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BEFORE THE ILLINOIS
POLLUTION CONTROL Board

IN THE MATTER OF:)
PROPOSED AMENDMENTS TO REGULATION)R01-26
OF PETROLEUM LEAKING UNDERGROUND)Rulemaking - Land
STORAGE TANKS (35 ILL. ADM. CODE 732.)

The following is a transcript of proceedings
from the hearing held in the above-entitled matter,
taken stenographically by ROSEMARIE LAMANTIA, CSR, a
notary public within and for the County of Cook and
State of Illinois, before JOEL J. STERNSTEIN, Hearing
Officer, at 100 West Randolph Drive, Room 2-025,
Chicago, Illinois, on the 3rd day of April 2001, A.D.,
scheduled to commence at the hour of 10:00 a.m.

1 A P P E A R A N C E S:

2 HEARING TAKEN BEFORE:

3

4 ILLINOIS POLLUTION CONTROL Board,

5 100 West Randolph Drive

6 Room 11-500

7 Chicago, Illinois 60601

8 BY: JOEL J. STERNSTEIN, HEARING OFFICER

9

10 MEMBERS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

11 AS WELL AS OTHER INTERESTED ENTITIES AND AUDIENCE

12 MEMBERS WERE PRESENT AT THE HEARING, BUT NOT LISTED ON

13 THIS APPEARANCE PAGE.

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1 HEARING OFFICER STERNSTEIN: If everybody is
2 ready, why don't we go ahead and get started.

3 Let's go on the record.

4 Good morning. My name is Joel Sternstein. I've
5 been appointed by the Illinois Pollution Control Board
6 to serve as hearing officer in this proceeding, which is
7 entitled, In The Matter of Amendments to 35 Illinois
8 Administrative Code, Part 732, Regulation of Petroleum
9 Leaking Underground Storage Tanks. The docketing number
10 for this rulemaking is R01-26.

11 Sitting to my right is Nicholas Melas, the board
12 member assigned to this matter.

13 We also have from the board to my left is Elena
14 Kezelis, Board Member Elena Kezelis.

15 To Mr. Melas' right is Alisa Liu, who is a
16 member of the board's technical unit.

17 And to Ms. Liu's right is Marili McFawn, who is
18 also a board member.

19 We also have Bob Boschont(phonetic), who is in
20 the audience, who is Board Member McFawn's attorney
21 assistant.

22 For the record, today's date is Tuesday, April
23 3, 2001, and it is approximately 5 after 10:00 o'clock
24 in the morning.

1 This is a rulemaking subject to the board's
2 procedural rules, and, therefore, all relevant,
3 non-repetitious and non-privileged testimony will be
4 heard at this second hearing in this proceeding. The
5 first hearing was held on February 7, 2001, at the
6 board's Springfield offices.

7 This matter was filed on December 6, 2000, by
8 the Illinois Environmental Protection Agency. On
9 December 21, 2000, the board accepted this matter for
10 hearing.

11 To my right over on the table over there are
12 copies of the current notice and service lists. If you
13 notice that your name does not appear on the list, there
14 are also sign-up sheets for the notice and service list
15 also on that table to my right. Please sign up if you
16 wish to be included on either list. Individuals on the
17 notice list receive only board and hearing officer
18 opinions and orders. Individuals on the service list
19 receive copies of all documents filed by all persons on
20 the service list including pre-filed testimony and
21 questions, motions and appearances, as well as board and
22 hearing officer opinions and orders.

23 If your name is on the service list and you file
24 documents with the board, you must also serve everyone

1 on the service list with copies of the same documents.
2 If you have any questions about the list, please see me
3 during a break or after the hearing.

4 In addition, at the table over on the side of
5 the room there, you'll find copies of the board's set
6 for hearing order in this matter dated December 21,
7 2000, and copies of the hearing officer order of January
8 29, 2000.

9 In addition, there are several other documents
10 on the table to my right, including the Memorandum of
11 Agreement between the Illinois Environmental Protection
12 Agency and the Illinois Department of Transportation.
13 There are two handouts on MTBE, which the Agency will
14 later be submitting as exhibits. One has a color map of
15 the United States on the front showing groundwater
16 aphemic levels for United States T sites and the other
17 contains an article on degradation in surface water
18 sediments.

19 In addition, there are copies of the Agency's
20 motion for acceptance dated December 5, 2000.

21 There is a copy of testimony to be presented by
22 Steve Beverly of the Navy.

23 There is a copy of the testimony to be submitted
24 by Richard Butterworth of the General Services

1 Administration.

2 There are copies of the Memorandum of Agreement
3 between Illinois Environmental Protection Agency and the
4 Navy, Army and Air Force.

5 There are suggested revisions submitted by the
6 Department of Defense as well.

7 The MOA between the Illinois Environmental
8 Protection Agency, Navy, Army, Air Force and the
9 suggested revisions submitted by the Department of
10 Defense both go with Mr. Beverly's testimony, just for
11 clarification there.

12 Also rest rooms, some housekeeping matters here,
13 rest rooms are located right next to the entrance to the
14 CMS conference facility, which is behind me out near the
15 outer hallway. And if anybody needs sodas, snacks, et
16 cetera, there is plenty of restaurants downstairs on the
17 concourse, in the food court.

18 The purpose of today's hearing is two fold.

19 First, we'll address the economic impact
20 statement or ECIS for this rule.

21 Pursuant to Section 27B of the Illinois
22 Environmental Protection Act, the board is required to
23 request the Department of Commerce and Community
24 Affairs, or DCCA, to conduct an ECIS on certain proposed

1 rules prior to the adoption of those rules. If DCCA
2 chooses to conduct the ECIS, DCCA has 30 to 45 days
3 after such request to produce a study of the proposed
4 rules. The board must then make the ECIS or DCCA
5 explanation for not conducting the study available to
6 the public at least 20 days before a public hearing on
7 the economic impact of the proposed rule.

8 In accordance with Section 27B of the act on
9 January 24, 2001, the board requested that DCCA conduct
10 an ECIS for docket R0126. In the request, the board
11 stated that if it did not receive a reply from DCCA
12 within 10 days, it would rely on the March 10th, 2000,
13 letter from DCCA. That March 10th, 2000, DCCA letter
14 notified the board that DCCA lacked the technical and
15 financial resources to respond to any rulemakings. The
16 board did not receive a reply from DCCA within the 10
17 day period, accordingly, the board relies on the March
18 10, 2000, DCCA as an explanation for no ECIS being
19 submitted for docket R01-26.

20 Section 27B of the act also requires the board
21 to have a hearing on either the ECIS or DCCA's decision
22 not to perform an ECIS.

23 Thus, pursuant to the hearing officer order in
24 this matter dated January 29, 2001, we'll hear testimony

1 from anyone who wishes to comment on DCCA's decision not
2 to conduct an ECIS for R01-26.

3 Today we'll also be hearing pre-filed testimony.
4 The testimony that has been submitted for this hearing
5 is from Stephen Beverly from the Department of the Navy;
6 Richard R. Butterworth, Jr., with the General Services
7 Administration; James Huff, P.E., of Huff & Huff, and
8 also Bruce Bonczyk of the Illinois Society of
9 Professional Engineers and the Consulting Engineers
10 Council of Illinois.

11 The Agency's testimony for this matter was
12 entered into the record at the first hearing. I'm not
13 going to have the Agency witnesses read their testimony
14 again but I'm sure if requested they'd be glad to
15 summarize their testimony.

16 We'll allow questions for the specific testimony
17 and the specific testifier.

18 In addition, the Agency will be submitting some
19 exhibits at the end of the hearing and they'll also be
20 available for questions on those exhibits.

21 Once we finish with the pre-filed testimony,
22 we'll proceed with anyone else who might wish to present
23 testimony if time permits and it appears that we will

24 have sufficient time.

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1 David Piotrowski of the Illinois Petroleum
2 Council submitted pre-filed testimony but did not file
3 by the deadline. The Illinois Petroleum Council filed
4 Mr. Piotrowski's testimony with a motion to file
5 instanter, and as I said, if time permits, and I believe
6 it will, I'll admit that motion to file instanter. And
7 we'll proceed with the testimony of Illinois Petroleum
8 Council and related questions.

9 As a point of order, we'll probably have the
10 Illinois Petroleum Council go second to last and the
11 Agency will go last just to make sure we get everybody
12 on the record. And, again, I don't think we'll have any
13 problems with time today.

14 Is there anyone else here today who wishes to
15 testify?

16 Okay. Great.

17 A few items about the quorum. Anyone who
18 testifies will be sworn in by the court reporter.
19 Anyone may ask a question of anyone who testifies,
20 however, in asking the question I ask that you raise
21 your hand, wait for me to acknowledge you, and after
22 I've acknowledged you, please state your name and who
23 you represent before you begin asking questions.

24

Please speak one at a time. If you're speaking

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1 over each other, the court reporter will not be able to
2 get your questions on the record. When answering
3 questions, please be sure to say yes or no instead of
4 nodding or shaking your head. Please note that any
5 questions asked by a board member or staff are intended
6 to help build a complete record for the board's decision
7 and are not meant to express any preconceived notion or
8 bias.

9 One other thing. While we're on the record, I
10 ask that everyone please turn off their beepers or cell
11 phones or set them to vibrate instead of ring. If you
12 must answer a call, please leave the hearing room.
13 Extraneous conversations in the hearing room can make it
14 difficult for people to hear or concentrate on the
15 testimony and questions.

16 Is there anything else that you'd like to add,
17 Mr. Melas?

18 MR. MELAS: No. I'd just like to say good
19 morning. Welcome all to Chicago on this day 2 of the
20 annual demise of the Chicago Cub's. I am a Sox fan, in
21 case you haven't figured that out.

22 HEARING OFFICER STERNSTEIN: Board Member

23 McFawn, Board Member Kezelis, is there anything you'd
24 like to add?

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1 Let's dispense with the ECIS testimony first.
2 Is there anyone who wishes to comment on DCCA's decision
3 not to perform an ECIS in this matter?

