

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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SEP 23 2005

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO: REGULATION) R 04-22
OF PETROLEUM LEAKING UNDERGROUND) (Rulemaking - Land)
STORAGE TANKS (35 ILL.ADM.CODE 732))

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO: REGULATION) R 04-23
OF PETROLEUM LEAKING UNDERGROUND) (Rulemaking - Land)
STORAGE TANKS (35 ILL.ADM.CODE 734))

PC#62

NOTICE

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

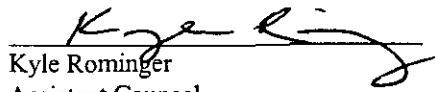
Marie Tipsord, Hearing Officer
Pollution Control Board
James R. Thompson Center
100 W. Randolph, Ste 11-500
Chicago, Illinois 60601
(Overnight Mail)

See Attached Service List

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 Comments on behalf of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

By:


Kyle Rominger
Assistant Counsel

DATE: September 22, 2005
Agency File #:
Illinois Environmental
Protection Agency
1021 North Grand Ave. East
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PROPOSED AMENDMENTS TO:) R04-22
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COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES the Illinois Environmental Protection Agency (“Illinois EPA”), by and through one of its attorneys, Kyle Rominger, and submits the following comments. These comments are divided into three sections. The first section contains comments on testimony submitted to the Board in response to its Proposed Rule First Notice Opinion and Order dated February 17, 2005, (“First Notice Proposal”). The second section contains comments on public comments submitted to the Board in response to its First Notice Proposal. The third section contains a few suggested non-substantive changes to the rules proposed by the Board to correct minor errors and promote consistency among the rules’ provisions.

While many suggestions and issues deserving comment have been raised, time does not permit the Illinois EPA to provide detailed comments on all of them in this document. Moreover, the usefulness of this document would be diminished by its length if the Illinois EPA addressed each issue and suggestion raised in the testimony and public

comments submitted to the Board. The absence of a comment on any testimony or public comment should not be construed as Illinois EPA acquiescence in, or support for, the testimony or public comment.

For ease of reading, like most testimony and public comments these comments mainly reference only provisions in Part 734. These comments should be taken as also applying to the corresponding provisions in Part 732 in addition to the referenced provisions of Part 734.

I. Comments on Testimony Submitted in Response to the Board's First Notice Proposal

The Illinois EPA supports the rules proposed by the Board in its First Notice Proposal. Like the Board, the Illinois EPA believes that the rules, as a whole, will allow for reimbursement of reasonable remediation costs from the Underground Storage Tank ("UST") Fund. The Illinois EPA also believes that the Board's proposal establishes reasonable and appropriate rules for the implementation of the statutory changes to the LUST Program enacted in 2002. The Illinois EPA requests that the Board proceed with adopting the rules proposed in its First Notice Proposal.

The following are specific Illinois EPA comments regarding testimony submitted in response to the Board's First Notice Proposal:

1. Section 734.100

CW3M suggests changing Section 734.100 "to clarify that the proposed rules should not be used as final rules before the rulemaking process has been completed." Exh. 106 at 11. CW3M's suggested revisions appear to be unnecessary. First, the suggested changes would not take effect until the Board's proposed rules are adopted as

final rules. Therefore, the above stated purpose of preventing use of the rules prior to their adoption could not be accomplished. Furthermore, the Administrative Procedures Act already prohibits the Illinois EPA from implementing the proposed rules as final rules until the rulemaking process is complete. See 5 ILCS 100/5-10(c) (rules not valid or effective and may not be invoked for any purpose unless properly adopted in accordance with the Administrative Procedures Act). Second, CW3M's suggested change of the word "applies" to "is intended" in Section 734.100(a) converts an applicability section into an intent section, which could minimize the effect of the provisions that explain how and to whom the rules must apply. Third, CW3M's suggested changes limit Part 734 to the implementation of the statutory amendments contained in P.A. 92-0554 and P.A. 92-735. Although the Board's proposed rules implement the amendments made by those two public acts, they also implement the rest of the LUST Program's statutory provisions (i.e., Title XVI of the Environmental Protection Act ("Act"), including the other amendments enacted in 2002 in P.A. 92-754 and P.A. 92-651). Finally, regarding CW3M's suggested change to Section 734.100(d), payment for work approved prior to the effective date of the proposed rules is already addressed in Section 734.100(a)(2), which provides for the same payment as CW3M's suggested language.

As the Board stated in its First Notice Proposal, it carefully examined Section 734.100 and made appropriate revisions to the Section to clarify the applicability language and to ensure that the rules do not apply retroactively. First Notice Proposal at 63. The Illinois EPA does not believe the additional revisions suggested by CW3M are

necessary or that CW3M has provided sufficient justification for changing the Board's First Notice Proposal.

2. Section 734.340(b)

CW3M suggests a change to Section 734.340(b) to "reflect that more than one alternative technology may not always be available." Exh. 106 at 13. CW3M states that "[o]nly available alternatives should be cost compared." Id.

CW3M's concern is already addressed in the Board's proposal. Therefore, the suggested change appears unnecessary. Under Section 734.340(b), an owner or operator intending to seek payment for costs associated with an alternative technology must demonstrate that the cost of the technology "is not substantially higher than other available alternative technologies." 35 Ill. Adm. Code 734.340(b) (proposed) (emphasis added). If a particular technology is not available (e.g., it cannot be implemented at the site due to site conditions), no cost comparison to the technology is required. The Illinois EPA would not require costs to be compared to an alternative technology that cannot be used. The Illinois EPA does not believe the change suggested by CW3M is necessary or that CW3M has provided sufficient justification for changing the Board's First Notice Proposal.

3. Section 734.505

CW3M suggests adding wording to Section 734.505(b)(3) to require "more specific language from the Agency" to explain Illinois EPA decisions. This change appears to be unnecessary. The proposed rules already provide, as required by statute, that any rejection or modification of a plan, budget, or report by the Illinois EPA must include, inter alia, "[a] statement of specific reasons why the cited Sections of the Act or

regulations may be violated if the plan, budget, or report is approved.” 35 Ill. Adm. Code 505 (proposed) (emphasis added). The Illinois EPA does not believe the change suggested by CW3M is necessary or that CW3M has provided sufficient justification for changing the Board’s First Notice Proposal.

4. Section 734.510

CW3M suggests deleting from Section 734.510(b) the standards the Illinois EPA has long been required to use when conducting financial reviews. In place of these standards, CW3M suggests that the Illinois EPA merely be required to determine that costs are “consistent with this Part [734].”

The Illinois EPA believes the suggested change is inappropriate. By statute, the Illinois EPA is charged with the duty of ensuring that costs are reasonable, are incurred in the performance of site investigation or corrective action, and are not for activities in excess of those required to meet the minimum requirements of Title XVI of the Act (“Title XVI”). See 415 ILCS 5/57.7(c)(3) (as amended by P.A. 92-554). The standards of review set forth in proposed Section 734.510(b), which repeat the long existing standards of review set forth in Section 732.505(c), mirror the Illinois EPA’s statutory criteria for reviewing costs and should remain in the rules. The Illinois EPA does not believe the change suggested by CW3M is appropriate or that CW3M has provided sufficient justification for changing the Board’s First Notice Proposal.

