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),	)	
	)	
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 July 8, 2005, filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of Pre-Filed Testimony & Revised Regulations from CW^{3}M, Company, Inc. for the Illinois Pollution Control Board's First Notice of Amendments to 35 Ill. Adm. Code 734 and 35 Ill. Adm. Code 732 in the above-captioned matter.

Dated: July 8, 2005

Respectfully submitted,

CW^{3}M Company

By: Carolyn S. Hesse
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, on oath state that I have served the attached Pre-Filed Testimony & Revised Regulations from CW^{3}M, Company, Inc. for the Illinois Pollution Control Board's First Notice of Amendments to 35 Ill. Adm. Code 734 and 35 Ill. Adm. Code 732 by placing a copy in an envelope addressed to the Service List Attached from CW^{3}M Company, Inc., 701 West South Grand Avenue, Springfield, IL 62704 before the hour of 5:00 p.m., on this 11th Day of July, 2005.

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Carol Rowe

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Proposed Rule. First Notice

PRE-FILED TESTIMONY & REVISED REGULATIONS FROM CW^{3}M COMPANY, INC. FOR THE ILLINOIS POLLUTION CONTROL BOARD's 1st NOTICE OF AMENDMENTS TO 35 ILL. ADM. CODE 734 AND 35 ILL. ADM. CODE 732

My name is Vince Smith. I am employed with the CW^{3}M 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.

The testimony was prepared with the assistance of Carol L. Rowe and Jeffrey Wienhoff of CW^{3}M 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 a Registered Professional Engineer in the State of Illinois. CW^{3}M has been in the business of providing consulting and contractor services for the removal of USTs and corrective action at

LUST sites since 1991. Cumulatively, personnel at CW^{3}M have more than 65 years of experience performing corrective action at LUST sites. CW^{3}M currently has more than 150 active LUST sites and has obtained closure/NFR Letters at more than 70 sites.

CW^{3}M has spent a considerable amount of time researching environmental cost data from numerous sources and preparing testimony for these rulemaking proceedings. Our intent during the previous hearings was to provide the Board, the Agency and other interested parties with credible supported data to illustrate the flaws in the rates initially proposed by the Agency and subsequently published by the Board in its 1st Notice. It is most disturbing to us that the data presented by CW^{3}M, PIPE and other experienced consultants representing hundreds of years of experience was largely ignored in favor of adopting the Agency's proposal that was recognized as based only on the Agency's experience in reviewing reports. The Agency admitted at hearing that Harry Chappel was the only person at IEPA who had worked in the private sector, and his experience was for only six years. Furthermore, it is even more disturbing that the Board would publish for First Notice the Agency's flawed rates which were not based on any scientifically or statistically recognized methods, especially after much of the Agency's testimony was proven to be incorrect. It is apparent that because the Agency and the regulated community did not approach this rulemaking proceeding in unison, the Board felt it had no choice but to defer to another State agency's position, whether accurate or not. Granted, the Agency does have some experience in reviewing budgets and payment requests, but they do not have experience in the business of conducting or costing the planned work; nor do they have experience in anticipating or resolving problems that could develop in the field. We believe the collective experience of various members of PIPE, ACECI and the other participants should be taken into consideration for "good government" to prevail in these proceedings.

A major inconsistency within the testimony and the proposed rates that has yet to be explained or addressed is the notion that the proposed rates are consistent with the rates historically and currently being deemed reasonable by the Agency. The Agency's testimony indicated that the proposed rates would be inclusive of ninety percent of the costs of sites remediated in Illinois. Yet, IEPA has provided no scientifically valid data to support this assertion. IEPA did not use a

statistically unbiased, randomly selected data set as the bases for its various rates. As discussed in more detail below, CW^{3}M has provided in Appendix C a list of IDOT awarded contracts to perform corrective action at LUST sites in Illinois. (*See* Appendix C, Table 1.) The contracts were awarded after competitive bidding. Table 1 includes a calculation of the cost per cubic yard to excavate, transport and dispose of impacted soil from all 39 projects. When IEPA's proposed \$57/yd^3 figure is applied, only 11 out of the 39 projects (less than 33%) would be deemed reasonable. In other words, IEPA would reject costs for more than two-thirds (2/3) of IDOT's sites. Numerous professional service providers have testified that the Agency's proposed rates are substantially less than the rates historically deemed reasonable and reimbursed by the Agency. If the proposed rates were reflective of the market and consistent with rates previously deemed reasonable by the Agency, there is little doubt that these proceedings would have been less controversial and the Agency might have secured the support of industry.

A related, but also contradictory statement is that the Agency felt it necessary to propose a payment containment method to protect the Fund. However, if the proposed rates are really consistent with current or historically approved payment amounts, where is the costs savings? How did average rates or median costs become maximum payment amounts? When average rates or the median is used, the maximum rate cannot account for site variability.