4 Okay. Seeing no one wishing to comment on the
5 lack of an ECIS, we'll proceed with the pre-filed
6 testimony and the first testifier will be Stephen
7 Beverly with the Department of the Navy.

8 And before you start testifying, let's ask the
9 court reporter to swear you in.

10 (Witness sworn.)

11 MR. BEVERLY: Good morning. My name is Stephen
12 Beverly. I currently serve as Senior Environmental
13 Counsel for Southern Division, Naval Facilities
14 Engineering Command, in Charleston, South Carolina.

15 My primary areas of responsibility include
16 providing legal counsel to the personnel in Southern
17 Division's environmental department on matters involving
18 compliance with applicable federal and state laws and
19 regulations as well as the Department of the Navy and
20 the Department of Defense policies pertaining to
21 environmental compliance, environmental restoration and
22 property disposal matters.

23 Southern Division serves as the facilities
24 engineering and public works provider for all naval

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1 shore establishments within a 26 state area of
2 responsibility, AOR, which includes, of course, the
3 State of Illinois.

4 My testimony here today was developed in
5 consultation with other DoD components.

6 On behalf of the Navy and the other military
7 services, I want to thank you for the opportunity to
8 provide our views on the Agency's proposed revisions to
9 the Part 732 Petroleum Underground Storage Tank (LUST)
10 regulations.

11 On February 16, 2001, the Agency filed a Motion
12 to Amend the proposed LUST rulemaking in order to
13 provide relief for the federal community from the
14 specific requirement that No Further Remediation, (NFR),
15 letters be "perfected" by recording them in the county
16 land records.

17 As will be discussed in testimony to be provided
18 shortly by Mr. Rich Butterworth of the General Services
19 Administration, that recording requirement was
20 problematic for federal landholding entities as we do
21 not generally "own" the federal lands on which we

22 operate and, therefore, have no legal authority to
23 record restrictions on their future use.

24 My focus today is to indicate our support for

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1 the Agency's Motion to Amend with minor amendments,
2 which I have provided as exhibits, marked as Exhibit 2?

3 HEARING OFFICER STERNSTEIN: Board's Exhibit 11.

4 MR. BEVERLY: I appreciate this board's
5 willingness to listen to our thoughts in that regard.

6 In terms of our preference for risk-based
7 cleanups, Southern Division's experience at sites
8 throughout our AOR is that under appropriate
9 circumstances, risk-based site cleanups can be a
10 protective, timely and cost-effective alternative to
11 more extensive and potentially cost prohibitive remedial
12 measures, which may, or may not, ultimately permit
13 unrestricted future land uses.

14 We wish to have the flexibility afforded by this
15 approach for LUST sites in Illinois where we and the
16 Agency agree that the use of a risk-based cleanup
17 approach will protect human health and the environment
18 and is practicable.

19 Unfortunately, unless the changes proposed in
20 the recent Motion to Amend brought forth by the Agency
21 are adopted, our future ability to do so will be

22 jeopardized since the existing regulations in Subpart G
23 of Part 732 contain specific deed recordation
24 requirements, which we are legally precluded from

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1 satisfying.

2 All that we in the federal community seek is the
3 same ability, which is being afforded those in private
4 industry, to be able to close out our LUST sites with
5 full Agency concurrence utilizing the concept of
6 risk-based remediation.

7 Why an exception should be made for federal
8 facilities?

9 Because we are asking this board to adopt an
10 alternative approach to the NFR recordation requirement
11 contained in the existing LUST regulations, we
12 understand that we need to explain to you how we will
13 ensure the future maintenance of whatever land use
14 restrictions, such as recorded instrument, would
15 otherwise have lawfully imposed.

16 In lieu of recording NFR letters containing
17 specific land use restrictions, we have proposed to the
18 Agency use of a tri-party Memorandum of Agreement (MOA)
19 between the federal landholding agency, United States
20 Environmental Protection Agency Region 5 and the Agency.

21 We have executed such agreements in other United
22 States Environmental Protection Agency regions, and more
23 importantly, this board recently approved their use
24 under the amended TACO Regulations as a form of

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1 institutional control.

2 Under such facility specific MOAs, DoD
3 facilities within the state would commit to, among other
4 things, certain periodic site inspection and reporting
5 requirements so as to ensure that our facility personnel
6 adequately maintain those site remedy based LUCs
7 necessary for long-term protection of human health and
8 the environment.

9 I have provided as Exhibit --

10 HEARING OFFICER STERNSTEIN: 13 for the board.

11 MR. BEVERLY: -- a model MOA for your
12 consideration.

13 The provisions contained within this model were
14 negotiated between DoD, United States Environmental
15 Protection Agency Region 5 and Agency representatives
16 and are consistent with DoD policy promulgated in
17 January 2001, on the establishment of land use controls
18 in consultation with appropriate environmental
19 regulatory agencies.

20 I have also brought with me today, and I've

21 marked as Exhibit 14, several copies of that policy
22 should the board desire to review the same.

23 We believe the MOA concept provides a sound
24 alternative approach to requiring NFR recordation.

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1 Moreover, the MOA makes clear that compliance
2 with its provisions is a prerequisite for continued
3 validity of those NFR letters, which would be issued by
4 the Agency for the sites, which would be encompassed
5 under such an agreement.

6 Conclusion.

7 In conclusion, we are proposing with full Agency
8 concurrence, that the Part 732 LUST regulations be
9 amended to exempt federal facilities from the
10 aforementioned NFR recordation requirement subject to a
11 given facilities execution of, and subsequent compliance
12 with, a tri-party LUC MOA with the Agency and the United
13 States Environmental Protection Agency.

14 Thank you very much.

15 HEARING OFFICER STERNSTEIN: Mr. Beverly, the
16 testimony that you just read, that was verbatim from the
17 copy that you provided the board, is that correct?

18 MR. BEVERLY: Yes.

19 HEARING OFFICER STERNSTEIN: Do you have a

20 couple of copies to file with us right now as exhibit
21 copies?

22 MR. BEVERLY: Sure.

23 HEARING OFFICER STERNSTEIN: If you can just
24 submit those right now, we'll mark those as exhibits and

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1 then we'll proceed with the questions.

2 Okay. So the board will admit the pre-filed
3 testimony of Stephen A. Beverly as Exhibit 10.

4 Mr. Beverly, did you also want to admit the
5 Memorandum of Agreement and suggested revisions at this
6 point as well?

7 MR. BEVERLY: Yes.

8 HEARING OFFICER STERNSTEIN: Why don't we do
9 that, too? If you can bring up a copy for myself and
10 one for the court reporter.

11 MR. BEVERLY: MOA would be 11 then?

12 HEARING OFFICER STERNSTEIN: Yes.

13 Did you run out of the MOA? I've got an extra
14 one here.

15 I'm sorry. Were there any objections to
16 admitting Mr. Beverly's testimony?

17 Okay. For the next exhibit, Memorandum of
18 Agreement between the Illinois Environmental Protection
19 Agency, the United States Environmental Protection

20 Agency Region 5 and the United States Departments of
21 Navy, Army and Air Force, will be admitted as Exhibit
22 11.

23 Are there any objections?

24 And the document entitled, Suggested Revisions

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1 Submitted by the United States Department of Defense,
2 will be admitted as Exhibit 12.

3 Are there any objections?

4 Seeing none I'll admit that one as well.

5 All right. At this point we'll proceed with
6 questions from the audience for Mr. Beverly.

7 Okay. Seeing no questions from the audience
8 right now, does anybody with the board have any
9 questions? Okay. Mr. Beverly -- oh, I'm sorry. Go
10 ahead, Ms. Liu.

11 MS. LIU: Good morning, Mr. Beverly.

12 In your testimony regarding the DoD policy
13 promulgated in January 2001, did you wish to provide
14 that?

15 MR. BEVERLY: Yes, we have a copy of that as
16 well. I can mark that Exhibit 13.

17 HEARING OFFICER STERNSTEIN: Why don't we do
18 that.

19 MS. LIU: Thank you.

20 HEARING OFFICER STERNSTEIN: Mr. Beverly, did
21 you provide extra copies of this?

22 MR. BEVERLY: Yes.

23 HEARING OFFICER STERNSTEIN: Copies over there
24 on the table.

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1 Okay. We'll mark the document dated January
2 17th, 2001, with the stationery the Office of the Under
3 Secretary of Defense on the top. This is the Memorandum
4 for Assistant Secretary of the Army, Installation and
5 Environmental, Assistant Secretary of the Navy,
6 Installation and Environmental, Assistant Secretary of
7 the Air Force, Manpower, Reserve Affairs, Installation
8 and Environment, and Director, Defense Logistics Agency,
9 on the Subject, Policy on Land Use Controls Associated
10 with Environmental Restoration Activities.

11 Are there any objections to admitting this as an
12 exhibit?

13 Seeing none, this document will be admitted as
14 Exhibit 13.

15 Again, I'd just like to ask if there are any
16 other questions for Mr. Beverly.

17 MR. MELAS: I assume now that this Memorandum of
18 Agreement has been fully signed off by all the

19 responsible parties in all of the various agencies?

20 MR. BEVERLY: Yes. We're looking to execute our
21 first one here probably in the next couple of months.

22 MR. MELAS: Thank you.

23 MS. McFAWN: Do you have a date for when that
24 was signed?

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1 MR. BEVERLY: No. We haven't actually executed
2 an agreement. It's a site specific installation by
3 installation agreement. So we have not actually
4 executed one for a particular base yet, but there has
5 been agreement between the Illinois Environmental
6 Protection Agency using the services on the format.

7 MS. McFAWN: To use this model that you
8 submitted?

9 MR. BEVERLY: Correct.

10 MS. LIU: Since we haven't had a chance to
11 review the DoD policy that you just submitted, could you
12 summarize what it says for us, please?

13 MR. BEVERLY: Well, there are quite a few
14 different aspects of it. It covers both active base
15 facilities as well as closing base facilities and what
16 the Department of Defense's obligations should be and
17 what we should attempt to do in dealing with United

18 States Environmental Protection Agency, state regulatory
19 agencies, in setting up a comprehensive oversight policy
20 on a site by site basis for land use controls, if we're
21 going to have a land use control imposed on a given
22 site. So it is broken out in those two different
23 categories.

