing approvals the use of such rates will provide." Exh. 109 at 68. Please explain this inconsistency.

17. USI continues to complain in its testimony that the rates the Board proposed in its First Notice Proposal, as well as the use of competitive bidding, are not statistically defensible. Please state and provide the citation for the express language in the Environmental Protection Act that requires the amounts reimbursed from the UST Fund to be statistically defensible in addition to being reasonable.

18. USI stated in its amended testimony that one of "four key facets of our regulatory system" includes "the use of unpublished maximum payment amounts." Exh. 109 at 69. "These rates will remain unpublished and known only to IEPA." Id. at 68. Please explain how the use of unpublished maximum amounts is legally consistent with the Illinois Administrative Procedures Act (5 ILCS 100) and the Board's decision regarding the IEPA's use of rate sheets in Illinois Ayers Oil Company v. IEPA, PCB 03-214 (April 1, 2004).

19. USI has testified that the "Maximum Unit Rates" are to "remain unpublished and known only to the IEPA." Exh. 109 at 68. However, the definition of "Maximum Unit Rate" in USI's proposed rules states that "Maximum Unit Rates" are to be

made available to the LUST Advisory Committee, which largely is comprised of owners and operators, consultants, and contractors, or their representatives. PC 55, Section 734.115. Please explain this discrepancy.

20. USI's proposed rules state that "the owner/operator may obtain three bids for services pursuant to Section 734.855" to demonstrate that "a product or service is not covered by one or more of the Standard Products or Services listed in Appendix E, is reasonable and meets the requirements of Sections 734.625 and 734.630 of Subpart F." PC 55, Section 734.805(a)(ii) (emphasis added). Given that obtaining three bids is discretionary, by what other means does USI contemplate an owner or operator being able to make the required demonstration?

21. USI's proposed rules require owners and operators seeking reimbursement to demonstrate that tasks performed pursuant to Subpart B are "necessary to meet the minimum requirements of the Act, or [are] otherwise eligible for reimbursement from the Fund." PC 55, Section 734.805(b)(i) (emphasis added). However, USI's proposed rules also provide that "[c]osts for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act" are ineligible for reimbursement." PC 55, Section 734.630(o). Please explain this inconsistency.

22. USI's proposed rules state that owners and operators must "demonstrate that the *Extended Costs* of Standard Products and Services is reasonable." PC 55, Section 734.805(c). The Section then requires the IEPA to calculate the Extended Rate via a prescribed formula using the "Expedited Rate" and the "Reasonable Quantity," and states that the result of the calculation "shall be presumed" reasonable. What type of demonstration is expected of the owner or operator if the IEPA is required to calculate the "Extended Cost" using a prescribed formula?

23. Please state the amounts or ranges of amounts that an owner or operator can be reimbursed under Section 734.810 of USI's proposed rules (PC 55) for costs associated with the removal or abandonment of USTs with the following volumes.

    a. 110 to 999 gallons.

    b. 1,000 to 14,999 gallons.

    c. 15,000 gallons or more.

24. Please state the amount or range of amounts, per gallon, that an owner or operator can be reimbursed under Section 734.815 of USI's proposed rules (PC 55) for costs associated with the removal, transportation, and disposal of groundwater or free product via hand bailing or vacuum truck.

25. Please state the amounts or ranges of amounts, per foot, that an owner or operator can be reimbursed under Section 734.820 of USI's proposed rules (PC 55) for costs associated with the following:

    a. Drilling via hollow stem auger (any purpose).

    b. Drilling via direct push platform for sampling or other non-injection purposes.

    c. Drilling via direct push platform for injection purposes.

    d. Monitoring well installation via hollow stem auger (excluding drilling costs).

    e. Monitoring well installation via direct push platform (excluding drilling costs).

    f. Recovery well installation for four-inch diameter recovery wells (excluding drilling costs).

    g. Recovery well installation for six-inch diameter recovery wells (excluding drilling costs).

    h. Recovery well installation for eight-inch or greater diameter recovery wells (excluding drilling costs).

    i. Abandonment of monitoring wells.

26. Please state the amount or range of amounts, per cubic yard, that an owner or operator can be reimbursed under Section 734.825 of USI's proposed rules (PC 55) for costs associated with the removal, transportation, and disposal of contaminated soil exceeding the applicable remediation objectives. Please also state how the volume of soil removed and disposed of must be calculated.

27. Please state the amount or range of amounts, per cubic yard, that an owner or operator can be reimbursed under Section 734.825 of USI's proposed rules (PC 55) for costs associated with the removal, transportation, and disposal of concrete, asphalt, or paving overlaying contaminated soil or fill.

28. Please state the amount or range of amounts, per cubic yard, that an owner or operator can be reimbursed under Section 734.825 of USI's proposed rules (PC 55) for costs associated with the purchase, transportation, and placement of material used to backfill excavations resulting from contaminated soil removal and disposal. Please also state how the volume of backfill material must be calculated.

29. Please state the amount or range of amounts, per cubic yard, that an owner or operator can be reimbursed under Section 734.825 of USI's proposed rules (PC 55) for costs associated with the removal and subsequent return of soil that does not exceed the applicable remediation objectives but whose removal is required in order to conduct corrective action.

30. Please state the amount or range of amounts, per drum, that an owner or operator can be reimbursed under Section 734.830 of USI's proposed rules (PC 55) for costs associated with the purchase, transportation, and disposal of 55 gallon drums used to contain the following:

    a. Solid waste generated as a result of corrective action.

    b. Liquid waste generated as a result of corrective action.

31. Please state the amounts or ranges of amounts, per square foot, that an owner or operator can be reimbursed under Section 734.835 of USI's proposed rules (PC 55) for costs associated with the following:

    a. The installation of asphalt or paving to a depth of two inches solely for the purposes of constructing an engineered barrier (i.e., not installed as replacement asphalt or paving).

    b. The installation of asphalt or paving to a depth of three inches solely for the purposes of constructing an engineered barrier (i.e., not installed as replacement asphalt or paving).

    c. The installation of asphalt or paving to a depth of four inches solely for the purposes of constructing an engineered barrier (i.e., not installed as replacement asphalt or paving).

    d. The installation of concrete (any depth) solely for the purposes of constructing an engineered barrier (i.e., not installed as replacement asphalt or paving).

    e. The replacement of two inches of asphalt or paving.

    f. The replacement of three inches of asphalt or paving.

    g. The replacement of four inches of asphalt or paving.

    h. The replacement of six inches of asphalt or paving.

    i. The replacement of two inches of concrete.

    j. The replacement of three inches of concrete.

55, Section 734.860(a). However, owners and operators are not required to demonstrate the these criteria when seeking "Justified Unit Rates" for products or services that are not listed in Appendix E. PC 55, Section 734.860(b). Please explain this inconsistency.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

Kyle Ronfinger
Assistant Counsel

DATED: 8-11-05

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

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S QUESTIONS FOR UNITED SCIENCE INDUSTRIES REGARDING TESTIMONY SUBMITTED AT THE JULY 27, 2005, HEARING upon the person to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
(Overnight Mail)

Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
(Overnight Mail)

SEE ATTACHED SERVICE LIST
(Regular Mail)

and mailing it from Springfield, Illinois, on August 11, 2005, with sufficient postage affixed as indicated above.

SUBSCRIBED AND SWORN TO BEFORE ME

this 11th day of August, 2005

OFFICIAL SEAL
CYNTHIA L. WOLFE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8-20-2007

Notary Public

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