It is CW^{3}M's opinion that IEPA wants to realize a cost savings by forcing industry to accept substantially less reimbursement than prevailing market rates or rates previously deemed reasonable as well as forcing industry to now comply with secret or undefined scopes of work. Now that the rate structure has been made public and the Agency and Board are unwilling to develop detailed scopes of work for the lump sum payment amounts, the Agency will try to force fit additional tasks into the lump sum rates. The Agency has refused to disclose what tasks it included when developing the rates or what tasks should be inclusive within the lump sum payment amounts. Either the Agency is unable to list specific tasks to include in a lump sum rate because IEPA does not have adequate experience to know what tasks to list or, based on the IEPA's Responses to Pre-Filed Questions, June 14, 2005, the Agency intends that any task that may come up or that was not previously addressed as being part of the lump sum payment

amounts will later be deemed as part of the rate. CW^{3}M believes that specific tasks should be listed if they are to be part of the lump sum payment amount. Failure to do so runs the risk of the rules being found unconstitutional and void due to vagueness.

Our interpretation of the Board's opinion is that even though the rates may be flawed, with the bidding and unusual circumstances contingencies the Agency's proposed rates, where too low, should be adjusted to market conditions. This could be plausible and possibly even acceptable, however, the Agency has testified that there will be very few reasons for them to accept or approve unusual or extraordinary circumstances. This is at the heart of our concerns over the rate structure IEPA proposed.

Failure to adequately and fairly adopt rates will have little impact on how the Agency does business. However, a poorly designed system of determining maximum rates can have a serious impact on owners, operators and those of us providing the services. The futures of our businesses are at stake. At one of the hearings, Agency witnesses tried to draw an analogy to the problems with the health care system. Yet, the Agency's proposed rates would create in the UST reimbursement program the most significant problems facing health care (1) lack of adequate insurance (which the UST Fund is) to cover necessary costs of treatment, and (2) driving service providers out of the state or to leave the profession because their high costs of doing business is not adequately offset by the amount they get paid to allow for an adequate profit margin. In other words, if the corrective action costs, minus the deductible, are not covered by the UST Fund, a substantial number of sites will not get cleaned up because the owner/operator will not be able to cover the difference between the cost of the work and the amount paid by the Fund. An additional problem is that consultants will leave this line of work in favor of more lucrative work.

"Good government" implies that any changes that could impact businesses to the level that the proposed regulations do, should be carefully and properly evaluated rather than be based on pulling a few non-representative files out of the cabinets and conducting a subjective review to support rates based on only a few selective sites. Our review of the record in its entirety does not

support the Agency's proposed rate structure; there are too many holes in the process of developing the Agency's proposed rates and no substantial support for them.

The notion that if the rates are flawed, we have the bidding process and the "extraordinary or unusual circumstances" provision to counteract with is also short-sided. These provisions do not neatly cover professional consulting services for many tasks defined on a lump sum payment basis. For example, preparation of a 45-Day Report is not a task that is let for bid because the information to prepare the reports is usually obtained by the consultant during the course of early action. Requiring a different consultant to prepare a 45-Day Report than the one who did the early action work would be extremely inefficient and more costly. When no extraordinary circumstances exist and the costs are higher that the Agency's average, the costs to conduct the work are not reimbursable in whole. This is contradictory to testimony that the proposed rates are consistent with the rates previously deemed reasonable by the Agency.

The costs for bidding individual tasks associated with professional consulting services would drive up the costs to complete each small task. First, the primary contractor/consultant would incur the costs of bid preparation and letting. Any other company who bids the work would have to build in the costs of gathering information on a new project (if it is not their site, the consultant bidding on the work would have to review the entire project file to conduct whatever phase of the project they would potentially be conducting).

All parties throughout these proceedings have used the term "reasonable". CW^3M urges the Board to evaluate what really is "reasonable". Are historically approved rates reasonable? Are rates developed based on averages or medians reasonable? Is the average plus one or two standard deviations reasonable? Is approving 90% of submittals for reimbursement of clean-up costs reasonable? If all unit prices are within rates historically approved by the Agency, is the grand total reasonable? If "reasonable" can be better defined, the rate structure can be established to fairly and adequately correlated to pay "reasonable" costs.

The Agency testified that the proposed rates were developed with the input of industry and are generally consistent with the rates the Agency currently approves. Significant testimony was presented during last year's proceedings that only limited rates were developed with industry's input and when industry's input was used for professional consulting services, the Agency misused the information it obtained from industry because the Agency only used only portions of the information rather than the whole and skewed the number of hours industry suggested for certain tasks. Testimony was also presented which illustrated that the proposed rates were not consistent with rates the Agency is currently or had historically approved; the Agency's proposed rates are less. Again, this suggests that the Agency's proposed rates cannot allow for reimbursement of reasonable costs.

Comments on the IEPA's Responses to Pre-Filed Questions, June 14, 2005

Throughout the proceedings, PIPE and others have strongly argued for the need of defined scopes of work. Rules that do not list the tasks covered in a specific scope of work would be vague. The consultant would not know whether a specific task is grouped with a specific scope of work or is a separate time and materials item. The Agency refused the request for defined scopes of work, and the Board concurred in 1st Notice, that scopes of work are not necessary given the bidding and extraordinary circumstances provisions. As stated above, bidding and extraordinary circumstances do not work for professional consulting services for lump sum tasks. There is nothing within these regulations to prevent a LUST Project Manager from requiring more detail or information beyond the items required for each report. The statistics on Project Manager Responses presented by CSD in its Pre-Filed Questions for 1st Notice illustrates the variability among Agency reviewers.