24 On the active side, it focuses very much on the

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1 concept of an MOA in the sense of we would have active
2 based personnel oversee the day-to-day maintenance
3 control in process.

4 On the BRAC side, if we're closing a base, it
5 speaks toward establishing a layering strategy. So if
6 you bring in local agencies, like zoning authorities,
7 well permitting authorities, as well as the state
8 environmental folks and the Environmental Protection
9 Agency to establish what is referred to as the layering
10 strategy of enforcement so that all of the players can
11 come together to the extent that they can assist a given
12 installation or given agency setting up land use
13 controls, that we try to set that framework in place.

14 So, for example, if we put a well restriction on
15 a piece of property and it's then conveyed to a
16 redevelopment authority or to some private party, that
17 both we and the local well permitting authority, let's

18 say the health department, would then work together and
19 coordinate to prohibit installation of wells that might
20 cause an exposure situation.

21 So it is just working with other agencies to
22 have that layer approach is basically what the policy
23 calls for on the BRAC side of that.

24 We feel what we're doing here with the MOA is

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1 entirely consistent in terms of the active base side.
2 We maintain a full responsibility for whatever land
3 controls are imposed on our installation and our people
4 control that. In a nutshell, is the best way I can
5 describe it.

6 MS. LIU: Is this a national policy or does it
7 apply just to the midwest?

8 MR. BEVERLY: It's a national policy, DoD wide.

9 HEARING OFFICER STERNSTEIN: Any other questions
10 for Mr. Beverly?

11 Okay. Thank you, Mr. Beverly. We appreciate
12 your testimony.

13 MR. BEVERLY: Thank you very much.

14 HEARING OFFICER STERNSTEIN: Going right down
15 the list, at this time, we'll have Richard R.
16 Butterworth, Jr., with the General Services

17 Administration, read his testimony.

18 Mr. Butterworth, will you be reading your
19 pre-filed testimony as it was submitted to the board?

20 MR. BUTTERWORTH: Yes, I will.

21 HEARING OFFICER STERNSTEIN: That's fine. Then
22 go right ahead. Let's have the court reporter swear you
23 in, though.

24 (Witness sworn.)

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1 MR. BUTTERWORTH: Good morning. My name is
2 Richard R. Butterworth, Jr. I am a Senior Assistant
3 General Counsel in the Office of General Counsel,
4 General Services Administration, GSA.

5 My testimony is provided on behalf of the GSA.

6 I have been an employee of the GSA for 13 years
7 and have been in my current role for the past 5 years.

8 In addition to other duties, I serve as Chief
9 Counsel for the Office of Property Disposal within the
10 Public Building Services GSA.

11 In that capacity, I'm responsible for policy
12 development, legislative initiatives, regulatory
13 interpretation and adoption, overall program legal
14 review and for individual real property disposal
15 actions.

16 To give some background to my testimony here

17 today, on February 16, 2001, the Illinois Environmental
18 Protection Agency filed a motion to amend its proposed
19 rulemaking filed with the board back on December 6,
20 2000, wherein certain amendments to the Part 732 LUST
21 regulations were proposed for board adoption. That
22 motion seeks to amend Subpart G, Sections 732.702
23 through 732.704, to adopt language similar in many
24 respects to that adopted by the board in its rulemaking

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1 R00-19A, which made certain amendments to the TACO rules
2 set forth in Part 742.

3 More specifically, the Agency's motion would
4 provide an exemption for federal landholding agencies
5 from the requirement to, quote, unquote, perfect all no
6 further remediation, or NFR letters, issued by the
7 Agency by recording the same in the cognizant county
8 recorders office. For any federal installation in the
9 state to be entitled to this exemption, it must enter
10 into a Memorandum of Agreement, or MOA, with the Agency,
11 which would contain certain periodic site inspections
12 and recording requirements.

13 I'm here today to testify in support of that
14 motion to amend and to explain why such relief is
15 necessary.

16 So, why federal installations need a recording
17 exemption.

18 Federal installations in Illinois need the
19 proposed recording exemption because, unlike privately
20 owned facilities, certain legal limitations exist on the
21 ability of federal agencies to deed record land use
22 restrictions on federal properties to be retained in
23 federal hands.

24 To understand the scope of federal agency real

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1 property management authority it must first be
2 recognized that those real properties, which the various
3 federal agencies occupy or otherwise control, are not,
4 quote, unquote, owned as such by them but rather by the
5 United States as sovereign. This is simply because the
6 ultimate authority to manage all federal owned land
7 rests with Congress pursuant to the property clause of
8 the United States Constitution, Article 4, Section 3.
9 And Congress has not chosen to assign ownership over
10 federal lands to any particular agency or agencies.

11 GSA derives its particular authority to manage
12 and dispose federal lands from the Federal Property and
13 Administrative Services Act of 1949, as amended, the
14 same statute under which GSA was established. See 40
15 U.S.C. Section 47, et. Seq., hereinafter property act.

16 One of the principle purposes of the property
17 act was to provide economies of scale and consolidation
18 of resources and authorities within the federal
19 government. One of those key areas of consolidation was
20 the authority to manage and dispose of real property.
21 Specifically GSA was authorized to insure the effective
22 utilization of, quote, excess, unquote, real property,
23 which is property which a landholding agency has
24 determined is no longer needed to accomplish its

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1 particular mission, and the efficient disposal of,
2 quote, unquote, surplus real property, which is excess
3 property for which there is no other federal agencies
4 need. See 40 U.S.C. Section 483 and 484. GSA is
5 authorized to provide these functions for all federal
6 executive agencies, therefore, unless an agency has
7 specific authority to dispose of real property, once a
8 landholding agency has determined that the property is
9 excess to its needs, it must turn the property over to
10 GSA for disposition.

11 The Department of Defense or DoD is in a unique
12 situation in the federal government in that it has
13 specific delegation of the same property and management
14 functions as GSA but only with regard to closing or

15 realigning base properties identified under one of the
16 various base closure and realignment or BRAC statutes
17 passed by Congress in recent years.

18 Therefore, in those limited circumstances, GSA
19 can act as both the landholding and disposal agency, DoD
20 can act as both the landholding and disposal agency, in
21 effect stepping into the shoes of GSA.

22 While it is true that Congress has chosen on
23 other occasions to grant certain specific property
24 management authorities to other federal agencies,

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1 including the DoD, the scope of those authorizations has
2 been very limited. For example, federal agencies have
3 the general authority to grant utility easement or
4 right-of-ways on retained land to parties. However, the
5 Department of Justice has previously determined that the
6 authority congress provided to agencies to execute these
7 types of instruments does not extend to other broader
8 disposals of property interests.

9 Consistent with the provisions of the property
10 act, GSA views the deed recording of specific land use
11 restrictions, that is future industrial use only
12 limitations or well installation prohibitions, as
13 constituting a disposal of a federal property interest.
14 Thus, only GSA and not individual landholding agencies

15 can impose such restrictions on active installation
16 properties.

17 GSA has chosen not to delegate the authority to
18 landholding agencies to record land use restrictions
19 that would run with the land in perpetuity for three
20 principle reasons.

21 First, we believe that it would be contrary to
22 Congressional desires as to who should hold property
23 disposal authority.

24 In the case of DoD, the fact that Congress has

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1 only chosen to expressly grant that agency full property
2 disposal authority in the context of BRAC real estate
3 actions clearly indicates that it was not their intent
4 for DoD to have those same authorities in the context of
5 managing active base properties.

6 Secondly, GSA believes that recorded land use
7 restrictions should only be agreed to in the context of
8 an actual property disposal, so that such restrictions
9 can truly reflect the risks associated with known site
10 conditions in the context of a particular contemplated
11 reuse of the property, rather than some hypothetical use
12 in the future.

13 At the time of property disposal, GSA or any

14 landholding agency with disposal authority could review
15 the institutional controls previously set in place
16 during the landholding agency's use of the property and
17 determine with the appropriate regulatory agency input
18 whether those controls should remain and become
19 permanent use restrictions or be modified in order to be
20 truly protective in the context of the pending reuse.

21 Finally, GSA strongly believes that there are
22 other effective means to impose these restrictions on
23 federal property without requiring that those
24 restrictions be recorded. An example would be the MOA

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1 concept developed by DoD and proposed to the Agency and
2 which has now been incorporated into the new TACO rules.

3 We believe it important to point out that in
4 addition to those specific site inspection and reporting
5 requirements, which the aforementioned agreements might
6 encompass, two federal laws, namely CERCLA and NEPA
7 independently impose certain free property disposal
8 related notice applications on federal landholding
9 agencies not similarly imposed on private entities. For
10 example, CERCLA Section 120H3 requires federal agencies
11 disposing of surplus properties to specifically state in
12 the form of a deed covenant that all remedial action
13 necessary to protect human health and the environment

14 with regard to identified hazardous substance activity
15 has been taken prior to conveyance. The United States
16 also commits to return the property, to correct any
17 other hazardous substance condition from prior federal
18 activity that was not previously identified.

19 Secondly, federal landholding agencies must
20 comply with the National Environmental Policy Act or
21 NEPA, in the context of making closure and excess
22 decisions.

23 Under NEPA, federal agencies are required to
24 assess potential impacts to, quote, the quality of the

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1 human environment, unquote, from the proposed federal
2 closure and disposal action, thus if any institutional
3 controls would be effected by an agency's decision to
4 close a particular facility or to declare that property
5 excess, the landholding agency must evaluate those
6 impacts and allow public comment on that evaluation.
7 GSA must also comply with NEPA before disposal actions
8 and if there is contamination that took place on
9 property GSA is disposing, we routinely notify the
10 appropriate state regulatory agency to obtain their
11 input on the need for land use restrictions on the
12 property.

13 In light of the foregoing, GSA urges the board
14 to adopt the amendments reflected in the Agency's
15 February 16, 2001, motion to amend.

