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	)	

RESPONSE OF PROFESSIONALS OF ILLINOIS FOR THE PROTECTION OF THE ENVIRONMENT ("PIPE") TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR EMERGENCY RULEMAKING

NOW COMES the Professionals of Illinois for the Protection of the Environment ("PIPE"), by and through its attorney Claire A. Manning, and, objects to the Illinois Environmental Protection Agency's ("Agency") Motion that the Board adopt revised Part 732 and create new Part 734 on an emergency basis.

First, PIPE appreciates that a process needs to be developed which effectively, efficiently, expeditiously and *fairly* reviews work plan budgets and submittals for reimbursement from the underground storage tank fund. That review should be based upon actual costs, industry standards, documented expenditures, scope of work and budget and project plan presentations which are certified by licensed professional engineers and geologists as required by the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 et. seq., and corresponding Board rules. As is most likely evident to the Board, because of the significant increase in underground storage

tank appeals, there has been a noticeable breakdown in the workability of the reimbursement program in the last few years. That breakdown results from various factors, and PIPE submits that changes in the Agency's administration of the program over the course of the last several years are at the heart of those factors.

First, the Agency began the routine utilization of a "rate sheet" which PIPE maintains that was developed in an arbitrary fashion and without public promulgation, inconsistent with the Environmental Protection Act ("Act") and the Administrative Procedures Act. 5 ILCS 10/5 Second, the Agency has discontinued affording any deference or consideration to the certifications of the licensed professional engineer and geologists that are required by the Act. Third, instead of reviewing a portion of the various types of budgets, plans and other claims for reimbursement, as contemplated by the Act (see 415 ILCS 5/57.2(c), the Agency reviews each and every submittal, at various different decision-making points and, as a result, the Agency's LUST Unit has grown substantially. Fourth, there is no longer any communication, written or otherwise, from the Agency to the requestor regarding the Agency's reasons for amendment of budgets or denial of costs. Finally, the most recent statutory changes, made well over two years ago, have never been incorporated into regulatory language and, accordingly, the procedural administration of the LUST program pursuant to these changes has never been subject to public comment or Board review – until now.

Now, after years of operating the program without public rulemaking, the Agency moves, without citing any legal authority, that the Board adopt these important rules, again without public review, in wholesale and emergency fashion. The Board should resist this particular effort and allow this important rulemaking to proceed in regular and expeditious fashion, with all the public participation and Board oversight contemplated by the Act.

In order to ensure that the reimbursement process works as intended by the underground storage tank legislation, PIPE is participating in the Board's rulemaking docketed as R04-22 and R04-23. Incorporated as a not-for-profit professional association on April 6, 2004, PIPE is an association of professionals (engineers, geologists and other professionals), businesses, and contractors who are employed or contracted to remediate, protect and enhance the environment and protect human health and safety. The membership consists of professional consultants, engineers, laboratories, contractors and other stakeholders vital to the remediation of LUST incidents in Illinois. Already, a great number of the businesses who are contracted by owners and operators of leaking underground storage tank sites to remediate those sites, many of which appeared at the Board's first hearing in this matter, are members of PIPE.

PIPE desires to cooperate with the Agency in an effort to establish a methodology for the Agency's review of costs associated with leaking underground storage tanks. Both parties have recently had the opportunity to meet and share their respective concerns and, importantly, their commitment to a mutual goal: making the best use of the resources of the fund, so that LUST sites can continue to be remediated and Illinois' environment can continue to be protected and enhanced. PIPE is interested in an expeditious and fair reimbursement process, one that recognizes both the reasonableness of the actual costs associated with remediation, as well as a deference that should be afforded the professional judgment that is inherent in the professional engineer's or geologist's certification required by the Act and Board rules.