CW^3M, in its experience, can submit reports or plans, identical in types of content or level of detail and have the majority of Project Managers approve the submittal, while a select few will always reject identical information. We are often forced to tailor submittals for certain Project Managers. The attempt to streamline the review process is admirable, but we find nothing within the proposed regulations that will actually make the Agency's review standardized. The

establishment of PIPE and the forum for consultants to share information has revealed to us that our issues with reviews are not ours alone and prevail among other consultants. There is also variability among Project Managers in experience, education and technical backgrounds.

For these reasons, we strongly urge the Board to reconsider standardizing reviews or developing Scopes of Work for identified tasks. Our only recourse under the proposed regulations is to declare extraordinary circumstances, however, the Project Managers will deny the requests based upon their personal plan denial rates, leaving us in a position of subjective decision making by Project Managers who are not prone to approve any submittal. Appealing each of these decisions is too costly. To bring a decision though the entire process of Hearing and Board decision-making can exceed $50,000 per case. These are unnecessary if the regulations can be developed to prevent subjective decision-making and, as discussed below, we have proposed regulations that list specific tasks for various scopes of work.

On page 17 of the Board's 1st Notice, summarization of Mr. Clay's testimony, the Agency concludes that the review time for submittals is largely based upon the quality of the submittal. CW^3M's experience is that the review time is based on the reviewer. We can typically expect certain Project Managers will complete their review in very short order while others typically complete the review near the end of the review clock. As discussed below, the statistics on Project Manager Responses support this claim. Rather than blame consultants for poor workmanship, the Agency should evaluate its Project Managers. CW^3M has experienced numerous plan denials on the basis of missing information when in fact the required information was present. In these situations, we are required to resubmit the information or bring its location to the attention of the Project Manager. This increases CW^3M's costs through no fault of our own. The owner, operator and consultant should not be penalized for resubmittal costs on the basis of Agency error. There are no provisions within the proposed rules to accommodate for such occurrences. As indicated by the Agency on page 13 of its Pre-Filed Responses, the maximum lump sum payment is all that is allowable regardless of how many reports are submitted or how many times the Agency bounces back a report because the project manager failed to adequately review the report that was submitted.

Page 19 of the Agency's Pre-Filed Responses states, "the Illinois EPA envisions that the maximum payment amounts will encourage the submission of complete plans and reports that can be approved in one submission, without the need for amendments or additional information". Most of the consultants involved in this rulemaking have been conducting LUST work for many years and know full well what constitutes a complete plan. We have perfected our report submittals. It is our collective experience that the approval rate is largely the result of the luck of the draw for a Project Manager. The statistics on Project Manager Responses support this experience given the high degree of approval/denial variability among Project Managers. Appendix E contains data on the number of approvals and disapprovals/modifications by project manager and was prepared by CSD and submitted to the Board, by CSD as an attachment to their May 11, 2005 prefiled questions. CSD's analysis shows that the overall average approval rate is near 50 percent. However, among project managers that reviewed at least 100 submittals since 2003, the approval rate per project manager ranges from 69.46% to 25.83%. [It is also noteworthy that the project manager with the lowest approval rate (Bauer) and that the unit manager with the lowest approval rate (Chappel) are the same persons who developed many of the rates in IEPA's proposed rules.] Because the proposed rules do not make any renewed effort at standardizing the Agency's review procedures, CW^3M expects that these problems will continue.

The general theme of the Agency's responses to questions regarding scope of work and whether certain tasks were or were not included within a lump sum payment amount is that any additional task should automatically be assumed to be included. For this reason, the Agency needs to provide the list of tasks they included in each lump sum at the onset of these proceedings, not lists they generate today or tomorrow. For example, it was clear during previous hearings that the Agency looked at a handful of sites for 45-Day Report generation fees. When summarizing those costs, the costs for preparing early action reimbursement claims were not included in the proposed lump sum rates. Yet now, we are to conduct the reimbursement process under a lump sum based on an average of 45-Day Report costs. The list of tasks included in each lump sum continues to grow while the pay amount remains the same. Lack of foresight on the Agency's

part should not be a cost carried by the owner, operator nor consultant. Again, without scopes of work or task identification, the Agency will continue along this path.

In response to the Agency's answer to CW^3M's question #21.a., CW^3M has attached in Appendix B additional information regarding the "buddy system" required by OSHA at hazardous waste operations. 29 CFR 1910.120. Appendix B includes a summary of this requirement from OSHA's website as well as a copy of the OSHA standards for hazardous waste workers and for excavation. The Agency questioned the necessity of the "buddy system" for petroleum sites and claimed that the requirement only pertained to hazardous substances and petroleum is not included in the definition of "hazardous substance". Petroleum is excluded from the definition of "hazardous substance" under CERCLA. However, petroleum products and their constituents are regulated as "hazardous substances" under OSHA requirements. OSHA defines the term "hazardous substance" more broadly than EPA. The OSHA definition includes the CERCLA definition of "hazardous substance," plus hazardous wastes regulated under RCRA, hazardous materials regulated by the Department of Transportation and "any biological agent and other disease-causing agent which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any person, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations in such persons or their offspring." *See* 29 CFR 1910.120(a)(3) which provides OSHA's definitions for various terms used in the rule including the definitions of the terms "buddy system" and "hazardous substance." At 29 CFR 1910.120(a)(1)(ii), Scope, OSHA's rules provided that these rules cover "Corrective actions involving cleanup operations at sites covered by the Resource Conservation and Recovery Act of 1976 (RCRA) as amended." RCRA at 42 USC 6991b covers corrective action at petroleum LUST sites. Thus, these OSHA rules do apply to LUST site corrective action.