16 GSA believes that these amendments will
17 adequately address the federal community's concerns
18 regarding limitations on our ability to perfect NFR
19 letters through deed recordation while establishing a
20 process for insuring federal agency maintenance with
21 Illinois Environmental Protection Agency oversight of
22 all LUST site related land use controls. Under this
23 amendment a NFR letter would be deed recorded if and
24 when any site to which they pertained was transferred by

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1 deed from the federal government to any non-federal
2 entity.

3 In conclusion, we at GSA support the agency's
4 proposal to modify the proposed LUST rules to take into
5 account the unique authorities provided to and
6 responsibilities imposed upon federal agencies'
7 management of federal real property.

8 I appreciate the opportunity the federal
9 government has had to work with the board and the Agency
10 to resolve these issues. And I thank you for the
11 opportunity to present this testimony to you today.

12 HEARING OFFICER STERNSTEIN: Okay. Mr.

13 Butterworth, do you have a copy of the your pre-filed
14 testimony there for both the board and the court
15 reporter?

16 MR. BUTTERWORTH: I do.

17 HEARING OFFICER STERNSTEIN: Any objections to
18 the admission of Mr. Butterworth's testimony?

19 Okay. Seeing none, I will admit the pre-filed
20 testimony of Richard R. Butterworth, Jr., as Exhibit 14.

21 And at this point, I'd like to open up the floor
22 for questions for Mr. Butterworth from those in the
23 audience.

24 Seeing none, does anybody from the board have

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1 any questions for Mr. Butterworth?

2 MS. LIU: Good morning, Mr. Butterworth.

3 I was wondering what other types of federal
4 agencies does GSA manage the property for?

5 MR. BUTTERWORTH: We manage property for a
6 number of federal agencies and particularly the disposal
7 of property for all of the military services, the coast
8 guard, NASDA, the Department of Energy, and many other
9 landholding agencies.

10 MS. LIU: Okay. The Federal Aviation
11 Administration?

12 MR. BUTTERWORTH: Yes.

13 There are some agencies that we generally have
14 authority to handle the disposal for, but those agencies
15 may have specific authority with regard to certain
16 properties. And so it is difficult to have a blanket
17 statement for all agencies. Some of them have very
18 narrow authority for certain types of property. But in
19 general, those landholding agencies must come to GSA for
20 disposal.

21 MS. LIU: Okay. Can you envision some of those
22 other federal agencies that might need special
23 provisions, such as DoD has proposed with their MOA
24 agreement?

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1 MR. BUTTERWORTH: I believe that the Department
2 of Energy has a section of property with regard to
3 certain energy facilities, which they have specific
4 disposal authority for, but they would not be prevented
5 from entering into the same kind of MOA agreement that
6 the DoD services have already agreed to.

7 I also know that the Department of Interior and
8 Agriculture, Departments of Interior and Agricultural,
9 with regard to national forests or other public domain
10 land have their own disposal authority, but, again, they
11 would be in the same position as the DoD services, which

12 I'm sure would be in a position to enter into the same
13 kind of MOA agreement.

14 MS. LIU: Okay. Very good. Thank you.

15 HEARING OFFICER STERNSTEIN: Does anybody else
16 have any further questions for Mr. Butterworth?

17 MS. McFAWN: Maybe I missed this, but the
18 drafter or the model of Memorandum of Agreement we have
19 is with the United States Department and it says Navy,
20 Army and Air Force.

21 Are you saying that these other governmental
22 entities such as DoD would use the same model?

23 MR. BUTTERWORTH: Yes, that would be the
24 proposal that we have. We have reviewed the MOA and we

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1 believe it is consistent not only with the DoD policy,
2 but also, although, GSA does not have a formal policy,
3 it is consistent with our informal policy as well.

4 MS. McFAWN: And were you involved when this
5 model was negotiated with Region 5 and the Illinois
6 Environmental Protection Agency?

7 MR. BUTTERWORTH: Not specifically, but I did
8 review its various permutations and have no objection to
9 it.

10 MS. McFAWN: Thank you.

11 HEARING OFFICER STERNSTEIN: Any other questions
12 for Mr. Butterworth?

13 MS. LIU: One more.

14 Although the model MOA that was presented here
15 could be used with other federal agencies, don't
16 different federal agencies have different kinds of
17 resources to implement some of the requirements that
18 they propose, as well as maybe address different levels
19 of need depending on the actual site involved?

20 MR. BUTTERWORTH: There is probably language in
21 the MOA that is unique to the DoD in the sense that DoD
22 uses base master plans and other ways of keeping track
23 of active base use that might need to be modified to
24 reflect the specific terminology or language that was

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1 used by an individual agency, but I believe the general
2 concept of the MOA is consistent with what we've
3 discussed across the federal government.

4 MS. LIU: Thank you.

5 HEARING OFFICER STERNSTEIN: Any other
6 questions?

7 Okay. Mr. Butterworth, thank you very much.

8 Before proceeding with Mr. Huff, I forgot to
9 mention at the beginning of the hearing on the table to
10 my right we also have a copy of the Agency's submission

11 of February 20, 2001. They submitted that on the eve of
12 the first hearing and it contains several of their
13 exhibits that were submitted at that hearing. I just
14 wanted to clarify that in case anybody hadn't picked
15 those up yet.

16 And I guess at this point we'll proceed with the
17 testimony of Mr. James Huff.

18 Mr. Huff, for clarification you'll be reading
19 from your pre-filed testimony as it was submitted?

20 MR. HUFF: Yes.

21 HEARING OFFICER STERNSTEIN: That's great. Go
22 right ahead whenever you're ready. Actually, let's
23 swear you in.

24 (Witness sworn.)

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1 MR. HUFF: Good morning. My name is James E.
2 Huff. I'm Vice President of Huff & Huff, Inc., an
3 environmental engineering firm located in LaGrange,
4 Illinois. I'm a licensed professional engineer and a
5 member of the Consulting Engineers Council of Illinois.
6 CECI.

7 I serve as Chairman of the Illinois
8 Environmental Protection Agency Liaison Committee for
9 the CECI. I am testifying today on behalf of the

10 Consulting Engineers Council as well as the Illinois
11 Society of Professional Engineers ISPE.

12 ISPE serves over 3,000 licensed professional
13 engineers in Illinois while CECI has 225 member
14 consulting engineering firms of which approximately
15 one-third provide environmental engineering services.

16 Many of the CECI member firms employ geologists
17 and their expertise is integral to our practice. This
18 is particularly true in the environmental arena.

19 I'm testifying today to object to certain
20 portions of the proposed amendment to the 35 Illinois
21 Administrative Code 732 on behalf of ISPE and CECI.

22 First, we commend the Illinois Environmental
23 Protection Agency and the Illinois Pollution Control
24 Board for its action in updating and amending these

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1 proposed rules.

2 We appreciate the Agency's concerns in refining
3 the process and implementing the proposed improvements
4 to the regulations.

5 Our objections to the proposed amendment relate
6 to the limited and specific issue. That issue is the
7 proposed inclusion of terminology in the regulation
8 which allows for a licensed professional geologist to
9 perform many of the same functions as licensed

10 professional engineers. We object on the ground that
11 there is no statutory authority in the enabling
12 legislation to include licensed professional geologists
13 in the rules. The only reference throughout the LUST
14 legislation is to licensed professional engineers.

15 As the board is aware, specific functions are
16 assigned in the LUST legislation to licensed
17 professional engineers. For example, the determination
18 of physical soil classifications, site evaluations,
19 survey of water supply wells and groundwater
20 investigations are all assigned to licensed professional
21 engineers.

22 The Agency is proposing that, with one
23 exception, licensed professional geologists should be
24 included for every action which licensed professional

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1 engineers currently perform.

2 Conceptually, both CECI and ISPE are open to
3 allowing qualified geologists to practice in areas where
4 they are licensed, so long as this is not achieved at
5 the exclusion of qualified engineers to properly
6 practice their profession.

7 Unfortunately, we believe the LUST legislation
8 does not grant the authority for such operations to

9 geologists and we request the board carefully examine
10 our legal argument contained in our motion to oppose
11 certain proposed amendments to the Environmental
12 Protection Agency proposal to amend 35 Illinois
13 Administrative code 732 and the accompanying memorandum
14 of law.

15 CECI and ISPE are prepared to work closely with
16 the geologists to develop the proper statutory basis to
17 allow the licensed professional geologist to certify
18 those items contained in the Agency's proposal.

19 The Agency's own testimony raises questions of
20 the validity of including licensed professional
21 geologists. The filed testimony of Mr. Doug Clay
22 clearly indicates that Title 16 of the Environmental
23 Protection Agency, the LUST provisions, was not modified
24 or amended to include certifications by licensed

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1 professional geologists.

2 His testimony merely reflects the Agency's
3 belief that the board should adopt these changes because
4 the Professional Geologists Licensing Act was adopted
5 subsequent to the LUST provision. However, that
6 testimony fails to indicate that the Professional
7 Geologists Licensing Act was passed prior to the most
8 recent amendments to the LUST provision in 1996. The

9 presumption, therefore, exists that if the general
10 assembly intended to include geologists in the LUST
11 provisions, they clearly could have done so in the
12 subsequent LUST amendments.

13 In the filed testimony of Mr. Ron Dye of the
14 Advisory Board of the Illinois Chapter of the American
15 Institute of Professional Geologists. Mr. Dye asserts
16 the Agency should also insert licensed professional
17 geologists in proposed Section 732.409A2 relating to
18 certification of corrective action completion reports.
19 The American Institute of Professional Geologists
20 acknowledges that certain portions of a corrective
21 action completion report are outside the purview and
22 practice of professional geologists. Geologists are not
23 trained as design professionals, though they provide
24 valuable scientific services.

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1 It seems inconsistent to us that the Agency can
2 pick and choose the application of where certification
3 by a geologist are appropriate, especially in light of
4 the fact that there are no enumerated statutory
5 standards to govern the Agency in its selection.

6 If the Agency project manager inappropriately
7 accepts a licensed professional geologist, the LPG,

8 certification that entails engineering, what are the
9 potential consequences? Could the no further
10 remediation letter become invalidated because the report
11 was certified inappropriately? Who would make such a
12 decision on the appropriateness of an LPG certification?