5. Section 734.605

CW3M suggests striking proposed Section 734.605(b)(10), which requires that proof of payment of subcontractor costs be included in an application for reimbursement when handling charges for the subcontractor costs are requested. CW3M also suggests

striking Section 734.630(ii), which states handling charges for subcontractor costs are ineligible for reimbursement when proof of payment of the subcontractor costs is not provided. In addition, CW3M suggests adding a new Section 734.625(a)(23) that states handling charges may be eligible for reimbursement if they are supported by only “receipts, invoices or other documents.” CW3M claims that submitting proof of payment of subcontractor costs will increase its costs of performing work. Exh. 106 at 14. It also claims that the requirement is “unduly burdensome based on the sheer [sic] number of projects, subcontractors and payments that we manage.” Id.

The Illinois EPA believes the suggested changes are inappropriate. A business’ workload understandably increases as the number and complexity of its projects increase. However, that increased workload should not excuse the proper documentation of costs reimbursed from the UST Fund. As noted in the Board’s First Notice Proposal, the rules already prohibit payment of handling charges if the primary contractor has not paid the subcontractor. See 35 Ill. Adm. Code 732.606(mm). The sections CW3M suggests striking merely require owners and operators to submit proof that the subcontractor has in fact been paid. Such proof is necessary “[b]ecause of ‘an alarming number of phone calls’ to the Agency from subcontractors claiming they have not been paid.” See First Notice Proposal at 72.

The Board has already considered requests to delete the proof of payment requirement and rejected the requests. First Notice Proposal at 72. However, the Board provided language in its proposed Section 734.605(b)(10) to clarify that the proof of payment requirement can be met many different ways. See First Notice Proposal at 72; 35 Ill. Adm. Code 734.605(b)(10) (proposed). The Illinois EPA believes the Board’s

proposed language is appropriate. The Illinois EPA does not believe the changes suggested by CW3M are appropriate, or that CW3M has provided sufficient additional justification to warrant a change to the Board's First Notice Proposal.

CW3M also suggests changes to Sections 734.605(j) and 734.630(nn) to allow applications for payment to be submitted more than one year after the issuance of the No Further Remediation Letter. Under CW3M's changes the one-year deadline can be exceeded "for any circumstance in which all applications for payment cannot be submitted within one year after the Agency issues a No Further Remediation Letter" Exh. 106 at Section 734.605(j) (emphasis added). The owner or operator only need submit the reason for exceeding the deadline, the estimated amount of reimbursement that will be requested in the future, and the anticipated date the final application will be submitted. Id. This suggested change nullifies the one-year deadline for submitting reimbursement applications because the deadline can be exceeded for any reason.

6. Section 734.625

CW3M suggests adding several specific costs to Section 734.625(a), which sets forth costs that may be eligible for reimbursement. The suggested changes do not appear to be necessary. The list of costs in Section 734.625(a) is not an exclusive list. It merely contains examples of costs that may be eligible for reimbursement. The eligibility of a particular cost is not dependant upon its listing in Section 734.625(a). Eligibility is determined by other factors. Adding the costs suggested by CW3M will not make those costs any more eligible for reimbursement. Furthermore, attempting to identify in the rules every cost that may be eligible for reimbursement would result in a list exponentially longer than the already lengthy list of non-eligible costs in Section

734.630. The Illinois EPA does not believe the changes suggested by CW3M are necessary or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

7. Section 734.630

a. CW3M suggests making costs associated with the compaction of backfill material eligible for reimbursement by deleting "compaction and" from Section 734.630(w). As discussed above, CW3M also suggests adding costs associated with the compaction of backfill material to Section 734.625(a), which lists costs that may be eligible for reimbursement. The Illinois EPA does not believe the suggested changes are appropriate. Costs associated with the compaction of backfill material have long been ineligible for reimbursement, and CW3M has not provided sufficient justification for changing this long-standing rule. See 35 Ill. Adm. Code 732.606(w).

CW3M states that "[c]ompleting 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." Exh. 106 at 16. Returning the subsurface of a site to a pre-excavation condition that is suitable for redevelopment, however, is not required as a part of corrective action. Such activity exceeds the minimum requirements of Title XVI, and therefore is not eligible for reimbursement. See, e.g., McDonald's Corp. v. IEPA, PCB 04-14 at 10 (January 22, 2004) (compaction ineligible for

reimbursement because it is not corrective action). Furthermore, the issue of reimbursement for compaction costs has already been addressed by the Board in these proceedings. See First Notice Proposal at 82. The Illinois EPA does not believe the suggested changes are appropriate or that CW3M has provided sufficient additional justification to warrant a change to the Board's First Notice Proposal.

b. Currently, costs incurred after the issuance of a No Further Remediation ("NFR") letter are ineligible for reimbursement. See 35 Ill. Adm. Code 732.606(kk). The Board's First Notice Proposal adds three exclusions to this provision for costs related to corrective action that is conducted prior to the issuance of the NFR letter but typically not completed until after the issuance of the NFR letter. See 35 Ill. Adm. Code 734.630(gg)(2) - (4) (proposed) (addressing costs related to abandoning monitoring wells, recording the NFR letter, and submitting applications for reimbursement). The Board's proposal also adds exclusions for costs incurred pursuant to Board rule or a court order. See 35 Ill. Adm. Code 734.630(gg)(1) (proposed) (addressing remediation of MTBE contamination where MTBE is added as an indicator contaminant pursuant to Board rule); 35 Ill. Adm. Code 734.630(gg)(5) (proposed) (addressing on-site remediation to Tier 1 objectives pursuant to a court order).

CW3M suggests adding the following additional exclusions to Section 734.630(gg) to allow reimbursement from the UST Fund for other activities conducted after the issuance of an NFR letter:

1) CW3M suggests adding Section 734.630(gg)(6) to allow the reimbursement of “incremental costs incurred by a highway authority through maintenance improvement of the Right of Way covered by a Highway Authority Agreement.” Exh. 106 at Section 734.630(gg)(6). The Illinois EPA believes this change is inappropriate. The definition of “incremental costs” is not clear, so this exclusion would be difficult to administer. Furthermore, costs incurred by a highway authority are not costs incurred by the owner or operator and therefore would not be eligible for reimbursement from the Underground Storage Tank Fund. In addition, exactly what activities constitute “maintenance improvement of the Right of Way,” or whether such activities are required as a part of corrective action under Title XVI, are also unclear.

The Board addressed the eligibility of costs incurred pursuant to highway authority agreements in the last LUST rulemaking and found that such costs are not eligible for reimbursement. See In the Matter of Regulation of Petroleum Leaking Underground Storage Tanks; Amendments to 35 Ill. Adm. Code 732, R 01-26 at 5-7 (February 21, 2002) (Proposed Rule, Second Notice). Therefore, allowing reimbursement of the costs would be improper. The Illinois EPA does not believe the suggested change is appropriate or that CW3M has provided sufficient justification to warrant a change to the Board’s First Notice Proposal.