Our interpretation of the "buddy system" is based on the definition (attached) of organizing employees into work groups for rapid response. Subcontractor employees do not train with us

nor are they required to meet our job safety requirements. One cannot assume that an equipment operator, who is intent upon completing his own tasks and may not be able to hear over the equipment, could watch out for all safety issues. Furthermore, OSHA's excavation regulations at 29 CFR 1926.651(k) requires that a "competent person" (as defined in the rules at 29 CFR 1926.650(b)) inspect the excavation, adjacent areas, and protective systems prior to the start of work and as needed during the shift. If the Agency believes that the OSHA requirements did not pertain to petroleum products, why then has the Agency provided OSHA training for its LUST personnel? Simply put, the Agency is wrong to argue that OSHA rules do not apply.. As CW^3M has previously testified, two consulting personnel are required on-site for field tasks, and all rates have been revised accordingly.

In response to the Agency's answer to CW^3M's question #21.c., it appears the Agency's intent is to fix prices within the State to interrupt free enterprise and force UST owners and operators to hire the closest consultant regardless of areas of expertise, qualifications, fees, workload or other factors owners or operators consider when hiring a consultant. CW^3M requests that the Board evaluate the legality and logic of the Agency's position as it significantly impacts these proceedings.

Regarding the Agency's comments on page 30 (Answers to the Pre-Filed Questions of CSD) of its June 14, 2005 Response, there appears to be a contradiction in what the Agency expects for payment requests for lump sum tasks. The June 14, 2005 Response indicates that consultants will be required to submit invoices that identify the work performed, parties that conducted the work and date(s) when the work was performed. However, the August 9, 2004 Hearing transcripts, pages 109-110, indicate that only an invoice stating the task completed is being requested for payment. Any reimbursement requests requiring greater level of detail should be reimbursed on a time and material basis rather than just being another part of the lump sum payment for the task. Payment requests requiring detailed breakdowns of the work require a significantly greater amount of time. If a reimbursement request is for a lump sum amount, the request should simply state what work has been done and the amount requested and detailed information should not be required by the Agency.

CW^3M Company's Proposed Amendments to the Illinois Pollution Control Board's
1st Notice of Amendments to 35 ILL. ADM. CODE 734 AND 35 ILL. ADM. CODE 732

CW^3M presents the following discussions of its proposed modifications to the proposed regulations. These proposed modifications are based on the collective testimony of PIPE and other participants throughout the rulemaking proceedings. It is our understanding that numerous, if not all PIPE members support these proposed modifications. In the 1st Notice discussion, the Board indicated that PIPE did not provide alternative rates; hence they relied on the Agency's proposed rates even though they are not statistically valid. The attached modifications include rates presented by PIPE in last summer's hearings. The alternative lump sum rates offered by PIPE were based on a weighted hourly rate reflective of the type of personnel actually conducting the work. Other rates are presented utilizing either RS Means or the National Construction Estimator.

The following discussion highlights some of the most significant changes.

Section 734.100

Clarifying revisions were added to subsection (a). Subsection (d) is proposed to clarify that the proposed rules should not be used as final rules before the rulemaking process has been completed, which includes promulgation by the Board, approval by JCAR and publication in the *Illinois Register*. *See* the Board decision in *Illinois Ayers Oil Company v. IEPA*, PCB No. 03-214, April 1, 2004.

Section 734.135 Form and Delivery of Plans, Budgets, and Reports; Signatures and Certification

CW^3M has proposed the additional language to allow for documentation of reports delivered by hand or a private delivery service to the Agency. The language merely clarifies the execution and acknowledgement of receipt.

Section 734.320(b)(2)(A), Section 734.330(a)(1)

CW^3M recommends altering the language in both sections to add the word "projected" before post-remediation use of the property. CW^3M objects to the need to characterize the post-remediation uses of the site and the surrounding properties. In limited instances, the property owner of the UST site will know with any certainty the future use of the property. If the LUST site is an active facility and the owner or operator plans to continue fuel sales, the future use is definable. If the LUST site is a closed or soon to be closed facility and the property owner plans to sell the real estate, the owner or operator will have no idea what the future use of the property will be. Similarly, post-remediation use of the surrounding properties is anyone's guess. If the entire investigation and remediation process requires several years to complete, the site investigation characterization of the properties will likely be outdated and any projected future use may change.

Decisions to conduct remediation or to rely upon land use or institutional controls should lie with the property owner and not the Agency. Property owners should not be discriminated against or disallowed remediation of their property by the Agency based on the sole potential future use of the property. Mr. Doug Clay stated during the Agency's testimony on March 15, 2004 that the development of higher clean-up objectives or use of institutional controls or engineered barriers was at the discretion of the tank and property owners. Such decisions should remain in the property owners' discretion.

If off-site access or investigation is not required of an off-site property and no communication has been established, that property owner has no reason to disclose information regarding their property to the UST owner, operator or their professional consultant.

Providing an answer to the question of characterization of "unknown" on nearly every submittal seems unnecessary and a waste of time.

Section 734.340(b) Alternative Technologies

Language was added to reflect that more than one alternative technology may not always be available. Depending upon the site-specific conditions encountered, especially geological conditions and specific contaminants, such as lead, two additional alternatives may not always be technically implementable. If this occurs, then only available alternatives should be cost compared. A listing of the alternatives considered could be provided, with explanations as to why they were eliminated from further consideration.