13 Our position remains that qualified licensed
14 professional engineers are the only professionals
15 qualified to certify corrective action completion
16 reports and allowing LPG to certify some of these
17 reports leads to far more complications and potential
18 problems.

19 In this regard, the CECI and ISPE are in full
20 agreement with the Agency's draft language in Part
21 732.409A2.

22 In summary, many of CECI member firms employ
23 geologists, and both CECI and ISPE support developing
24 the framework to allow qualified professional geologists

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1 to certify in those areas recognized by the statutes.
2 ISPE and CECI are prepared to work closely with the
3 geologists to develop this proper statutory framework to
4 allow LPG to certify those items contained in the
5 Agency's proposal, however, this legislative framework
6 is not in place and, consequently, ISPE and CECI objects
7 to the licensed professional geologist inclusion in the

8 proposed 732 changes.

9 I thank the board for this opportunity and would
10 be pleased to answer any questions you may have.

11 HEARING OFFICER STERNSTEIN: Thank you, Mr.
12 Huff.

13 Are there any questions from the audience for
14 Mr. Huff?

15 Okay. Seeing none right now, does anybody with
16 the board have any questions for Mr. Huff? Ms. Liu.

17 MS. LIU: Good morning, Mr. Huff.

18 In your practice, what types of roles do
19 professional geologists currently fulfill?

20 MR. HUFF: In the environmental arena?

21 MS. LIU: Yes.

22 MR. HUFF: A lot of times they do a lot of field
23 work, soil classification work, oftentimes accompanying
24 a drill rig, engineers also practice that same area.

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1 MS. LIU: Thank you.

2 MS. McFAWN: Are there any particular situations
3 when mediating underground storage tanks that you would
4 call on a geologist, either one you employ by Huff &
5 Huff or an outsider?

6 MR. HUFF: Geologists specifically in my firm --

7 MS. McFAWN: Yes.

8 MR. HUFF: -- you're talking about?

9 MS. McFAWN: Sure.

10 MR. HUFF: Currently, we do not have any
11 geologists on our staff. We have some complex
12 geological sites where we have a contract geologist that
13 assists us in some of the drilling activities on complex
14 sites.

15 MS. McFAWN: I'm not that familiar with the
16 profession. What would constitute a complex site?

17 MR. HUFF: Where you have multiple groundwater
18 zones, trying to determine whether you have a Class I or
19 Class II groundwater confining layer of bedrock,
20 oftentimes, complex sites where you encounter bedrock in
21 groundwaters in the bedrock.

22 MS. McFAWN: And so you would be talking to the
23 geologists and seeking his or her expertise for
24 identifying peculiarities of the strata?

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1 MR. HUFF: Proper placement of the well screens
2 and the geology would be a perfect example of that.

3 MS. LIU: Do the professional geologists you
4 work with typically employ their design skills or are
5 they more task oriented towards gathering and
6 interpreting data?

7 MR. HUFF: Clearly the latter. They do not
8 practice in the design arena.

9 MS. McFAWN: Would they ever review a design to
10 see if there is a flaw?

11 MR. HUFF: Well, I can't answer for the entire
12 profession. Certainly not in my firm.

13 HEARING OFFICER STERNSTEIN: Any other questions
14 for Mr. Huff?

15 Mr. Huff, before I let you go, let's have you
16 submit your pre-filed testimony as an exhibit. Just
17 need one copy for myself and one for the court reporter.

18 MR. HUFF: Let me see if I can find them over
19 there. I was having a little trouble.

20 HEARING OFFICER STERNSTEIN: I've got an extra
21 copy. Actually, I have two. If you just want to -- Mr.
22 Huff, just come up here and take a look at these and
23 make sure that that -- those reflect what you've
24 testified to today.

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1 MR. HUFF: Yes, they are.

2 HEARING OFFICER STERNSTEIN: Is there any
3 objection to the admission of Mr. Huff's testimony?

4 Okay. Seeing none, I will then admit the
5 testimony of James Huff, professional engineer, in

6 opposition to certain proposed amendments of the
7 Environmental Protection Agency proposal to amend 35
8 Illinois Administrative Code 732. This testimony will
9 be admitted as Exhibit 15.

10 Next, Mr. Bonczyk, Bruce Bonczyk with the
11 Illinois Society of Professional Engineers and
12 Consulting Engineers Council of Illinois. We'll have
13 the court reporter swear you in and you may begin.

14 (Witness sworn.)

15 HEARING OFFICER STERNSTEIN: You'll be reading
16 from pre-filed testimony as it was submitted?

17 MR. BONCZYK: Seems to be the standard.

18 My name is Bruce Bonczyk. I'm an attorney with
19 Bruce S. Bonczyk, Limited. I represent the Illinois
20 Society of Professional Engineers, ISPE, and the
21 Consulting Engineers Council of Illinois, CECI.

22 I'm also a licensed professional engineer in the
23 state of Illinois.

24 I'm testifying today to object to certain

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1 portions of the proposed amendments to 35 Illinois
2 Administrative Code 732.

3 On behalf of ISPE and CECI, I filed with the
4 board a motion to oppose certain proposed amendments of
5 the Environmental Protection Agency's proposal to amend

6 35 Illinois Administrative Code 732, and a companion
7 memorandum of law in support of said motion.

8 Our objections to the proposed amendments relate
9 to limited and specific issue. We object to the
10 proposed inclusion of terminology in the regulations,
11 which allow for licensed professional geologists to
12 perform the same function as licensed professional
13 engineers.

14 An administrative agency has only such authority
15 as is conferred by express provisions of law or is found
16 by fair implication to the incident to the expressed
17 authority concurred by such legislation. We object on
18 the ground that there is no statutory authority in the
19 enabling legislation to include licensed professional
20 geologist in the proposed rules.

21 On its face the LUST legislation only refers to
22 licensed professional engineers.

23 Further, on examination of the legislation
24 provides no other guidelines or standards upon which the

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1 Agency or board may conclude that licensed professional
2 geologists are equally charged by the general assembly
3 to provide the enumerated services in the statute, thus
4 rendering proposed promulgation of such rules to include

5 licensed geologists to likely be invalid. We believe
6 that if the board is to adopt this proposed change, the
7 rules would be invalid as without the statutory basis.

8 The express enacting legislation and amendatory
9 legislation for the LUST program is silent as to the
10 inclusion of licensed professional geologists.

11 This is true even though the Professional
12 Geologists Licensing Act, Public Act 89-366 was enacted
13 into law prior to the amendatory legislation affecting
14 the LUST program, Public Acts 89-428 and 89-457. The
15 presumption exists that the general assembly in
16 formulating subsequent changes to the LUST legislation
17 was aware of the Licensed Professional Geologists Act
18 chose not to include said professionals into the LUST
19 amendments.

20 Beyond legal issues there are practical
21 problems. The legislation embodies a provision, which
22 creates a presumption against liability for the
23 professional engineer's certifications pursuant to the
24 statute. And that is contained in Section 5/57-10. As

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1 proposed by this rule, the inclusion of licensed
2 professional geologists in the proposed rule Section
3 732.402 will disrupt the general assembly scheme for
4 presumption against liability as this specific law

5 contains no reference to a licensed professional
6 geologist, thereby detrimentally affecting the viability
7 of the certification and the ability to ensure
8 protection to owners, operators, et cetera.

9 For the above reasons, ISPE and CECI also
10 suggest to the Agency and to the board, that the prior
11 testimony of Mr. Doug Clay, Mr. Ron Dye and Mr. Kenneth
12 Liss promoting the inclusion of the terminology for
13 licensed professional geologists is without merit and
14 should be afforded no weight by the board in considering
15 these amendments.

16 It is my understanding of both ISPE and CECI are
17 willing to work with the various associations
18 representing geologists in formulating a legislative
19 response to this situation.

20 While there may be merit to include certain
21 functions performed by licensed professional geologists
22 into the LUST provision and subsequent rulemaking, we
23 believe this should be confirmed through legislation
24 providing a substantive basis upon which the Agency and

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1 the board can rely without fear of invalidity in the
2 future.

3 I thank the board for the opportunity to testify

4 and I will respond to any questions.

5 HEARING OFFICER STERNSTEIN: Thanks, Mr.

6 Bonczyk. Before we start with the questions, would you
7 like to admit your testimony as an exhibit?

8 MR. BONCZYK: Yes, apparently I don't have any
9 extra copies either.

10 HEARING OFFICER STERNSTEIN: Is there any
11 objection to the admission of Mr. Bonczyk's testimony?

12 Mr. Bonczyk, since these are our copies, I just
13 ask that you take a look at those and let us know that
14 those are an accurate representation of your testimony.

15 Mr. Bonczyk has just indicated that the two
16 copies that I have are an accurate reflection of the
17 testimony he just provided. Seeing no objections from
18 the audience, I will admit the testimony of Bruce S.
19 Bonczyk in opposition to certain proposed amendments of
20 the Environmental Protection Agency's proposal to amend
21 35 Illinois Administrative Code 732 as Exhibit 16.

22 At this time I'll ask if anybody in the audience
23 has any questions of Mr. Bonczyk.

24 Seeing none, do the members of the board or the

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1 board staff have any questions for Mr. Bonczyk?

2 MR. MELAS: Mr. Bonczyk, in your testimony you
3 used the phrase that the LUST legislation refers to

4 licensed professional engineers. Does that mean that in
5 that legislation it is specifically addressed, term,
6 licensed professional engineers, and assigns certain
7 responsibilities and duties that they may or may not
8 perform?

9 MR. BONCZYK: That is correct. In both the
10 definitional terminology where they talk about a
11 licensed professional engineer and the act itself, and
12 then also in the operations that they're to perform,
13 such as this no remediation letter and some other
14 activities that they are to perform.

15 There is a section in there, in particular, in
16 Section 5/57.2, 457 ILCS, is the definition of licensed
17 professional engineers contained in the actual act
18 itself. And then I believe it is 5.57, and 5.57 is
19 another area underneath the leaking underground storage
20 tanks themselves where they talk about soil
21 classifications and some other operations of licensed
22 professional engineers are directly referenced in that
23 statute.