PIPE is working with the Agency toward that end. PIPE's understanding, as a result of its discussions with the Agency, is that the Agency will be asking the Board to refrain from acting on this emergency Motion pending further discussions. PIPE has indicated a continued willingness to discuss, to the extent it may be deemed necessary, an interim agreed approach to the

review of LUST reimbursement claims until a rule can be formally promulgated by the Board. These efforts should narrow the issues and controversy currently before the Board and allow the rulemaking to proceed more smoothly. Nonetheless, PIPE objects to the Agency's specific request for emergency rulemaking in this matter since, with all due respect, any "emergency" is of the Agency's own making: a result of its routine application of an arbitrary "rate sheet" and its avoidance of public rulemaking.

Recently, the Board admonished the Agency for utilizing the rate sheet without promulgating it as a rule. In *Illinois Ayes Oil Company v. Illinois Environmental Protection Agency ("Ayers")* (PCB 03-214, April 1, 2004), the Board considered a contested reimbursement issue, where the Agency denied Ayers a substantial part of its requested reimbursement, based upon the Agency's application of its "rate sheet" and concomitant "reasonableness" determination. At hearing, witnesses for CSD Environmental (the remediation company responsible for the *Ayers* site and now a member of PIPE) credibly testified as to the reasonableness of its remediation project and related costs. While the Board opined that the Agency's rate sheet was invalidly promulgated, the Board nonetheless considered the Agency's application of the rate sheet as the Agency's interpretation of "reasonableness." The Board's decision, which cost the petitioner more to pursue than the actual dollar amount in dispute, in essence declared that the position of CSD Environmental was more reasonable than that of the Agency.

On January 22, 2003, CW^3M Company, Inc., another environmental remediation company and also now a member of PIPE, filed suit in Sangamon County seeking to enjoin the Agency from its standard use of a rate sheet to determine "reasonableness" of remediation and related costs under the Act. The matter was not heard until April 21, 2004 and, upon the motion of the Agency, the court declared the matter moot because of the Board's decision in *Ayers*.

Nonetheless, the court admonished the Agency to discontinue the use of a standard rate sheet that had not been promulgated as a rule. See *CW³M Company, Inc. v. Illinois Environmental Protection Agency*, Circuit Court of Sangamon County, NO. 03-MR-0032 (April 21, 2004).

Based in large part upon the above-referenced challenges to the Agency's use of the rate sheet as a "rule" regarding "reasonableness," the Agency now seeks to have the Board promulgate its proposed rule as an emergency rule. In support thereof, the Agency asserts: "Without the rate sheet, the Illinois EPA lacks a standard methodology for determining whether the costs submitted for approval in budgets and applications are reasonable. A standard methodology for determining the reasonableness of costs is included in the proposed rules currently before the Board." (See Agency Motion at page 2).

Thus, while the Agency has been reviewing LUST fund claims for well over ten years, certainly prior to the routine use of an established rate sheet, the Agency now seeks the Board's immediate blessing of the use of its rate sheet, now incorporated into regulatory language, via this Motion for Emergency Rulemaking. PIPE strongly objects to the Board's sanctioning of this rate sheet by incorporating it into formal Illinois administrative regulation for various reasons.

First and foremost, Illinois caselaw is clear: a state agency cannot create its own emergency and then, in justification of emergency rulemaking, assert the existence of a situation that "reasonably constitutes a threat to the public *interest, safety, or welfare." See 5 ILCS 100/5-45; Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 83 Ill. Dec. 609, 470 N.E. 2d 1029 (1984). See also, *Citizen's for a Better Environment v. Illinois Pollution Control Board,* 152 Ill.App.3d 105, 105 Ill. Dec. 297, 504 N.E.2d 166 (1st. Dist. 1987): "the need to adopt emergency rules in order to alleviate an administrative need, which, by itself, does not threaten the public interest, safety or welfare, does not constitute an "emergency." The policy reasons underlying this case-

law are clear: government should not be able to create its own emergency and then use that emergency as a justification to administer its program in a way that forecloses legitimate and required public input. In this case, those policy reasons are even more evident because it is the very foreclosure of the right to participate that here creates the claimed emergency.