Section 734.505 Review of Plans, Budgets or Reports

Language has been added in order to attempt to eliminate the standard response of the Agency which is "exceeds the minimum requirements of the Act". Such language doesn't provide the owner or operator with an explanation of the Agency's decision and limits the owner's operator's ability to respond. With more specific language being required from the Agency, the owner or operator should be able to provide a more focused response, and therefore, reduce the number of additional submittals.

Section 734.510 Standards of Review of Plans, Budgets, or Reports

This language was added in order to ensure that the Agency documents and maintains records of their technical and fiscal reviews as part of the record of the site.

Section 734.605 Applications for Payment

CW^{3}M recommends striking the requirement for providing proof of payment of subcontractor costs when requesting handling charges. The Board invited additional discussion of this issue in 1st Notice. CW^{3}M maintains that this requirement is unduly burdensome based upon the shear number of projects, subcontractors and payments that we manage and will increase the costs to perform the work. It is the owner or operator or prime consultant's responsibility, and not the Agency's, to define terms of payment and issue payment for work satisfactorily performed. Even with the Board's revisions, the requirement is burdensome with no method of reimbursement for this added cost. A proof of payment requirement may also increase the number of reimbursement preparations and submittals to the Agency. Particularly with larger projects during the corrective action phase of a project, reimbursement requests are made almost immediately for some or all of the work to minimize financing costs. When corrective action costs are carried for nearly a year, due to review and processing times and Fund balances, the largest invoices will be submitted immediately. It is unlikely that the prime contractor will have secured all proof of payment documents prior to submittal of his invoice to the consultant, requiring separate claim(s) for handling charges. Requiring proof that all subcontractors have been paid does not help to streamline the process; it only makes it more bureaucratic.

Because the Board published for first notice subsection 734.605(j) as proposed by the Agency, CW^{3}M recommends revisions in order to accommodate both owners/operators experiencing uncontrollable situations creating submittal delays and the Agency's need to archive files and maintain an accounting of future liabilities of the Fund. CW^{3}M's proposed revision provides exemptions to the requirement that the owner/operator make all requests for reimbursement prior

to the one-year anniversary of the No Further Remediation Letter accompanied by a reason for the request, an anticipated timeframe for submittal and an approximate cost of the final claim. We believe this accomplishes the intent of the Agency's initial proposal and their reasoning for the necessity while also allowing exceptions for rare situations, which would limit the owner or operators' ability to meet the one-year deadline.

As stated in previous testimony, the proposed submittal limitation may cause severe hardship for owners or operators or their beneficiaries. As has been CW^3M's experience on a few cases, Illinois Pollution Control Board appeals may be pending and settlement negotiations are in progress. There is no incentive for the Agency to expedite the process and final disposition of a case can exceed one year. In such a circumstance, the owner or operator would be prevented from submittal of a claim until the appeal is settled or reaches a decision by the Board.

Should an owner or operator submit a plan or budget, which is rejected by the Agency and deems an appeal is its best course of action, the time to reach settlement or a decision by the Board may extend beyond the timeframe for allowance of submittal for an application for payment (following approval of the budget).

For 731 sites (where no budget is in place), the Agency has historically utilized the general review and payment guidelines for 732 sites, except for the 120-day review clock. If the review process exceeds one year, as it often does, and some costs are denied or resubmittal is required, the owner or operator would not have the opportunity to do so within the time constraints of 734.605(j).

An owner or operator's incapacitation, illness, inaccessibility, bankruptcy or even death can cause delays in submittal of final plans, budgets or requests for payment.

The owner or operator could delay submittal of the Corrective Action Completion Report if they foresee delays in finalizing plans or payment submittals or approvals, however, unexpected illnesses, for example, cannot be planned. If a final budget and CACR are submitted at the same

time and the Agency rejects the budget, they could not plan for such a scenario and would not have sufficient time to negotiate a settlement or move through the entire appeal process within one year.

Section 734.625 Eligible Costs.

As noted by the Board, governmental fees are often unavoidable and may be necessary corrective action costs. Accordingly, payment of such fees has been added to this listing of eligible costs. Likewise, consultant's costs to prepare reimbursement packages are listed as an eligible cost.

There was considerable debate regarding the need and payment for compaction. CW^3M recommends the addition of compaction costs as an eligible corrective cost. Completing compaction during the backfill process returns the site to one with a stable foundation suitable for redevelopment and avoids multiple trips back to the site to provide additional materials and grading where the excavation has settled. The subsurface should be returned to a condition similar to the pre-excavation condition. Thus, compaction should be an eligible expense.

CW^3M has added to the list of eligible costs a specific provision for payment of handling charges incurred by the prime contractor for field and other direct expenses, other than subcontractors. Payment of handling charges for field and other expenses would require documentation of the expense incurred.

Section 734.630 Ineligible Costs

Section 734.630(gg) has been revised to include costs incurred by a Highway Authority Agreement after issuance of the No Further Remediation Letter. They would have been eligible costs if incurred prior to site closure. The owner or operator is placed in a no win situation with regards to costs invoked under a Highway Authority Agreement. The highway authority would not allow remediation beneath a roadway or possibly even within the right-of-way during the active correction phase of the project, when the costs would be reimbursable. However, if the highway authority incurs corrective action costs after closure, the owner or operator is expected to reimburse the highway authority.

