BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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

PUBLIC COMMENT

Now comes Professionals of Illinois for the Protection of the Environment (PIPE), by and through its attorneys, Claire A. Manning, Brown, Hay & Stephens LLP, and offers the following public comment in this proceeding, for the Board's consideration, prior to moving the rule as proposed by the Illinois Environmental Protection Agency (Agency) to Second Notice.

The Professionals of Illinois for the Protection of the Environment (PIPE) would like to thank the Pollution Control Board for the opportunity to appear before it and present evidence, argument and comment in this public hearing – the statutory purpose of which is to provide public input into this regulation prior to its being declared by the Board to be appropriate and reasonable for promulgation as a state rule. Indeed, pursuant to the Illinois Environmental Protection Act ("Act") and the Administrative Procedures Act (APA), the Board has both broad and specific responsibilities in promulgating rules such as those presented here. Most importantly, the Board's broad regulatory responsibility rests, independently, in providing assurance to the citizens of Illinois that the environment is protected.

In this case, regardless of other potential designs on the underground storage tank fund, the Board's sole concern should be with the broad purpose of the leaking underground storage tank (LUST) regulations and fund: to provide assurance that Illinois' LUST program effectively meets the goal for which it was established, the complete remediation of the thousands of Illinois LUST sites that are eligible for reimbursement through the LUST fund. Indeed, the primary purpose for the LUST fund, the purpose for which it was established and for which owners and operators (OO) pay a substantial deductible, is to have the state assume 100 % of the rest of the financial responsibility for the remediation. The testimony of Bill Fleishli from the Illinois Petroleum Marketers and Convenience Store Operators establishes that fact.

Much evidence has been presented in this proceeding. One of the most important pieces of evidence for the Board's consideration ought to be: despite the fact that millions of dollars are used each year for the administration of the fund, almost one-half of the sites in the program have not even begun remediation.[1] Therefore, prior to moving this rule to Second Notice, the Board should be convinced that the rule as proposed will result in remediation of *more* sites – not less. Yet, the wealth of the evidence in this proceeding suggests otherwise. Certainly, the Board cannot be convinced on the basis of this record that more sites will be remediated with the promulgation of this rule.

This has been a very controversial rule, with an unusual amount of varied opposition – and, importantly, a dearth of supporters. Indeed, one could suggest that the only two entities who have appeared to have voiced support for the rule are the Agency itself and, as set forth in its First Notice opinion, the Board.

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[1] Importantly, as with much of the actual statistics in this proceeding, that information was presented by PIPE, the companies whose very business it is to remediate more sites – not by the administrators of the program, whose job it is to ensure full remediation is accomplished in accordance with established federal objectives.

Certainly, PIPE acknowledges its appreciation to the Board and its staff for the attentiveness paid to the members of PIPE which, as all participants now know, is an association of Illinois companies involved in underground tank remediation products and services throughout Illinois. The most vocal members of PIPE have been those small Illinois companies who remediate a substantial percentage of the underground storage tank sites in Illinois, much of it for downstate owners and operators whose properties are not geographically located in growing urban markets and who likely have no corporate structure to rely upon. As the record demonstrates, not all owners and operators can assume a percentage cost of the remediation beyond the deductible they have already paid (with the justifiable expectation that the statutory LUST program allows for full remediation of contaminated property upon payment of the deductible.)

The evidence in this proceeding establishes that the rule as proposed will, more likely than not, require owners and operators to pick up a large percentage of the actual cost of the remediation and, when that is not possible, there simply will be no remediation. Clearly, the rule as proposed restricts "maximum" reimbursement to a level that has proven to be lower than the level that the Agency has historically paid for the very same services and products. In its First Notice opinion, the Board in fact recognized that the Agency's designated maximum rates were not statistically defensible. Since that First Notice Opinion, they certainly have not become more defensible; in fact, they are even less so, especially given the staggering evidence USI presented at the last public hearing based upon information from the Agency's own database. Given that evidence, PIPE must query how the Agency's designated rates, when established as maximums, can be considered by the Board to be "reasonable" reimbursement.