2) CW3M suggests adding Sections 734.630(gg)(7) through (11), as well as Section 734.630(gg)(6), to allow for the reimbursement of certain costs after the issuance of an NFR letter. The Illinois EPA believes these changes are inappropriate.

The Illinois EPA agrees with the Board's finding in the previous Part 732 rulemaking, that, "absent special circumstances such as MTBE contamination, the UST Fund should not be used to pay for remediation costs once the Agency issues an NFR Letter. An NFR letter signifies that no further corrective action is necessary, thus making the use of the UST Fund unnecessary." In the Matter of Regulation of Petroleum Leaking Underground Storage Tanks; Amendments to 35 Ill. Adm. Code 732, R 01-26 at 7 (February 21, 2002) (Proposed Rule, Second Notice). In the same rulemaking, when discussing the issue of off-site access denial, the Board noted that "an NFR letter does not absolve a UST owner or operator from liability for cleaning up off-site releases, even where an NFR letter has been issued." In the Matter of Regulation of Petroleum Leaking Underground Storage Tanks; Amendments to 35 Ill. Adm. Code 732, R 01-26 at 12 (November 1, 2001) (Proposed Rule, First Notice). The Board has already acknowledged through its previous Part 732 rulemaking opinions that, while an owner or operator may be liable for certain additional remedial activities after the issuance of an NFR letter, remedial activities conducted after the issuance of the NFR letter are not eligible for reimbursement from the UST Fund. Such remedial activities would

exceed the minimum requirements of the Title and therefore would not be eligible for reimbursement. See 415 ILCS 57.7(c)(3) (as amended by P.A. 92-574).

The changes suggested by CW3M are not consistent with the exclusions the Board is adding to Sections 732.606(kk) and 734.630(gg). The changes do not address activities related to corrective action conducted prior to the issuance of the NFR letter, nor do they address activities conducted pursuant to a LUST Program Board rule or a court order. The Illinois EPA does not believe the changes suggested by CW3M are appropriate or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

- c. CW3M suggests deleting Section 734.630(ii) to allow reimbursement of handling charges for subcontractors costs without proof of payment of the subcontractor costs. Please see the discussion of CW3M's suggested changes to Section 734.605 (above) for comments on this change.
- d. CW3M suggests deleting Section 734.630(oo) to allow payment of handling charges when the prime contractor and subcontractor are related entities. CSD also testified in support of allowing reimbursement of handling charges when the prime contractor and the subcontractor are related. Their arguments in support of this change center on the costs the prime contractor incurs for administration, insurance, and interest costs, and a reasonable profit for procurement, oversight, and payment of the subcontract.

Unlike the situation where a third party is subcontracted, the primary contractor does not incur many of these costs when a related entity is subcontracted. Furthermore, when such costs are incurred for related subcontractors they are the result of the prime contractor's or its owner's decision to conduct business through multiple entities instead of a single entity. There are many reasons for conducting business through multiple entities. One result, however, is an increase in the cost of conducting business. The Illinois EPA does not believe the UST Fund should be used to cover these additional costs resulting from a voluntary business decision.

As noted by the Board, "there is no prohibition over hiring one's own company to do the work and be paid a fair price including profit." First Notice Proposal at 71. Under the Board's proposal persons conducting business through multiple entities will still receive a profit for the work their related entities perform. The Illinois EPA does not believe the suggested change is necessary, or that CW3M or CSD have provided sufficient additional justification to warrant a change to the Board's First Notice Proposal.

e. In Section 734.630(aaa), and throughout the Board's proposed rules, CW3M suggests deleting the word "maximum" from the term "maximum" payment amount. CW3M does not provide any additional testimony to support these changes. The Board has already considered and declined a request to change the phrase "maximum payment amount." See First Notice Proposal at 82. The Illinois EPA agrees with the Board's determination that the phrase is appropriate in the context of these rules. The Illinois EPA does not believe that

the suggested change is necessary or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

f. CW3M suggests deleting Section 734.630(ccc) due to possible negative effects on property values. CW3M cites 35 Ill. Adm. Code 620.260, Reclassification of Groundwater by Adjusted Standard, as support for its assertion that "the IEPA and the Board recognize that changing groundwater standards can affect, among other environmental and economic standards, property values." See Exh. 106 at 19. However, CW3M has not adequately demonstrated how 35 Ill. Adm. Code 620.260 applies to reimbursement from the UST Fund. Proposed Section 734.630(ccc) does not require an owner or operator to reclassify groundwater by an adjusted standard. Furthermore, the effect of remediation on property values is not a factor in UST Fund reimbursement. Reimbursement from the UST Fund is limited to the reasonable costs necessary to meet the minimum requirements of Title XVI. See 415 ILCS 5/57.7(c)(3) (as amended by P.A. 92-554). Using a groundwater ordinance as an institutional control meets the minimum requirements. The Illinois EPA does not believe the suggested change is necessary or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

8. Section 734.665

CW3M suggests changing Section 734.665 so that Licensed Professional Engineers and Licensed Professional Geologists who certify plans, reports, budgets, applications for payment, and other documents are not required to maintain information directly pertinent to those documents and are not required to allow the Illinois EPA to

inspect such information (e.g., financial information and data used in the preparation of the submitted documents). See Exh. 106 at Section 734.665. CW3M also suggests requiring the Illinois EPA to provide a list of the documents that will be required during any inspection. See Id. at Section 734.665(b).

The Illinois EPA believes the suggested changes are inappropriate. Although the rules require owners and operators to submit the plans, reports, budgets, applications for payment, and other documents to the Illinois EPA, these documents are often, if not routinely, submitted directly to the Illinois EPA by the consultant. In many cases the owner's or operator's only involvement in the process is signing the documents. As a result, they are not likely to have much more information about the documents submitted to the Illinois EPA other than their copy of the documents. Limiting the Illinois EPA's review to the information maintained by the owner or operator would essentially limit the review to the documents the Illinois EPA has already received. The Illinois EPA needs to review the information maintained by the owner's or operator's consultant who prepared the documents in order to conduct a complete and proper review of the information submitted on behalf of the owner or operator.

Regarding the requirement that the Illinois EPA must provide a list of documents required during any inspection, it is impossible for the Illinois EPA to provide such a list.

The Illinois EPA cannot possibly know what information is in the consultant's or the owner's or operator's possession until it conducts its review. Furthermore, this limitation is inconsistent with the auditing and record retention provisions in other Board and Illinois EPA rules. The Illinois EPA does not believe the suggested changes are

appropriate or necessary, or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

9. Section 734.800

a. CW3M suggests changing Sections 734.800(a) and (c) to create a presumption of reasonableness for the costs set forth in Subpart H. It also suggests amending language in other sections to change maximum payments amounts into amounts that are "considered reasonable." See, e.g., the suggested changes to the first sentences of Sections 734.810 and 734.815. CW3M does not provide any additional testimony to support these changes.