Proposed section 734.630(gg) has been revised to include costs incurred as result of necessary corrective action measures being conducted after closure as a result of unknown contamination, migratory pathways or properties for which access had previously been denied. With the Agency's push to leave contamination in place to preserve the Fund, even modeling may fail when there are unknown migratory pathways. Properties can change ownership; a previous owner's denial may be unacceptable to a new owner. Off-site contamination may not have been predictable or modeling indicated such property would not be affected, hence, never investigated. Off-site construction or other activities could identify contamination that was not previously investigated or was missed during the investigation due to the impracticality of investigating every cubic foot of a site. In such cases, the contamination should be eligible for investigation and remediation under the provisions of the Act and the Fund.

Proposed section 734.630(gg) was also revised to include costs for remediation needed to reinstate or obtain a new NFR Letter after a prior NFR Letter was voided by IEPA due to no fault of the property owner. Two situations, which track conditions under which an NFR Letter

could become void, are described: (1) the subsequent discovery of contaminants, and (2) where an IEPA approved plan to leave contaminants in place failed and the contamination poses a threat to human health or the environment.

CW^3M recommends deletion of Section 734.630(oo). Considerable testimony was presented during the 2004 hearings regarding this issue and the Board invited additional discussion and deliberation of this issue. The Board indicated that the record to date did not have sufficient information to determine if the costs of securing a subcontractor with or without financial interest were the same.

Based on the definition of financial interest, ownership of the subcontractor could be entirely the same as the prime or could have a minority ownership or have ties via employees. The only factor of the definition of handling charges that may reduce the amount of costs incurred by the prime contractor is procurement. There are, however, procurement costs associated with hiring a subcontractor even if the prime has a financial interest. The subcontractor will likely conduct work for many other businesses or contractors and time will be spent securing and scheduling the work. The remaining factors identified in the definition of handling charge are not reduced if the prime has a financial interest in the subcontractor. Insurance, interest, administrative, oversight and payment costs will remain.

Our insurance companies assess rates based on gross sales and we receive no discount for a financial interest in a subcontractor. Banks charge us interest at a single rate that is not adjusted if part of the costs is incurred by subcontractors with whom there is a financial interest. Further, banks do not decrease their interest rates based on the amounts we borrow as the handling charge sliding scale would suggest. The administrative costs are not less for the prime if the subcontractor has shared interest. Each entity functions as a separate company and incurs the

same costs of management as would separately held companies, such as personnel, accounting, overhead, taxes, etc.

Section 734.630(ccc) has been eliminated for the following reasons. In 35 IAC 620.260 *Reclassification of Groundwater by Adjusted Standard* it is clear that the IEPA and the IPCB recognize that changing groundwater standards can affect, among other environmental and economic standards, property values. The IEPA did not consider the affect on both on-site and off-site property values for sites where IEPA forces the property owner to leave contamination in place by not reimbursing clean-up costs when a groundwater ordinance is in place. This could have a major affect on a property owner. A tank/property owner should be able to have the option of remediating the contamination with the Fund that they paid into to keep their property value up instead of being forced to incur a loss of property value by the State of Illinois.

Section 734.665 Audits and Access to Records; Record Retention

CW^3M is providing additional testimony regarding auditing and offers revised language for this Part in order to assure that the Agency does not exceed its statutory authority and conducts such audits consistently with other Agency programs.

CW^3M does not disagree that the Agency has statutory audit authority, however, we contest extending that authority beyond the Act and the entities regulated by the Act and this Part. The audit authority was initially granted to allow the Agency to review only portions of the plans and reports submitted to them rather than be required to review all plans. Hence, the LUST Section would audit reports submitted instead of conducting a full technical review of each plan. The Agency has attempted to broaden its authority beyond the original intent of the Act. The Agency

has further attempted to broaden its authority to attempt to regulate entities not otherwise regulated by the Act or this Part. This Part regulates owners and operators of underground storage tanks, not professional engineers and geologists.

As CW^3M previously testified, audits of records of Licensed Professional Engineers or Geologists also violate client-privileged information. CW^3M, as well as the majority of consultants maintains confidentiality agreements with its clients. Open, unrestricted audits violate such confidentiality. Section 1252.110(a)(6) of the Rules for Administration of the Professional Geologist Licensing Act Part 1252 prohibits the Licensed Professional Geologist from disclosing information concerning the lawful business affairs or technical processes of a client or employer. Thus, as currently drafted language in the Board's 1st Notice violates another act and other State regulations.

The proposed revised language is presented in an attempt to provide the Agency with the information it has indicated it needs but also conforms with other document review procedures, such as the Freedom of Information Act (FOIA) and audit procedures already conducted by the Agency, such as the landfill auditing program to evaluate fee collection and payment. The Agency conducts the review at the site of the regulated entity or its documentation center, not at its consultant or attorney's office. The FOIA process allows the Agency time to review and screen a file for sensitive or privileged information prior to making it available to the public. The Agency also requires a request in writing and makes scheduling arrangements for its review. The regulated community should be afforded the same rights to its files and documents.