Moreover, as pointed out repeatedly by Dan Goodwin and David Kennedy from the American Council of Engineering Companies, as well as Mike Rapps from Rapps Engineering on behalf of the Illinois Society of Professional Engineers, and PIPE, the rule is fatally flawed because it fails to contain "scope of work" language; thus, it fails to identify what actual work the Agency will consider reimburseable.

To add to this uncertainty, the Agency has insistently refused any attempts to mutually design a process that would allow for cost disputes to be reasonably and cost effectively resolved. As it is, if promulgated, the rule will be implemented in a virtual vacuum of review – since, as the record demonstrates, the costs of legally challenging any Agency reimbursement decision generally exceeds the discrete costs that are at the heart of the dispute. Thus, the program does not provide for the procedural due process constitutionally required in an administrative process.

PIPE and the other participants in this rulemaking have presented a myriad of information and evidence to the Board for their consideration in this regulatory proceeding. Unlike an adjudicatory proceeding, where the Board acts in a quasi-judicial capacity, the Board here is called upon to act in its quasi-legislative function. This is a fact finding proceeding, where the Board is obligated to utilize the record facts in its determination of the propriety and workability of a proposed rule. The Act does not require that the partipants in a regulatory proceeding present a viable rule (or numbers) as alternatives to that set forth in the proposal under consideration.

Nonetheless, individual PIPE members have taken their best shot at presenting draft rule language to the Board that would achieve the Act's objectives where the Agency's rule does not. While there is little expectation that the Board will do a wholesale trade of the Agency's

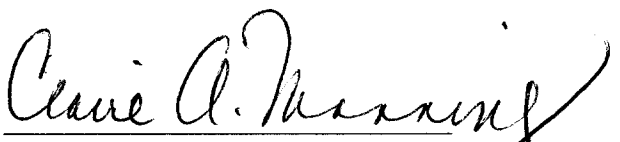
proposed rule for one of the PIPE members proposed draft rules, and send a PIPE proposed rule to Second Notice, there is every expectation that the Board will exercise its authority and responsibility to substantially redraft this rule. Quite simply, without substantial changes, the Agency's rule is not ready for Second Notice and review by the Joint Committee on Administrative Rules.

The Board is certainly qualified and authorized to make such changes as this is a Board rule that is being promulgated, not an Agency rule. The regulatory provisions of the Act establish the Board's responsibility following hearing as follows: "After such hearing the Board may revise the proposed regulations before adoption in response to suggestions made at the hearing, without conducting a further hearing on the revisions." Also, the Act allows that "nothing herein shall preclude the Board from, on its own motion: ...(2) modifying a proposed rule following receipt of comments, objections, or suggestions without agreement of the proponent after the end of the hearing and comment period."

PIPE respectfully requests that the Board exercise its independent judgment and substantially amend this rule, consistent with the evidence and public comment presented, prior to sending anything to Second Notice. PIPE recognizes that such changes will likely require the Board to take this regulatory proceeding back to First Notice. PIPE suggests that such is imminently preferable to moving the Agency's drafted rule to Second Notice. Alternatively, PIPE would suggest that the Board write an opinion that analyses the approaches submitted by PIPE members, and requires the Agency to work with the participants, pursuant to a Board-established timetable, in developing a new First Notice proposal which specifically addresses the legitimate concerns raised in this proceeding.

As a final comment, PIPE would submit that the Illinois environmental regulatory process, as envisioned by the Act, is meant to provide meaningful public input into the promulgation of Board rules. If the Board moves to Second Notice with the Agency's rule, without substantial change that addresses the significant public input the Board has received, that input will in no way have been meaningful. Moreover, the promulgated rule will not be based upon record evidence, but instead will be based upon the Agency's "we know it when we see it" approach which is, at its core, arbitrary.

Respectfully submitted,



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On Behalf of the Professionals of Illinois for the Protection of the Environment

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PROOF OF SERVICE

The undersigned states that a true and correct copy of the foregoing PUBLIC COMMENT, was served on the individuals listed on the Board's Notice list, as reflected on the Board's website on September 23, 2005, below by mailing the same via the United States postal service, Springfield, Illinois on September 26, 2005:

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