CSD suggests changing the maximum payment amounts in Subpart H to "threshold values at or below which proposed budgets and requests for reimbursement can be approved without significant review, but require the owner/operator to submit actual costs for Agency review and approval." Exh. 99 at 3. Reimbursement could exceed the threshold value under a "longer and more detailed review." Id.

USI does not appear to believe that a fundamental shift in Subpart H to "considered reasonable" or "threshold" amounts is necessary, at least in Sections 734.810 through 734.840. USI states in its testimony that "USI's experience in LUST work in Illinois indicates that the billing methods, units of measure and prices [set forth in Section 734.810 through 734.840 of the Board's First Notice Proposal] are not highly inconsistent with those prevailing in the market today. And, to the extent that the maximum payment amounts are inconsistent with prevailing market rates or insufficient to cover unique situations, the scope of

work for these activities is defined in sufficient detail to accommodate the use of the competitive bidding provision and extraordinary circumstances provision provided in 734.855 and 734.860 as a means of establishing alternative maximum payment amounts.” Exh. 109 at 33-34.

The changes suggested by CW3M and CSD would entirely alter the intent and effect of Subpart H. As stated in the Board’s proposal, Subpart H “provides methods for determining the maximum amounts that can be paid from the Fund for eligible corrective action costs.” 35 Ill. Adm. Code 734.800(a) (proposed) (emphasis added). The maximum payment amounts in Subpart H were developed and intended to be used as maximums, not speed bumps. Still, they are not absolutes. The maximum payment amounts can be exceeded via the bidding and the unusual or extraordinary circumstances provisions in the Board’s First Notice Proposal.

Allowing costs to be reimbursed over and above the maximum payment amounts, outside of the bidding and the unusual or extraordinary circumstances provisions, renders the bidding and the unusual or extraordinary circumstances provisions superfluous. Furthermore, based on past experience, the Illinois EPA believes the changes suggested by CW3M would result in frequent if not common attempts to exceed “considered reasonable” or “threshold” amounts set forth in the rules rather than routine requests for reimbursement at or below the “considered reasonable” or “threshold” amounts because of a desire for more expeditious reviews and approvals. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that CW3M or CSD has

provided sufficient justification to warrant a change to the Board's First Notice Proposal.

b. CW3M suggests changing Section 734.800(b) to allow costs not specifically listed under a particular task to be reimbursed separately from the maximum payment amount for the task. CW3M does not provide any additional testimony to support this change.

The suggested change would alter the entire structure of Subpart H, which includes all costs associated with a particular task in the maximum payment amount allowed for the task. Allowing individual costs associated with a task to be reimbursed over and above the maximum payment amount for the task will result in the eventual devolution of Subpart H into reimbursement on a time and materials basis for every item and task not specifically identified in the rules. As the Illinois EPA testified, the development of an all-inclusive list of costs associated with each task identified in Subpart H would be impossible. The Illinois EPA's testimony is echoed in USI's comments, where USI states that "[i]t is reasonable to believe that it would be impossible to capture, in a rule of this nature, a list of all products or services that may be needed during a UST remediation project." PC 59 at 44. The Illinois EPA does not believe that the suggested change is appropriate or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

c. CW3M suggests changing Section 734.800(c) to eliminate the submission of cost breakdowns and invoices for costs paid by "lump sum or unit of production" and to allow reimbursement in excess of the maximum payment

amounts of Subpart H if the reimbursement applicant provides “separate and adequate justification of [cost] reasonableness on a time and materials basis.” Exh. 106 at Section 734.800(c). CW3M does not provide any additional testimony to support these changes.

Regarding the first change, a description of the type of supporting documentation the Illinois EPA believes is necessary in a reimbursement application is already in the record of these proceedings. One item that certainly is necessary is an invoice with a minimum amount information to document the costs requested for reimbursement (e.g., the task performed, the amount charged for the task, and the date the task was conducted). Regarding the second change, the Board’s proposal already allows an owner or operator to exceed the maximum payment amounts via bidding and the unusual or extraordinary circumstances provisions. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that CW3M has provided sufficient justification to warrant a change to the Board’s First Notice Proposal.

d. CW3M suggests adding a Section 734.800(d) to provide reimbursement of emergency activities on a time and materials basis. CW3M does not provide any additional testimony to support this change. There is nothing to show that emergency activities need to be reimbursed differently than non-emergency activities. Under the Board’s proposal emergency activities will be reimbursed to the same extent and in the same manner as non-emergency activities. The Illinois EPA does not believe the suggested change is necessary or

appropriate, or that CW3M has provided sufficient justification to warrant a change to the Board's First Notice Proposal.

10. Section 734.810

CW3M suggests changing Section 734.810 to exclude several costs from the maximum payment amounts allowed for UST removal and abandonment and to reimburse the costs on a time and materials basis. CW3M also suggests changing the maximum payment amounts for UST removal and abandonment. CW3M does not provide any reasoning for excluding the identified costs from the maximum payment amounts, nor does it explain how its suggested maximum payment amounts were calculated.

CSD also suggests changing the maximum payment amounts in Section 734.810 and suggests reimbursing costs associated with filling USTs abandoned in place on a time and materials basis. The payment amounts suggested by CSD are based upon *RS Means* calculations and are different than the amounts suggested by CW3M.

USI states in its testimony that it "agrees with the Board when they state that the rates should be based upon actual experience in the UST program in Illinois. *RS Means* and other sources that do not specifically track costs associated with the Illinois UST program are not likely to reflect the requirements and costs unique to the Illinois

Underground Storage Tank Program and the peculiarities of the Agency's administration of the program." Exh. 109 at 32 (citations omitted). USI further states that it believes the maximum payment amounts set forth in Section 734.810 of the Board's First Notice Proposal "are appropriate," and that it has "no objection to their implementation." Id. at

40 (no objection to the maximum payment amounts in Sections 734.810 through 734.840, excluding drilling mobilization costs).

PIPE previously proposed alternative rates for UST removal and abandonment that were based on the 2004 *RS Means Environmental Costs Handling Options and Solutions* publication. See First Notice Proposal at 81. In its First Notice Proposal the Board stated that it “is not convinced that basing rates on *RS Means* in and of itself is appropriate. Although as indicated above, the Agency’s method for developing the maximum payment amounts had statistical limitations, the Agency’s rates were based on real data from actual sites in Illinois. Therefore, the Board rejects alternative rates, such as *RS Means*, and the Board will propose the rates as developed by the Agency for first notice.” Id.

CW3M and CSD have suggested alternative payment amounts for Section 734.810, but they have not provided sufficient additional testimony to show why the Board must adopt their suggested rates over the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner’s or operator’s costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board’s First Notice Proposal has been provided. Please see the Illinois EPA’s comments on Section 734.800 (above) for a discussion of CSD’s suggested change of the maximum payment amounts to “threshold” amounts.

11. Section 734.820

CW3M suggests adding a provision to Section 734.820 to make the maximum payment amounts for travel associated with professional consulting services also applicable to drilling costs to cover drilling contractors' mobilization charges. See Exh. 106 at 21. USI states in its testimony that the maximum payment amounts proposed by the Board in Section 734.820 "are appropriate" and that it "has no objection to their implementation," with the exception of the omission of a maximum payment amount for mobilization. Exh. 109 at 40.