SUBPART H: PAYMENT AMOUNTS

The language regarding the applicability and other minor language changes throughout have been revised in a manner that we feel more accurately reflects the testimony regarding how the Agency intends to apply Subpart H and what the members of PIPE feel is appropriate for the

application of this Section. The revised proposed costs are based on costs actually experienced by PIPE members based on their aggregate experience of hundreds of person years, IDOT competitively bid projects, and/or published numbers from R.S. Means or the National Construction Estimator. Each of the changes not specifically explained in the following changes has either been previously explained by PIPE as an organization or is explained by another PIPE member in these hearings.

Section 734.810 UST Removal or Abandonment Costs

The pricing the Agency provided is now outdated, considering the recent revisions to the Office of the Illinois State Fire Marshal regulations, which were enacted in 2003. Among the items within the new regulations are the requirement for additional safety equipment (full-face mask supplied air to enter a tank), and the removal of all product piping as part of a tank removal. Additionally, the Agency apparently collected cost information for removing tanks without regard for whether or not there was a release. Costs for a tank removal if a release did not occur is lower than the cost for removing a tank with a release, due to reduced worker productivity because of safety restrictions and additional time required for sampling.

Section 734.820 Drilling, Well Installation, and Well Abandonment

Mobilization for a drilling contractor has been a standard charge throughout the history of the LUST program and continues to be standard for drilling contractors in other environmental fields. A drilling contractor has to bring a drill rig and a support truck to the site in order to complete the task. Therefore, at a minimum they should be allowed the same travel expenses as professional consulting personnel if not additional expenses. Larger equipment is less economical to move than passenger vehicles.

Section 734.825 Soil Removal and Disposal

The suggested "fluff factor" and conversion rate are more typical values for Illinois than those suggested by the Agency, as was debated during the first round of hearings. The Agency's mystical "fluff factor" and the conversion rate from tons to cubic yards could be debated endlessly. The fact is, materials vary significantly in unit weight and in the amount they "fluff" when excavated. To simplify all soils and backfill materials found in Illinois into single universal rates is almost impossible. The Agency has selected each factor to cause minimum expense to the Fund. The Agency's conversion factor, the "fluff factor" and the unit rates for disposal and backfill are each within the appropriate range for Illinois, however each is at an end of the scale, the end that would create minimum costs. Together, they form the absolute minimum that could be paid out, instead of a reasonable rate.

As a suggestion, eliminate the "fluff factor" by multiplying the unit rate by a percentage (105% to 120%), and eliminate the conversion factor by basing the costs purely on the size of the excavation. For early action, only allow for up to 4 feet beyond the tanks, in an amount not to exceed Length X Width X Depth minus the volume of the tank(s) in a cubic yard basis. This eliminates the games played with the "fluff factor" and the conversion factor.

The Agency has presented no viable evidence on the reasonableness of the $57.00 rate. The data presented by IEPA in Attachment 9 to Chappel's prefiled testimony is not scientifically defensible because it was not statistically derived and it is based on outdated information. When questioned about the source of $57 rate, the response was merely that this is a number that IEPA personnel think should be used.

CW^3M has and is presenting data from Illinois sites, based upon actual contracts let by the Illinois Department of Transportation, after competitive bidding, which show that IEPA's numbers for excavation, transportation and disposal of contaminated soil are substantially less than they should be. Attached, in Appendix C, in Table 1, is a compilation of the Illinois Department of Transportation (IDOT) bid results, which have become available since the

submittal of CW^{3}M's prior testimony. The average from IDOT for excavation, transportation and disposal of impacted soil for the period is $119.42, up from the prior figure of $99.75. Although the Agency has attempted to discredit the IDOT information, the data obtained and presented from IDOT clearly demonstrates that the IEPA's proposed rate is too low. As discussed above, if IEPA's proposed rate is applied to the IDOT data, IEPA would determine that the costs are reasonable at only 11 out of 39 sites. This is a far cry from the 90% of sites that the Agency said it intended to cover.

The Agency had IDOT testify that the data was not to be taken by itself, but was part of a larger contract. This point is irrelevant and ignores the fact that the bids were given competitively by contractors who hoped to win the bid and the fact that the numbers reflect the winning bid, which presumably was the lowest bid. There is no difference between the Agency's methodology in developing and verifying the rates and CW^{3}M's methodology of developing rates based on the IDOT data, except for the following:

- The IDOT data is more current
- The IDOT data demonstrates the extreme variability in costs to conduct excavation and disposal at sites due to the variable conditions between sites
- The IDOT data set is more robust and scientifically defendable (all data points are listed, but the two extreme data points were not included in the calculations.)
- The IDOT data is for the entire subset of work necessary to accomplish the task, not just what the Agency interprets needs to be included.
- The IDOT data was the result of competitive bidding in all cases.
- The IDOT data represented a wider geographic mix than the Agency dataset
- The IDOT data was for the specific task at hand, which included a well-defined scope of work