24 MR. MELAS: There was also a comment that you

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1 made with respect to presumption of liability, that does
2 extend some protection to the LPE. Does that exclude

3 possibly that same protection to LPG?

4 MR. BONCZYK: Well, I believe the way the
5 statute itself is actually written is application
6 extends, presumption against liability to the owners of
7 the property, and subsequent owners, after the no
8 remediation letter is entered, but in the statute itself
9 the reference is made that licensed professional
10 engineers are the parties who are supposed to assign
11 that letter and our suggestion is that because there is
12 no inclusion of licensed professional geologists, that
13 if that was challenged at a later date by a court
14 activity, should the board accept licensed professional
15 geologists, there would be no statutory basis to render
16 that indemnification.

17 MR. MELAS: I have no other questions.

18 HEARING OFFICER STERNSTEIN: Anybody else from
19 the board have any questions for Mr. Bonczyk?

20 MS. LIU: Good morning, Mr. Bonczyk.

21 When you spoke of the presumption of liability,
22 does that alleviate any liability that a professional
23 engineer could hold personally in something were it to
24 be found inaccurate and that no further remediation

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1 letter?

2 MR. BONCZYK: I don't believe that is the way

3 the statute is written. Obviously, professional
4 engineers is a licensed professional and I would assume
5 under a lot of the contracts that are in place would be
6 required to carry professional liability policy as most
7 of them do. As that particular section of statute I
8 believe addresses third parties that are. . .And
9 difficulties on the project and not particularly to the
10 engineer themselves. What I believe the distinction is
11 is that when he writes his letter, he creates his
12 presumption against liability for other parties in the
13 future. Obviously, if there is an error or an omission
14 at this point in time, there would be recovery to the
15 professional engineers as a secondary source, I believe.

16 MS. LIU: Could a PE be liable for any costs
17 incurred because of that inaccuracy?

18 MR. BONCZYK: I would -- you know, the typical
19 lawyer answer, not knowing the entire hypothetical and
20 knowing what the damage is, I don't think I could answer
21 that, but I assume that if there would be damages, then
22 there would a third-party action against that
23 professional at some point.

24 MR. MELAS: The insurance would respond.

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1 MR. BONCZYK: Most likely, yes.

2 MR. MELAS: Would a geologist also have
3 insurance policies of that nature available to them?

4 MR. BONCZYK: That I don't know because I didn't
5 investigate that as representing the engineers.

6 MR. MELAS: Okay.

7 MS. LIU: Could a PG be held personally liable
8 for something like that?

9 MR. BONCZYK: Oh, sure. I mean, it's -- you
10 know, I would assume that any error or omission that
11 occurs on a project or as they're going through
12 something on their recommendations or the report,
13 anything that falls outside of the parameters of the
14 standard of care would be chargeable against either the
15 individual, if that is what it was, or the coverage,
16 and, hopefully, all those involved have an insurance
17 policy or PL policy.

18 MS. LIU: Could a PE or professional geologist
19 lose their license because of this?

20 MR. BONCZYK: I would assume -- I mean, I --
21 you'd have to go back, I think, again, frame the
22 scenario a little better about what you're looking at
23 but, you know, if they acted outside of the scope of the
24 licensing statutes, you know, they deliver a standard of

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1 care in both the engineering statute as well as the

2 geologist statute, if they violated those and gave cause
3 of action against the Department of Professional
4 Regulation or third party could raise that issue, then
5 I -- that could occur on either side.

6 MS. LIU: The general assembly didn't
7 specifically give statutory authority to professional
8 geologists for the LUST provisions?

9 MR. BONCZYK: Right. It is clear from the act
10 itself that there is no reference to licensed
11 professional geologists. I believe in the -- the
12 proposed rules, if you look at the proposed rules that
13 the Agency brought to you, they make reference to
14 licensed professional geologists, but they don't give a
15 statutory cite like they do for licensed professional
16 engineers. It's already contained in the rules. So the
17 presumption was -- is that, you know, maybe this is a
18 practical application of working that way, but what
19 we're suggesting to the board is to avoid a
20 conglomeration in the future for the board should they
21 adopt this rule, that by looking at this now, you may
22 avoid problems later if the geologists are included in
23 the statute. I'm sure the thousands of lawyers out
24 there at some point in time somebody would look at that

1 and say, you know, there is an unfounded basis, there is
2 no statutory authority, the rule went outside or the
3 board went outside their authority with the rule and,
4 even though they have geologists in here, certain things
5 that you may include may invalidate at a later date.
6 We're just suggesting to the board and to the
7 professional geologists that we're willing to work
8 together to try and clear up that problem, let's get a
9 statutory basis to define the interrelationships of the
10 party and then come back with proposed rulemaking that
11 would cover these things.

12 MS. LIU: So without that statutory authority,
13 are professional geologists not afforded the same
14 protection presumption against liability that
15 professional engineers are?

16 MR. BONCZYK: I think what happens to the
17 geologists is they -- as the current situation works
18 right now, is that geologists can be retained by the
19 professional engineers to do certain scope of services.
20 And within the scope of services and within their
21 licensing act, those scope of services then fall in the
22 purview of licensed professional engineers. And that is
23 what is in this act and that is how it would proceed.
24 It's kind of like subcontracting, I guess, in a specific

1 way, but until the -- you know, there is some
2 recognition, I believe, and that the general assembly or
3 that there is a statutory basis that includes licensed
4 professional geologists in the terminology somehow
5 without that it is our position that, you know, the
6 board is outside the authority to try to promulgate
7 these type of rules.

8 And, again, I think our point is that we'd like
9 to be able to see if we can clarify this now so that,
10 you know, as legislation moves forward or this general
11 assembly or the next one be put in place, geologists and
12 the engineers can understand what scope of services
13 would be laid out, and then come back to the board with
14 a rulemaking that they would have no objections and give
15 you a good solid basis for any further activities.

16 HEARING OFFICER STERNSTEIN: Anything further
17 for Mr. Bonczyk?

18 MS. McFAWN: I have a couple of questions.

19 You were talking about the ability or the act's
20 reference to soil classification, physical soil
21 classification. Would a PE ever hire a geologist to
22 assist the project on a physical soil classification?

23 MR. BONCZYK: I don't know that answer from my
24 personal experience. My presumption would be is that

1 they would on occasion.

2 MS. McFAWN: That would be in the expertise --

3 MR. BONCZYK: Correct.

4 MS. McFAWN: -- of a geologist?

5 MR. BONCZYK: Correct.

6 MS. McFAWN: Let's just say an engineer did that
7 and would the engineer's ultimate certification of the
8 site then be valid and you -- as you put it, given the
9 presumption against liability?

10 MR. BONCZYK: Well, I believe, yes, if the
11 professional engineer would look at the overall picture,
12 assuming that that is just a component of the overall
13 letter that would be issued, and there is design
14 considerations, there are geological considerations. I
15 myself, when I went to engineering school, took a class
16 in soil classification, did that render me to be a
17 geologist, I don't believe I would make that
18 presumption, because, you know, it's like being a
19 contract lawyer from taking one contracts class, you
20 know, until you practice in that area and become
21 experienced and you have the -- and in Illinois, at
22 least, would have a licensing provision that you would
23 have to pass a test to be qualified under those
24 circumstances. So I think the overall liability lies

1 with the engineer based on statute as it stands right
2 now, but he is the conductor, I guess you would say, of
3 the components that bring all of this together. He is
4 not just certifying an issue that has some portion of
5 geology, but he is relying upon the geologists component
6 to do an overall design or remediation of this site.

7 MS. McFAWN: You said you took like, for
8 example, in your case, you took a class in soil
9 classification. At the last hearing we were talking
10 about the licensing of PE. And I was wondering, what
11 does it take to be licensed as a professional engineer
12 in geology?

13 I'm not sure if I'm phrasing that exactly
14 correctly in your terminology but I was led to believe
15 that professional engineers get certain types of
16 licenses one might include in the study of geology.

17 MR. BONCZYK: It's my understanding in the
18 current law that you get your license as a licensed
19 professional engineer, and you practice within that
20 practice that you're suited for.

21 MS. McFAWN: Do you have to take a special test
22 to --

23 MR. BONCZYK: Not that I know of, for geology,
24 or anything, as I understand it, there is no

1 subcategories underneath the Licensed Professional
2 Engineers Act. There is -- you know, the test that I
3 remember taking, granted this was like 20 something
4 years ago, was a broad test that included everything
5 like questions about mining to civil engineering to
6 survey. And those things were all encompassed into an
7 overall exam. So you had to have those -- to pass that
8 license, you had to have a broad spectrum background in
9 engineering in order to meet the requirements.

10 Obviously, most people, as they move forward in
11 life, you know, focus in on certain particular areas of
12 expertise, like Mr. Huff in environmental. I personally
13 myself, and, again, I don't know the current testing
14 because I just renewed my license, thank God, and so I
15 don't have to deal with the intricacies of what you're
16 talking about but it is my understanding that there is
17 no classification below that, that the industry itself
18 that you go into is what you work in and you may develop
19 a special expertise in there. Just like lawyers don't
20 advertise that they're certified in certain areas,
21 neither do engineers or licensed professional engineers.

22 MS. McFAWN: Thank you for clarifying that
23 point. I didn't realize that.

24 MS. LIU: Actually, there are different tests, I

1 think, such as electrical engineering test or mechanical
2 engineers test, civil engineering test?