Further, while the Agency claims that it needs an "emergency" fix because it can't utilize it's rate sheet, the fix it seeks would delete long standing regulatory language (in Part 732) and add an entirely new Part 734 – all justified by a self created emergency and all without the requisite public participation. Even if the "fix" is limited to allowing the Agency to use its proposed rates (e.g., Subpart H), as it claims is necessary, such "fix" will only serve to create, not dissipate, havoc. This is so because, as is likely clear to the Board from its first hearing in this proceeding, PIPE members seriously dispute the Agency's claim that the proposal before the Board is reflective of a standard methodology for determining the reasonableness of costs. For the Board to sanction these rates, without public input and Board review, even in emergency fashion, is for the Board to legitimize the very rates that PIPE maintains have been arbitrarily established.

Since that hearing, PIPE has become aware of further information, which it plans to present at the Board's next hearing, which further undermines the claimed methodology and reasonableness of the Agency's proposed reimbursement rates in this rulemaking. On the eve of the CW^3M court hearing in Sangamon County, the Agency finally responded to an FOIA request that had previously been denied. (The denial was one of the issues before the court that, as a result of the Agency's belated response, was also declared moot.) Three important documents were, for the first time, released and have been reviewed by members of PIPE: an Agency 1998-1999 sampling of remediation sites; a 2003 rate sheet; and a 2004 rate sheet.

PIPE will submit these documents as demonstration that proposed Subpart H and Appendices were developed utilizing non-representative group of site remediations from as far back as 1998-1999. Even then, many of the rates in the 2003 rate sheet are less than these representative amounts. Uncannily, in the 2004 rate sheet, they are lesser still. Thus, while one might presume that the cost of remediation and the cost of doing business in Illinois has risen during this period of time, the rates, as determined "reasonable" by the Agency, have fallen. Simply put, the Agency's rates are not a reasonable representation of the current costs of remediation of underground storage tank sites and should not be sanctioned by the Board, especially on an emergency basis.

The Agency's claim that it cannot make determinations of "reasonableness" without using emergency promulgated rates is without merit, especially since the Act requires a certification of a licensed professional engineer or geologist on virtually every cost associated with LUST reimbursement. Indeed, the Act contemplates the Agency's role as being one of selected "review" and "audit" of these remediation projects and, while a promulgated rate sheet may be helpful, it is not a necessary pre-requisite to an Agency approval of costs associated with remediation. To the extent the Agency believes that a consideration of standardized rates is appropriate, PIPE agrees that such rates, if promulgated correctly and fairly, might well serve to expedite the reimbursement process. When not promulgated fairly or correctly, however, the opposite is the inevitable result. Further, there are various industry publications that the Agency reviewers might draw from, including *RSMeans*, that annually publish standard rates for the construction and environmental industries. However, these publications do not appear to have been utilized by the Agency in its development of the proposal currently before the Board.

Also, as the Board well knows, any emergency rule is only valid for 150 days and, given the controversy currently evident in this rulemaking, the promulgation of a permanent rule in 150 days would be a yeoman's job. Thus, unless the stakeholders' positions become less divergent quickly, any emergency rule would likely terminate prior to a regular rule's promulgation. In order to facilitate this rulemaking, and in an attempt to create some degree of harmony in the processing of LUST budgets, plans and reimbursement claims, PIPE is involved in an ongoing dialogue with the Agency. As a result of those discussions, PIPE expects that the Agency will request that the Board hold its request for emergency rulemaking in abeyance so that the parties might continue to dialogue. The hope is that the Agency will present a more palatable proposal to the Board. Unless and until that occurs, however, PIPE strenuously objects to the Agency's motion that the Board adopt Part 732 and Part 734 in emergency fashion.

Respectfully submitted,

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