The Illinois EPA testified that mobilization costs were included in the drilling rates it proposed to the Board. Transcript of May 26, 2005, at 46-47. The Board's proposal expressly includes mobilization charges in the maximum payment amounts for drilling. See 35 Ill. Adm. Code 734.820(a) (proposed) ("Such costs must include, but not be limited to, those associated with mobilization."). Furthermore, the travel rates that CW3M proposes to make applicable to drilling costs were developed and intended to be used for travel costs associated with professional consulting services, not drilling costs.

Neither CW3M nor USI provide sufficient additional testimony to show why the proposed maximum payment amounts do not provide reimbursement for reasonable mobilization costs, or why the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs associated with drilling in cases where the owner's or operator's drilling costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

12. Section 734.825

CW3M continues to suggest changing the maximum payment amounts under Section 734.825 based upon amounts approved under Illinois Department of Transportation (“IDOT”) contracts. CW3M also suggests changing the “swell factor” and “weight/volume” conversion factor set forth in Section 734.825, and suggests adding a reimbursement amount of \$14.25 per cubic yard for “additional expenses” associated with the transportation of soil that is temporarily stockpiled on-site or off-site.

USI states that it believes the maximum payment amounts set forth in Section 734.825 of the Board’s First Notice Proposal “are appropriate.” Exh. 109 at 40. It has “no objection to their implementation.” Id. (no objection to the maximum payment amounts in Sections 734.810 through 734.840, excluding drilling mobilization costs).

The Illinois EPA submitted as Exhibit 89 a letter from IDOT that explains the costs in IDOT’s contracts “should not be used to compare or justify cost[s] proposed by IEPA in this rulemaking.” Exh. 89 at 2. The Board has already considered testimony from CW3M regarding IDOT contract costs and decided not to use those costs to determine the maximum payment amounts under Section 734.825. See, e.g., Exh. 29 at 49, Appendix J. CW3M has not provided sufficient additional testimony to show why the Board must adopt its suggested rates over the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner’s or operator’s costs exceed the maximum payment amounts proposed by the Board.

The weight/volume conversion factor now suggested by CW3M is 1.2 tons per cubic yard, lower than the 1.5 tons per cubic yard conversion proposed by the Board.

CW3M personnel previously testified that a conversion factor of 1.68 tons per cubic yard more accurately reflects the predominant soil type in Illinois. See First Notice Proposal at 73 (describing testimony of Mr. Smith). The Board received a great deal of comments and testimony regarding the swell factor and the weight/volume conversion factor, and concluded that the factors it proposed are appropriate. Id. at 73-74. CW3M does not provide any testimony regarding how its suggested swell factor and weight/volume conversion factor are calculated, or why the weight/volume conversion factor should now be 1.2 instead of 1.68. It merely states that the changes it proposes will eliminate “the games played” with the factors. How a change in the conversion factor to 1.2 will eliminate any “games played” is unclear. CW3M has not provided sufficient additional testimony to show why the Board must adopt its suggested swell factor and conversion factor over those proposed by the Board, nor has it provided sufficient additional testimony to show that the maximum payment amounts plus the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs.

Regarding CW3M’s suggested additional \$14.25 per cubic yard for “additional expenses” associated with the transportation of uncontaminated soil that is temporarily stockpiled, one-site or off-site, CW3M does not provide sufficient testimony to show why the Board must adopt this additional reimbursement amount. CW3M has likewise not provided sufficient testimony to show that the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner’s or operator’s costs exceed the maximum payment amounts proposed by the Board. Rather, it merely suggests arbitrarily increasing the maximum payment

amount by a sum roughly equal to the transportation charge for hauling contaminated soil to a landfill, even in cases where the soil is stockpiled on-site. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

13. Section 734.830

CW3M suggests changing Section 734.830 by adding a "stop fee" for drum disposal. To accomplish this CW3M suggests making the maximum payment amounts for travel associated with professional consulting services also applicable to drum disposal.

USI states that it believes the maximum payment amounts set forth in Section 734.825 of the Board's First Notice Proposal "are appropriate." Exh. 109 at 40. It has "no objection to their implementation." Id. (no objection to the maximum payment amounts in Sections 734.810 through 734.840, excluding drilling mobilization costs).

The Board's proposal already includes any "stop fees" or other travel fees associated drum disposal in the maximum payment amounts for drum disposal. See 35 Ill. Adm. Code 734.830 (proposed) (maximum payment amounts include payment for costs associated with drum purchase, transportation, and disposal). Furthermore, the maximum payment amounts for travel set forth in Section 734.845(e) were developed and intended to be used for travel costs associated with professional consulting services, not drum disposal. CW3M has not provided any additional testimony to show why the Board must adopt a "stop fee" in addition to the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner's or

operator's costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

14. Section 734.840

CW3M suggests changing the maximum payment amounts in Section 734.840 for costs associated with concrete, asphalt, and paving. In support of the changes it references its prior testimony in this rulemaking and states that the suggested rates are consistent with prevailing rates. Exh. 106 at 25.

USI states that it believes the maximum payment amounts set forth in Section 734.840 of the Board's First Notice Proposal "are appropriate." Exh. 109 at 40. It has "no objection to their implementation." Id. (no objection to the maximum payment amounts in Sections 734.810 through 734.840, excluding drilling mobilization costs).

The Board has already considered the prior testimony submitted by CW3M and others regarding the maximum payment amounts for concrete, asphalt, and paving, and declined to make any changes to the amounts proposed by the Illinois EPA. See First Notice and Opinion at 81. CW3M has not provided any additional testimony to show why the Board must adopt CW3M's suggested rates over the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner's or operator's costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

15. Section 734.845

Throughout Section 734.845 CW3M suggests changing the maximum payment amounts for professional consulting services into absolute payment amounts. See, e.g., Section 734.845 (“shall be paid per unit task”); Section 734.845(a)(1) (“shall be paid a lump sum total of”); Section 734.845(a)(2) (“shall be reimbursed at a rate of”); Section 734.845(a)(3) (“shall be paid a lump sum rate of”). With such changes, the rules would mandate that the Illinois EPA reimburse an owner or operator the full maximum payment amount for a task regardless of the amount actually charged for the task. CW3M does not provide any additional testimony to support these changes.

The Illinois EPA does not believe that an owner or operator should be reimbursed the full maximum payment amount for a task in cases where the owner or operator is charged less for the task. Amounts exceeding the total charged to the owner or operator would not be reasonable, would not be incurred in the performance of site investigation or corrective action, and would be amounts in excess of those required to meet the minimum requirements of Title XVI. Therefore, they would be ineligible for reimbursement from the UST Fund. See 415 ILCS 5/57.7(c)(3) (as amended by P.A. 92-554). The Illinois EPA agrees with the Board’s conclusion that “maximum payment amount” is the proper term to use to identify the payment amounts set forth in the rules.

See First Notice Proposal at 81.