3 MR. BONCZYK: Well, it has been a long time for
4 me.

5 MS. LIU: As you said, there is one license for
6 professional engineer, it doesn't state a type of
7 professional engineer, but you are expected --

8 MR. BONCZYK: That's exactly right, that's what
9 I get on mine, just says licensed professional engineer.

10 HEARING OFFICER STERNSTEIN: Any further
11 questions for Mr. Bonczyk?

12 Okay. Seeing none, thank you very much, Mr.
13 Bonczyk.

14 Let's go ahead and proceed with Mr. Piotrowski's
15 testimony.

16 Before he begins I'll just say, if there is no
17 objections, I'll approve the motion to file instanter
18 just to take care of that, and with that out of the way,
19 I believe that we can go ahead with Mr. Piotrowski's
20 testimony. You'll be reading your testimony as it
21 was --

22 MR. PIOTROWSKI: No, I'm going to give just a
23 summary .

24 HEARING OFFICER STERNSTEIN: That would be fine.

1 MR. PIOTROWSKI: Unless you want me to read it.

2 MR. RIESER: Mr. Hearing Officer, David Rieser
3 on behalf of the Illinois Petroleum Council. We have
4 two copies of Mr. Piotrowski's testimony be entered as
5 exhibits at the conclusion of his testimony. He is
6 going to summarize his testimony briefly rather than
7 read it directly and then be available to answer
8 questions at the conclusion of his testimony. If we
9 could have his testimony entered as an exhibit, if there
10 are no objections, that would be great.

11 HEARING OFFICER STERNSTEIN: Mr. Piotrowski,
12 let's have the court reporter swear you in.

13 (Witness sworn.)

14 MR. PIOTROWSKI: Good morning. I think it is
15 still morning. My name is David Piotrowski. I am an
16 Environmental Business Manager with BP Amoco. I've
17 worked in and out of Illinois for the past 14 years,
18 either as a consultant or as an environmental manager
19 with BP or Amoco.

20 First, I guess, I'd like to thank you for the
21 opportunity to provide this testimony on behalf of the
22 Illinois Petroleum Council. And I'd like to say that
23 the IPC is in general agreement with the Illinois
24 Environmental Protection Agency's proposed amendment to

1 Part 732 LUST regulations, specifically, 732.404C and
2 732.411, regarding the issuance of no further
3 remediation in lieu of addressing all potential off-site
4 contamination that would result from the inability to
5 gain access to an adjacent property owner, however, we
6 believe that certain modifications to the proposed
7 amendments should be made.

8 I guess I'd like to talk a little bit about my
9 experience base and BP Amoco's experience, because I
10 think it brings to light some important information.
11 We're the largest marketer in Illinois. That also means
12 we have the greatest number of LUST incidents in
13 Illinois. And our experience tells us that on average
14 there are two to three adjacent property owners for
15 every LUST incident that we have. So that equates to,
16 for us, over a thousand third parties that we deal with
17 in regard to assessing and bringing to closure our
18 incidents.

19 That being said, I think the important thing to
20 remember is that every site is different. Conditions
21 relating to every third party that we deal with is
22 different and it's important that an incident owner and
23 operator be allowed to work with its neighbors in a
24 flexible way.

1 And, you know, we see property owners that range
2 from small residences, and some folks don't even speak
3 English, all the way to large corporations. And so in
4 our efforts to try to gain access, it's important that
5 we're able to provide these folks with accurate and
6 complete information so that they can make an educated
7 decision.

8 I guess that being said, in our view there are
9 two basic issues on the table.

10 The first is the content of the letter that we
11 would be sending out to adjacent property owners, our
12 neighbors. We believe that the letter that is proposed
13 by the Illinois Environmental Protection Agency should
14 be modified to reflect the need for that flexibility
15 when dealing with adjacent property owners.

16 Also, we propose that the contents of that
17 letter be -- or what's proposed be modified to remove
18 certain, as we see it, inaccuracies, either legal or
19 technically, so that we can move forward with gaining
20 access.

21 I think there are a couple of issues that I
22 guess I would raise just for example purposes and you
23 can read the rest.

24 The first is when we work with our neighbors, we

1 don't want to scare them. We want to educate them so
2 they can make appropriate decisions. And one of the
3 proposed items of information that is recommended for
4 submittal to a neighbor indicates that threats to human
5 health and environment may exists if they don't enter
6 into an agreement with us to allow us to investigate,
7 and that their property value may be diminished. I
8 don't think that is necessarily accurate nor -- and it's
9 also speculative. We really don't know if their
10 property value is diminishing.

11 And the other point there is -- I look at it
12 from a practical perspective, if I'm a property owner
13 and someone comes to me and says, hey, your health may
14 be in danger here, quite frankly, our corporate policy
15 is if there is any chance that somebody's health is in
16 danger, we get on that property one way or another. And
17 so at this point, I don't necessarily think that that is
18 an accurate statement and it's speculative, too, on a
19 broad basis to require that in every letter that goes
20 out to an adjacent property owner. If that condition
21 exists, we certainly want to inform those people that it
22 exists, but if it doesn't, I don't want to scare them
23 either.

24 Another issue that is raised in regard to

1 communicating to our neighbors is requirement for the
2 owner, operator to return the property to its original
3 condition. By saying that, we're limiting the
4 third-party property owner in regard to what they may
5 require us to do if we do find something on their
6 property. If they ask for an engineer barrier or some
7 form of corrective action, it certainly would require us
8 to not leave that property -- or repair that property to
9 its original condition but to change something. And so
10 it certainly is something that we need to consider, but
11 I don't think it is something that we want to have as a
12 limiting factor in how we work with these folks.

13 There are other examples and other changes that
14 we propose but I won't go into those.

15 What the IPC is proposing is that the
16 modifications that we include, first and foremost, still
17 require the owner, operator to be responsible, whether
18 we have access or not. It allows more flexibility in
19 our mind in dealing with adjacent property owners and
20 trying to gain access, which is the ultimate goal here.
21 It still provides a baseline for the Illinois
22 Environmental Protection Agency to determine whether or
23 not we have done our diligence in trying to gain access
24 and it provides protection to the property owners.

1 The second issue that we have, and I'll try to
2 get through this quickly, is the definition of what
3 constitutes best efforts for obtaining access and also
4 how the Illinois Environmental Protection Agency would
5 determine whether or not to issue a no further
6 remediation letter based on whether or not there is a
7 threat to the human health or the environment in regard
8 to that third-party property. 732.411D, 1 through 9, the
9 proposed amendment lists a series of factors that
10 describe in our mind general site conditions but don't
11 really establish criteria for determining whether or not
12 we've done our best job or best effort in trying to gain
13 access. I think what we would propose is that the issue
14 of whether contamination poses an imminent threat to
15 that third party or if the environment be considered and
16 would suggest that the following be considered in
17 determining whether or not to issue an NFR and that
18 would be if free product is present on that adjacent
19 property. If there is a fire, explosion, vapor hazards
20 present, if there were potable wells, surface water, if
21 that property was within the setback of potable wells,
22 or if there is a regulated recharge area.

23 We think those are actual criteria that would be

24 used to determine whether or not an NFR should be

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1 issued.

2 Finally, I guess all these things being said,
3 the bottom line, I think, in my mind is that the owner,
4 operator, whether we gain access or not, is still
5 responsible for that incident and for insuring that the
6 contamination does not effect human health or the
7 environment.

8 So I'd be happy to answer any questions.

9 HEARING OFFICER STERNSTEIN: Okay. At this
10 point, Mr. Rieser, would you like to have Mr.
11 Piotrowski's testimony admitted?

12 MR. RIESER: I would, and I'd like to note for
13 the record that his testimony includes his curriculum
14 vitae as well as a red line copy of the proposed changes
15 that the IPC proposes and a clean copy. And all of
16 those things are attached and should be included as
17 Exhibit 17 or what would be Exhibit 17.

18 HEARING OFFICER STERNSTEIN: Okay. Are there
19 any objections to the admission of Mr. Piotrowski's
20 testimony? Seeing none, I'll admit the testimony of Mr.
21 Piotrowski on behalf of the Illinois Petroleum Council
22 as Exhibit 17.

23 Before we begin with questioning, we've been

24 going at this for about 90 minutes now. I'd like to

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1 propose that we take a 10 minute break, go off the
2 record and come back on the record at 11:40.

3 (Off the record.)

4 HEARING OFFICER STERNSTEIN: Okay. We're back
5 on the record.

6 When we had gone off the record, Mr. Piotrowski
7 had just finished summarizing his pre-filed testimony
8 and at this point, I'll open up questions to Mr.
9 Piotrowski, and Mr. Rieser as well, from the audience.

10 Seeing none at this time, I'll ask if any of the
11 board members have any questions?

12 MR. MELAS: Yes.

13 Mr. Piotrowski, specifically referring to
14 733.411B, page 2 of your. . .The former number 6 that
15 you've scratched out, is that one of those sentences
16 that you are concerned is going to unduly frighten
17 property owners out? I'll read it. It's only two
18 lines, that threats to human health and the environment
19 and diminished property value may result from failure to
20 remediate contamination from the release.

21 The sentence itself is true. You think it is
22 just the verbiage or the -- what is your specific

23 objection?

24 MR. PIOTROWSKI: I think that -- one, I haven't

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1 gotten access to that adjacent property owner so to
2 speculate that their human health or the health of the
3 people on that property could be in danger or the
4 value of the property could be diminished, I don't think
5 is entirely accurate.

6 The other issue is, I think, when we're going
7 and I'm working with an adjacent property owner to gain
8 access, I'm trying to educate that person or the folks
9 that are working for me are trying to educate that
10 property owner so that they can make a knowledgeable
11 decision. And I think part of that process is submittal
12 of a letter describing why we would like to have access.
13 And we certainly provide all of the information that we
14 have on a site to let those folks know so that they can
15 make a knowledgeable decision. We don't hold back. But
16 I think that putting language in a letter that is
17 language such as this, if it's not the case, if that
18 health is -- their health is not threatened or we don't
19 know if it is, I don't believe that is a good way to
20 approach folks. I think it would scare them. I mean,
21 my goal is to ultimately get this assessment done and
22 find out what the complete extent of the problem is.

23 I can tell you that our corporate policy, this
24 is not the Illinois Petroleum Council, but our corporate

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1 policy is if there is truly a threat to human health in
2 the environment, we're there, one way or another.
3 Well -- and we listed what we believe are appropriate
4 criteria for determining whether or not that is the
5 case. I'm not sure if I answered your question. I kind
6 of went around.