While CW^{3}M believes that, due to the high degree of variability between sites, the costs to excavate, transport and dispose of contaminated soil and other material and the costs for purchase, transportation and placement of clean fill should be based on time and materials. However, CW^{3}M is proposing that a value of $74/yd^3 be considered reasonable to excavate,

transport and dispose of impacted soil and that a rate of $26/yd^3$ be used for backfill. The $74 number was derived from IDOT's data set by first eliminating both the lowest ($2.95) and highest ($1475) values and then calculating a per cubic yard weighted mean ($50.69) and weighted standard deviation ($23.53). The volume of soil excavated was the factor used to weight the data. Then, similar to IEPA's methodology, the weighted mean and weighted standard deviation were added together to get $74.22. The methodology used is explained further in Attachment C. Applying the rate of $74/yd^3$ to the list of IDOT sites results in only 21 out of 39 sites (54%) falling within the "reasonable rate." CW^3M proposes that bidding be used for sites where costs to excavate, transport and dispose of soil exceed $74/yd^3$ and where costs to purchase, transport and place backfill exceed $26/yd. Doing so would allow rapid approval for sites that are below these amounts and flexibility for sites where the costs cannot be met due to the site being in a remote location or for some other valid reason. Allowing the more realistic costs of $74/yd^3$ and $26/ yd^3$ would reduce the number of sites where bidding would be necessary, resulting in lower overall project costs. CW^3M also believes that the $74/yd^3$ and $26/yd^3$ rates are more realistic because the unit rates will now include a number of activities that the Agency used to reimburse separately when it first started using the rates of $55/yd^3$ and $20/yd^3$. Activities that the Agency used to reimburse as separate line items included but were not limited to mobilization, field preparation, utilities location, landfill authorization, crew travel allowance, scheduling, and preparing, purchasing and tracking manifests.

The Agency presented testimony on the $6.50 per cubic yard figure was for the excavator to excavate soils from the hole and set them aside. This amount does not cover a situation where the site does not have adequate room for this type of operation. Therefore, the proposed rules need to account for instances in which the clean soil needs to be temporarily transported off the site or to a remote area of the site for stockpiling. This proposed amount has been calculated using the Agency's logic in calculating the fluff factor. Mr. Harry Chappel previously stated that transportation is roughly 25% of the $57/yd^3$ for excavation, transportation and disposal. So 25 % of $57, or $14.25/yd^3$ should be added to the $6.50/yd^3$ cost to stockpile soil when the soil cannot be stockpiled next to the excavation. The $14.25/yd^3$ figure includes both moving the soil to the stockpile location and returning it to the excavation.

Section 734.830 Drum Disposal

The word non-hazardous has been added in order to more clearly define the situation in which the costs are appropriate. Drums containing hazardous wastes are much more expensive to dispose of and while hazardous wastes are rare at LUST sites, there are occasions where it arises.

A mobilization fee for the drum disposal contractor is also included in this section. The same justifications as for the drilling contractor are applicable.

Section 734.840 Concrete, Asphalt, and Paving; Destruction or Dismantling and Reassembly of Above Grade Structures

CW^3M's prior testimony demonstrated the numerous flaws, each of which lowered the proposed rate, in the Agency's calculation of its rates and that the agency improperly took rates from the National Construction Estimator. The rates provided in CW^3M's proposal are consistent with prevailing rates, and include *all* work and oversight necessary to complete the task.

Section 734.840 Professional Consulting Services

The proposed report preparation numbers were the subject of testimony. The method of their calculation was thoroughly explained in previous testimony by PIPE. To reiterate, the values proposed here were calculated using the same total number hours to prepare reports as the IEPA used, however, the hours were broken down into a more realistic distribution of the type of personnel who work on the project. We used the same hourly personnel rates from Subpart H, as IEPA used, to perform the calculations for the proposed lump sum payments for various consulting services. Thus, the rates proposed in this submittal more accurately reflects the costs and distribution of work to complete these reports.

As discussed in more detail elsewhere, CW^3M has demonstrated that OSHA rules apply to work at LUST sites. Therefore, two consulting personnel are required for a majority of the tasks provided for in Subpart H. Therefore, the half-day rate and travel rates should properly reflect the necessity for two people to complete the work.

Additionally, the proposed travel rates have been revised to include distances further from a site. In the Agency's responses they indicated that if a an owner or operator chooses to hire a consultant farther from their office, that is their decision to pay the extra travel costs. An owner or operator should be able to choose a consultant based upon that firm's qualifications and the services which the consultant can provide and should not be limited to consultants within a 60 mile range of each site. Furthermore, in *City of Roodhouse v. IEPA*, PCB No. 92-11, Sept. 17, 1992, the Board found that a consultant's travel costs were reasonable corrective action costs even though the consultant traveled from Kansas City. Capping travel costs to mileage within 60 miles also limits the choices of large oil companies which have sites across the state. Why should the company be forced into hiring a different consultant for each site when it could use one with which it already has a comfort level and rapport.

Determination of the rate of movement of the groundwater at a site is a technical requirement of the proposed First Notice. However, the currently proposed Subpart H does not allow for payment for determination of this value. As a slug test typically takes one half-day to complete, it is proposed to incorporate one half-day for each time during the site investigation process that a hydraulic conductivity test is required.

The original proposal by the IEPA was for a half–day to equal 5 hours and their calculations showed that 250 yd^3 could be excavated in a typical half-day. However they have currently reduced a half-day to 4 hours. Therefore, the volumes which can be excavated should be reduced by a similar ratio to 200 yd^3.

The other consulting tasks listed are tasks that are required at a LUST site but for which no allowance is made in Subpart H. Therefore, to ensure these tasks remain reimbursable they have been listed in this Section.

This concludes my prepared testimony.

Dated: July 8, 2005

Respectfully submitted,

CW^{3}M Company

By: Vince Smith (CSH)

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