CW3M also suggests changing the maximum payment amounts throughout Section 734.845. However, it does not provide sufficient additional testimony to show why the Board must adopt its suggested rates over the maximum payment amounts proposed by the Board, or that the bidding and the unusual or extraordinary

circumstances provisions will not allow for reimbursement of reasonable costs in cases where an owner's or operator's costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

Although USI believes the maximum payment amounts set forth in earlier sections of Subpart H are appropriate and has no objection to the structure of those Sections, USI suggests a wholesale change to Section 734.845. USI's suggests changing Section 734.845 into an elaborate and difficult to decipher system for calculating a series of different payment amounts the Illinois EPA must use when reviewing costs associated with professional consulting services. Some payment amounts developed under the system would be published and made available to the public while others would remain unpublished and be known only to the Illinois EPA. However, as stated at the July 27, 2005, hearing, and repeated numerous times in Public Comment 59, USI's suggested changes are just a concept rather than an alternative proposal that can be readily adopted by the Board. See, e.g., PC 59 at 20 ("It should be emphasized that USI's proposed changes to the regulations were conceptual in nature and were not considered to be a final draft that could be adopted without further editing and review.")

Although USI's suggested changes are merely a concept, the Illinois EPA submits the following comments:

- a. The Illinois EPA testified earlier about the creation and use of a database to set reimbursement rates under Subpart H. The Illinois EPA continues

to believe that the concept suggested by USI would greatly complicate and lengthen the reimbursement process for all parties involved.

b. The Illinois EPA believes that USI's concept of requiring the Illinois EPA to develop and use secret rates that are not adopted in rules or otherwise made public is inappropriate. The Illinois EPA has been sued in the past for using reimbursement rates that were not adopted in rules. Setting up a system of generally applicable rates that are not adopted in rules as required by the Administrative Procedures Act only invites additional litigation.

c. Prior to the July 27, 2005, hearing USI met with the Illinois EPA and provided a detailed demonstration of the database software it developed as a part of its concept. The Illinois EPA found that the database was very complicated, confusing to understand, and cumbersome to use. In addition, the database required a breakdown of costs into minute detail with little or no quality control to determine whether the costs being entered are reasonable. The Illinois EPA does not believe that the large majority of consulting firms would embrace the use of the database software as USI represented.

In addition, the Illinois EPA's information systems staff had concerns about application and security issues related to the database software.

Furthermore, implementation and maintenance of such a database and its software would require significant resources that the Agency simply does not have.

d. It appears that USI's concept would require the Illinois EPA to adopt rules containing rates before the concept could be implemented. The concept's cost review system, at least in its first phase, "would use Agency-

approved unit rates, against which the consultant's proposed pricing will be compared." Exh. 109 at 72. Because such "Agency-approved unit rates" would be generally applicable and implement, apply, interpret, or prescribe law or policy, the Administrative Procedures Act requires that the rates be adopted in rules. See 5 ILCS 100/1-70 (definition of "rule"). Therefore, implementation of USI's concept could not begin until the Illinois EPA has adopted rules that set forth the "Agency-approved unit rates."

e. Whether USI's concept would result in the reimbursement of reasonable remediation costs is not clear. USI could not provide the amount, or even a range of amounts, that owners and operators would be reimbursed under its concept. See PC 59 at 42-43. However, based on USI's data the amounts reimbursed under its concept could be high. For example, in USI's data the "Historical Professional Consulting Service Charges Based on 80% Coverage/ 95% Confidence (Upper Limit)" total more than \$110,000. Exh. 109 at 399. Contrast this amount, which is for consulting services alone, with the average total amount paid per site for sites closed during the years 1997 through 2001. See Exh. 88 at 16-17 (average total amount paid per site ranged from \$75,759 to \$95,707).

At the last hour, USI has submitted a significant amount of information regarding its concept for the reimbursement of professional consulting services. However, it has not provided sufficient additional testimony to show why the Board must abandon the proposed maximum payment amounts and structure of Section 734.845 and begin developing rules for a reimbursement system similar to the concept submitted by USI.

Nor has USI provided sufficient additional testimony to show that the bidding and the unusual or extraordinary circumstances provisions of the Board's proposal will not allow for reimbursement of reasonable costs in cases where an owner's or operator's costs exceed the maximum payment amounts proposed by the Board. The Illinois EPA does not believe the suggested changes are necessary or appropriate, or that sufficient justification to warrant a change to the Board's First Notice Proposal has been provided.

II. Comments on Public Comments Submitted in Response to the Board's First Notice Proposal

1. Under item 11 of CSD's pre-filed testimony for the July 27, 2005, hearing, CSD comments on costs associated with preparing and submitting applications for reimbursement.¹ See Exh. 99 at 5-6. Such costs are included in the amounts the Board proposed for professional consulting services under Section 734.845. The Illinois EPA believes the amounts proposed by the Board are appropriate to cover reasonable costs associated with the preparation and submission of reimbursement applications. The frequency with which an owner or operator submits requests for reimbursement, whether it be only a few times during remediation or once every 90 days, is a decision left to the owner or operator.

2. ~~Public Comment 39 discusses a perceived ambiguity in the proposed rules.~~
The premise of the comment is that defining the extent of groundwater contamination is unnecessary if the local municipality's groundwater ordinance has been approved as an

¹ This comment was submitted in CSD's pre-filed testimony for the July 27, 2005, hearing, but is discussed here because it is more in the nature of a public comment than testimony in support of a suggested change to the Board's First Notice Proposal.

institutional control. According to Public Comment 39, this is because certain pathways have already been severed by the “preexisting” groundwater institutional control.

The ambiguity discussed in Public Comment 39 does not exist. There are no “preexisting” groundwater ordinance institutional controls. Groundwater ordinances are approved as institutional controls on a site-specific basis, not on a city-wide basis. In the case of the City of Chicago, the City’s groundwater ordinance has been approved as an institutional control only for individual sites, not for the entire City.

In order to use a groundwater ordinance as an institutional control for a particular release, the owner or operator must show that the Tiered Approach to Corrective Action Objectives (“TACO”) rule requirements for using the ordinance as an institutional control have been satisfied. The first step is for the owner or operator to show that the requirements of 35 Ill. Adm. Code 742.1015 have been met.² See 35 Ill. Adm. Code 1015(a). Inter alia, Section 742.1015 requires the submission of maps delineating the extent of groundwater contamination, maps delineating the boundaries of all properties under which groundwater contamination is located, and information identifying the current owners of the properties under which groundwater contamination is located. 35

² Once the requirements of 35 Ill. Adm. Code 742.1015 are met, the groundwater ordinance can be used as an institutional control to satisfy two different requirements under TACO. See 35 Ill. Adm. Code 742.1015(a). The first is 35 Ill. Adm. Code 742.320(d), one of six provisions that must be met in order to exclude the groundwater ingestion exposure route from consideration (i.e., no remediation objectives need to be developed for the exposure route). It requires an ordinance adopted by a unit of local government to effectively prohibit the installation and use of potable water supply wells within 2,500 feet from the source of the release. 35 Ill. Adm. Code 742.320(d). The second is 35 Ill. Adm. Code 742.805(a)(3), which is one of seven demonstrations that must be made before the owner or operator can request approval to develop Tier 2 groundwater remediation objectives. Under Section 742.805(a)(3), using Equation R26 in accordance with Section 742.810 the owner or operator must demonstrate that, at the point of human exposure, the concentration of any contaminant of concern in groundwater will meet the applicable Tier 1 groundwater remediation objective or the Health Advisory concentration. 35 Ill. Adm. Code 742.805(a)(3). Groundwater ordinances are used under this second provision to extend the point of human exposure outward from a site to a location where the concentrations of contaminants of concern no longer exceed remediation objectives or Health Advisory concentrations.

Ill. Adm. Code 1015(b)(2) through (4). Other requirements under Section 742.1015 include notifying the owners of the property under which contaminated groundwater is located (35 Ill. Adm. Code 742.1015(c)), submitting a copy of the request to use the groundwater ordinance as an institutional control to the local government (35 Ill. Adm. Code 742.1015(e)), and recording the ordinance with the No Further Remediation Letter (35 Ill. Adm. Code 742.1015(f)). The TACO rules expressly provide that a groundwater ordinance approved as an institutional control does not become effective until it is officially recorded with the No Further Remediation Letter. 35 Ill. Adm. Code 742.1015(g).

As can be seen from the requirements of 35 Ill. Adm. Code 1015, as well those from 35 Ill. Adm. Code 742.320 and 742.805 (see footnote 2), a groundwater ordinance cannot be used as an institutional control at one site merely because it has been approved as an institutional control for another site in the same municipality. The owner or operator must demonstrate that the requirements of Section 742.1015, and the requirements of Section 742.320 or 742.805, have been met with respect to the particular release being remediated. Furthermore, the requirements for using a groundwater ordinance as an institutional control specifically call for a delineation of the groundwater contamination. Therefore, a groundwater investigation is necessary. For these reasons, the suggested change to Section 734.300 is unnecessary.

3. In Public Comment 51, Greg Courson of Advanced Environmental Drilling and Contracting, Inc., (“Advanced Environmental”) states that he has not been contacted by the Illinois EPA regarding anything pertaining to this rulemaking, and that he has not provided any rates to the Illinois EPA for this rulemaking. This comment was

submitted in response to Illinois EPA testimony indicating that Illinois EPA personnel talked to Mr. Courson about drum disposal rates.

On page 167, line 2, of the transcript of the May 25, 2004, hearing, Harry Chappel identified Advanced Environmental as one of the companies the Illinois EPA contacted about drum removal costs. After reviewing the notes of his conversation with Mr. Courson, Mr. Chappel realized that he did not discuss drum removal costs with Mr. Courson. He called Mr. Courson on or about October 3, 2003, to discuss such costs, but Mr. Courson never returned that call. On or about the same date, Mr. Chappel did talk to Mr. Courson about drilling costs. The conversation about drilling costs is reflected on page 28 of Exhibit 98, where the Illinois EPA lists Advanced Environmental as one of the companies contacted about drilling costs.

4. The Illinois EPA has been unable to review Public Comment 53 and therefore is unable to provide any comments on it. The Illinois EPA was not served with a copy of this comment, nor has it been able to access a copy of the comment through the Board's Clerk's Office On Line system.

5. Public Comment 58 objects to allowing bidding as an alternative method of setting maximum payment amounts for professional consulting services. PC 58 at 1. In support of this objection the comment cites laws that require government agencies to use a qualification based selection process when procuring professional services. See Id. Professional service costs being reimbursed from the UST Fund are for professional services procured by owners and operators, not the Illinois EPA. Therefore, the laws cited in Public Comment 58 are inapplicable.

6. Based on letters being sent by USI (see Attachment A to these comments) the Board is sure to receive additional form letters or petitions complaining about the proposed rules. While the persons signing these letters or petitions have every right to register their opinions with the Board, the Illinois EPA suspects that most of their opinions on this rulemaking are based on USI's characterization of the rulemaking and may not reflect what their opinions would be if they had reviewed the entire record of these proceedings.

III. Suggested Non-Substantive Changes to the Rules Proposed in the Board's First Notice Proposal

The Illinois EPA suggests the following non-substantive changes to the rules proposed in the Board's First Notice Proposal to correct minor errors and promote consistency among the rules' provisions. Some suggestions are in response to errors or inconsistencies in the Illinois EPA's proposal to the Board. The Illinois EPA apologizes for any inconvenience caused by these errors or inconsistencies.

1. Under the table of contents for Part 732, Section numbers "732.410" and "732.612" were replaced with "A." The Section numbers need to be restored. See First Notice Proposal at 84, 85.

2. Under Section 732.112/734.145, "be" should be removed from the middle of the second sentence so the sentence reads "but is not limited to" instead of "but is not be limited to." See First Notice Proposal at 102, 239.

3. The last line of Section 732.202(h)(1)(A) refers to the collection of samples as close as "practical" to the UST backfill. See First Notice Proposal at 105. However, the remainder of Section 732.202(h) and the corresponding sampling

requirements in Section 734.210(h) refer to collecting samples as close as “practicable.” For consistency, the Illinois EPA suggests that “practical” be changed to “practicable” in the last line of Section 732.202(h)(1)(A).

4. In Section 732.307(j)(2), due to the deletion of the reference to Section 732.311, “Sections” should be changed to “Section”. See First Notice Proposal at 134.

5. Under Section 732.309(a), a Licensed Professional Engineer must certify a site’s classification as a part of the Site Classification Completion Report. See First Notice Proposal at 139. The paragraph should be amended to also allow Licensed Professional Geologists to certify a site’s classification. Such a change is needed for consistency with the proposed certification requirement in Section 732.110(d), which allows Licensed Professional Geologists to certify Site Classification Completion Reports, and Public Act 92-735, which expressly provides that “Site classification shall be determined by a Licensed Professional Engineer or Licensed Professional Geologist in accordance with the requirements of this Title, and the Licensed Professional Engineer or Licensed Professional Geologist shall submit a certification to the Agency of the site classification.” Public Act 92-735 (2002) (amendment to 415 ILCS 5/57.7(b)(1)).

6. Under Section 732.309(a)(2), “potables” should be changed to “potable.” See First Notice Proposal at 140.

7. Under Section 732.606(eee), the reference to “this subsection (fff)” should be changed to “this subsection (eee).” See First Notice Proposal at 187.

8. Under Section 734.315(a)(1)(B), the second sentence should be changed from “a close as practicable” to “as close as practicable.” See First Notice Proposal at 251.

9. Under Section 734.345(a), "5" should be added to the statutory citation so it reads "[415 ILCS 5/57.7(b)(5)]." See First Notice Proposal at 263.

10. Under Section 734.350(d)(5), the "a" before "potable" should be deleted to match the plural noun. See First Notice Proposal at 267.

11. Under Section 734.410, the symbol for soil bulk density should be changed from "(ρ_b)" to " (ρ_b) " and the symbol for soil particle density should be changed from "(ρ_s)" to " (ρ_s) ." See First Notice Proposal at 270.

12. The Board decided to delete Sections 734.845(b)(5) and (6) of the Illinois EPA's proposal and replace them with a new Section 734.845(b)(5). See First Notice Proposal at 80. In the text of the rules, however, changes were made to Sections 734.845(a)(5) and (6) instead of Sections 734.845(b)(5) and (6). The Board's changes should be made under Section 734.845(b) instead of Section 734.845(a).

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY



Kyle Rominger
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September 12, 2005

RE: **URGENT: IEPA Proposed Underground Storage Tank Rules Have Significant Negative Impact for Owners/Operators**

Dear [REDACTED]

Beware that the Illinois Environmental Protection Agency (IEPA) is proposing changes to its underground storage tank rules and regulations that are likely to force you to dig into your pocket to pay for the costs of environmental clean-up at your site.

The modifications proposed by the IEPA could reduce your benefits from the Leaking Underground Storage Tank (LUST) Fund by an estimated thirty percent to fifty percent (30% to 50%) and may force you to pay for services out of your own pocket. **If adopted, this rule could cost you thousands of dollars.** In addition, the modifications could significantly impact your long-term property value and leave you with unknown financial and legal liabilities. **In order to protect your interest, this proposed ruling must be changed before it is adopted!**

Simply put, the proposed rules are not fair to you, the taxpaying tank owner/operator who has paid into the LUST Fund in good faith and who relies upon the LUST Fund to provide full coverage of your post-deductible corrective action costs. Industry professionals and owners/operators from all parts of the state have voiced strong opposition to the proposed IEPA ruling.

Your opinion will make a difference! Prior to a July 27, 2005 hearing on this matter, we received over 100 signed petitions from owners/operators requesting more reasonable modifications to the rules. The petition was invaluable in gaining the Illinois Pollution Control Board's (IPCB) attention, concerning the problems associated with the IEPA's proposed rules. The IPCB agreed to receive submittals of alternative rules and to receive additional public comments up to September 23, 2005.

Since the last hearing on July 27, 2005 our company, United Science Industries (USI), developed alternative rules that we believe are fair and equitable for all concerned parties including you as an owner/operator, the consultants/contractors that provide environmental services and the IEPA. The alternative rules were provided to the IPCB and should be listed on their web site in the next several days. They are also listed on USI's web site. Links to both sites are provided in the attached information sheet.

ATTACHMENT A

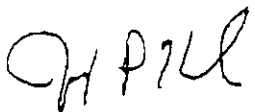
Here is how you can help and it is relatively easy! The IPCB must understand your position on this critical issue. A significant public response may definitely sway their opinion. You can help by signing the attached statement of support card indicating either your support of the alternative rules or your request that the IPCB delay the rulemaking until such time that another alternative rule can be prepared that is similarly fair and equitable. Although we would like your support of the alternative rules proposed by USI, either position will help.

The attached information sheets provide more detailed information concerning the rules and how you can help. We are near the end of what has been a long and difficult negotiation process. Now, more than ever, is the time your opinion will count! We hope you agree and will send us the attached statement of support card. To meet the deadlines, we need to receive your response no later than September 21, 2005.

In closing, I realize you may not have much background on this situation or our firm. I believe the attached information sheet plus the web site links will provide you more than enough information concerning the situation. Concerning our firm, USI has been serving the owners/operators of leaking underground storage tanks in Illinois since 1989. We are a strong, viable company with over 100 employees and have for years specialized in serving the interests of small owners/operators. We want to protect the interest of our clients and all owners/operators within the industry. I know this is short notice, but as you probably know as a business owner, sometimes drastic situations require quick actions.

If you would like to speak to someone about this right away, please don't hesitate to contact us at 1.800.372.8740.

Sincerely



Jay P. Koch
CEO

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Illinois Environmental Protection Agency's Comments on behalf of the Illinois Environmental Protection Agency upon the person to whom it is directed, by placing a copy in an envelope addressed to:

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

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

See Attached Service List

and mailing it from Springfield, Illinois on 9-22-05

Meredith Kelley

SUBSCRIBED AND SWORN TO BEFORE ME

this 22 day of September, 2005
Brenda Boehner
Notary Public



THIS FILING IS SUBMITTED ON RECYCLED PAPER

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Interested Party Craig S. Gocker, President			
<u>Office of the Attorney General</u> Interested Party	Environmental Bureau 188 West Randolph, 20th Floor	Chicago IL 60601	312/814-2550 312/814-2347
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<u>Herlacher Angleton Associates, LLC</u> Interested Party	8731 Bluff Road	Waterloo IL 62298	618/935-2262 618/935-2694
Tom Herlacher, P.E., Principal Engineer			
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Dorothy M. Gunn, Clerk of the Board Marie Tipsord, Hearing Officer			
<u>Huff & Huff, Inc.</u> Interested Party	512 West Burlington Avenue Suite 100	LaGrange IL 60525	
James E. Huff, P.E.			
<u>Black & Veatch</u> Interested Party	101 North Wacker Drive Suite 1100	Chicago IL 60606	
Scott Anderson			
<u>Posegate & Denes</u> Interested Party	111 N. Sixth Street	Springfield IL 62701	217-522-6152
Claire A. Manning			
<u>Marlin Environmental, Inc.</u> Interested Party	1000 West Spring Street	South Elgin IL 60177	847-468-8855
Melanie LoPiccolo, Office Manager			
<u>Illinois Department of Natural Resources</u> Interested Party	One Natural Resources Way	Springfield IL 62702- 1271	217/782-1809 217/524-9640
William Richardson, Legal Counsel			
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Musette H. Vogel			
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Joe Kelly, VP Engineering			
<u>Great Lakes Analytical</u> Interested Party	1380 Busch Parkway	Buffalo Grove IL 60089	(847) 808- 7766
A.J Pavlick			
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Joseph W. Truesdale, P.E.			
<u>CORE Geological Services, Inc.</u> Interested Party	2621 Monetga, Suite C	Springfield Il 62704	217-787-6109
Ron Dye, President			
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Monte Nienkerk			
<u>PDC Laboratories</u> Interested Party	2231 W. Altorfer Dr.	Peoria il 61615	309-692-9688
Kurt Stepping, Director of Client Services			

<u>Atwell-Hicks, Inc.</u> Interested Party Thomas M. Guist, PE, Team Leader	940 East Diehl Road Sute 100	Naperville IL 60563	630 5770800
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<u>Suburban Laboratories, Inc.</u> Interested Party Jarrett Thomas, V.P.	4140 Litt Drive	Hillside IL 60162	708-544-3260
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<u>Herlacher Angleton Associates, LLC</u> Interested Party Jennifer Goodman	522 Belle Street	Alton IL 62002	
<u>United Environmental Consultants, Inc.</u> Interested Party George F. Moncek	119 East Palatin Road Suite 101	Palatine IL 60067	
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<u>American Environmental Corp.</u> Interested Party Ken Miller, Regional Manager	3700 W. Grand Ave., Suite A	Springfield IL 62707	217/585-9517
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Daniel Caplice			
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Total number of participants: 52