7 MR. MELAS: Your purpose isn't to educate them,
8 you know, it's to get access?

9 MR. PIOTROWSKI: You're right, but in gaining
10 access --

11 MR. MELAS: Maybe sometimes you may have to
12 scare somebody in order for them to respond.

13 MR. PIOTROWSKI: And you know what, I think if
14 that is the case, you know, we might do that, but to
15 include this in every letter that goes out to every
16 property owner, would unduly alarm many folks, I think,
17 and, you know, for those folks to make a decision, and I
18 try to put myself into their shoes when I'm out there
19 working with folks, they need to understand what they're
20 agreeing to do, and so, you know, there is -- you know,
21 we do need to get access, but they need to understand

22 why they're granting this access.

23 MR. MELAS: I understand. The other --
24 incidently, just below that, the former 7, you're

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1 eliminating -- that is an obvious thing, you're
2 eliminating the insurance provision.

3 MR. PIOTROWSKI: No, we actually --

4 MR. MELAS: Did you scratch that out?

5 MR. PIOTROWSKI: No, we reworded it, and -- in
6 item 3, if you go back a page, that in performing the
7 requested investigation the owner, operator will work so
8 as to minimize any disruption on the property, will
9 maintain or its consultant will maintain appropriate
10 insurance and will repair any damage caused by its
11 investigation, I think we reworded it more or less.

12 HEARING OFFICER STERNSTEIN: Go ahead, Board
13 Member Kezelis.

14 MS. KEZELIS: Do you mean BP Amoco typically
15 initiates your contact with adjacent landowners through
16 letters?

17 MR. PIOTROWSKI: We actually have a fairly
18 aggressive program, after we identify the property
19 owner, we try to attempt to contact them by phone and
20 then send a letter as well and then we follow-up
21 submittal of that letter with actually weekly phone

22 calls until we gain access, and we actually employ --
23 our consultant initiates this. We also have a public
24 affairs company that, you know, their expertise is

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1 working with folks, and if folks are unwilling to
2 respond to us, we sometimes even make visits to show up
3 at their door because we do get our letters returned
4 certified mail not even accepted in some cases and so we
5 try lots of things to get access.

6 MS. KEZELIS: Do you try certified mail?

7 MR. PIOTROWSKI: Oh, we do. Our letters are all
8 submitted certified mail, either that or federal
9 express, return receipt.

10 MS. KEZELIS: I recognize your observation that
11 in some instances people may be concerned about what the
12 content of a certified mail letter would be, and are
13 leery of accepting it.

14 MR. PIOTROWSKI: Right.

15 MS. KEZELIS: Something by certified mail.

16 Has that been your experience?

17 MR. PIOTROWSKI: I can tell you that really, and
18 this is just kind of a ballpark, but on about 90 percent
19 of our cases we're able to gain access, generally most
20 people want to know. What we do find, though, in many

21 of our service stations and in the industry, are located
22 in commercial areas, and so there are adjacent property
23 owners or other petroleum retailers that don't want you
24 on their property for their concerns about maybe us

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1 finding something that is not ours but is their's. And
2 so on about 10 percent of the cases we get folks that
3 just don't want us on their property, are unresponsive
4 and that is where we kind of ramp things up and, you
5 know, we have attorneys that try to get access for us,
6 if things get turned over to attorneys, and, we have,
7 like I said, this public affairs company that sometimes
8 goes door to door for us, and then we use our
9 consultant, kind of a traditional -- pretty aggressive.
10 I mean, we make weekly phone calls.

11 MS. KEZELIS: Thank you.

12 MS. McFAWN: Has it been your experience ever
13 that the Agency has issued NFR letters where you were
14 denied access?

15 MR. PIOTROWSKI: I'll tell you I've been back in
16 Illinois for the last two years, and I haven't seen that
17 much in the last two years, no.

18 MS. McFAWN: You mean you haven't seen it that
19 you've been denied access?

20 MR. PIOTROWSKI: No, I haven't seen that an NFR

21 has been issued without having that property fully
22 assessed.

23 MS. McFAWN: Is that because of the state of the
24 rules or just that they have the -- the sites haven't

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1 been -- reached the point where the NFR -- everything
2 has been done that could possibly have been done for the
3 NFR?

4 MR. PIOTROWSKI: Right. I can tell you that we
5 do have sites where -- actually, I have one where an
6 access issue has been opened since 1997 and haven't been
7 able to gain access. I completed assessment on all of
8 the other properties around and have gotten whatever
9 institutional controls are necessary, with the exception
10 of this one particular property and no, we have not been
11 able to get an NFR on that site.

12 MS. McFAWN: And do you believe that the reason
13 is just because you can't bring closure to that part?

14 MR. PIOTROWSKI: Correct. Yes.

15 MS. McFAWN: If you were to apply the language
16 you propose at Subparagraph E of Section 732.411, where
17 the Agency instructed to evaluate the factors that. . .
18 Imminent threat. . .Do you think you could get --

19 MR. PIOTROWSKI: On that particular site, yes.

20 MS. McFAWN: -- NFR.

21 Without gaining access, can you make a
22 demonstration that there is no free product?

23 MR. PIOTROWSKI: I think on a -- if we look at
24 sites on a site specific basis, our assessments are

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1 fairly complete and if we assess up to the edge of that
2 property and don't show free product anywhere on our
3 site, I think that our consultants would be comfortable
4 in staying that the likelihood that free product is not
5 present on adjacent property is pretty good.

6 MS. McFAWN: So when you tell me that example
7 you mean that free product was never found on your --

8 MR. PIOTROWSKI: Correct.

9 MS. McFAWN: When has the Petroleum Council
10 discussed these proposed changes at all with the
11 Illinois Environmental Protection Agency?

12 MR. RIESER: We discussed a prior draft and
13 briefly discussed this draft prior to the hearing.

14 MS. McFAWN: Can I ask you about the feedback
15 and then I'll ask the Agency as well?

16 MR. RIESER: Feedback was -- well, I can't speak
17 for the Agency but -- referred to me was that they would
18 respond to comments, but you might want to ask them
19 direct.

20 MS. McFAWN: Okay. Your proposal is two part.
21 One is having to do with the notice letter. I assume
22 both are critical, but it seems to me the one that
23 you're experiencing -- the one you spoke to most was the
24 elements of the letter?

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1 MR. PIOTROWSKI: Yes.

2 MS. McFAWN: Is that a correct assessment?

3 MR. PIOTROWSKI: I think that what is important
4 is that we make every attempt possible to gain access.
5 I can tell you internally our experience is that we
6 don't like the threat of taking somebody to court. In
7 the event that I have to go back after I do gain access
8 through the court and get permission to conduct some
9 kind of remediation or ask some third party to
10 voluntarily enter into an environmental land use control
11 agreement, potentially restrict their property, I don't
12 have a very good chance of doing that. So I can tell
13 you that we do try to avoid that and to this date have
14 not attempted to take an adjacent landowner to court,
15 just because our team's thought is that once I do that,
16 my chance of doing the right thing on that adjacent
17 property may be pretty slim. If I force you to go to
18 court to give me access and you're forced to give me

19 access and then I complete my assessment and then come
20 back and ask you for. . .How cooperative are you going
21 to be? I don't think very cooperative. I certainly
22 wouldn't be.

23 That being said, I think we really do need to
24 try to concentrate our efforts first on trying to get

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1 that access in performing our diligence to do that and
2 then, you know, the second part of my -- of the
3 testimony here suggests that there are really two issues
4 there. It's did we do the diligence we were required to
5 do, and then what standards are used to determine
6 whether or not an NFR could be issued? They really are
7 two separate issues. And I think in the proposed
8 amendments they were kind of combined and I don't think
9 it was really clear. So that is kind of why we propose
10 what we proposed.

11 MS. McFAWN: Thank you.

12 HEARING OFFICER STERNSTEIN: Any further
13 questions for Mr. Piotrowski?

14 MR. RIESER: I just want to ask one follow-up to
15 follow up on a question that Board Member McFawn or,
16 actually, Board Member Melas and Board Member Ms. McFawn
17 asked. You talk about the identification of risks and
18 how, you know -- Mr. Piotrowski, would it be accurate

19 that as part of the early access activities, when you
20 first are removing the tanks and assessing the site
21 required to look at issues, such as free product and
22 vapors through pathways?

23 MR. PIOTROWSKI: That's correct.

24 MR. RIESER: Okay. So would those pretty much

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1 advise you what the situation was not only on the
2 property but most likely to be on the adjacent property
3 as well?

4 MR. PIOTROWSKI: Yes.

5 MR. RIESER: Okay.

6 HEARING OFFICER STERNSTEIN: Any further
7 questions? Okay. Seeing none, Mr. Rieser, Mr.
8 Piotrowski, thank you very much.

9 As I said at the beginning of the hearing, as I
10 said at the beginning of the hearing, the Illinois
11 Environmental Protection Agency submitted some documents
12 at the beginning of this week. I'd just like to have --
13 call up the staff from Illinois Environmental Protection
14 Agency at this point and have them submit those
15 documents as exhibits and provide any testimony that
16 they feel is necessary to go along with those exhibits.
17 So, you all come up. It will just be the three of you?

18 Why don't we swear the three of you in? Let's have Ms.
19 Brockamp and Mr. Clay be sworn in right now.

20 (Witnesses sworn.)

21 MS. DYER: Good afternoon. My name is Judith
22 Dyer. I am here on behalf of the Illinois Environmental
23 Protection Agency.

24 I have three exhibits that we would like to

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1 submit.

2 The first being a Memorandum of Agreement
3 between the Illinois Environmental Protection Agency,
4 the Illinois Department of Transportation. The board
5 requested at the last hearing that we submit this.

6 HEARING OFFICER STERNSTEIN: Are there any
7 objections to the submission of the Memorandum of
8 Agreement between the Illinois Environmental Protection
9 Agency and the IDOT? Seeing none, the Memorandum of
10 Agreement between Illinois Environmental Protection
11 Agency and the IDOT will be submitted as 18. And why
12 don't we go ahead and have all of the exhibits submitted
13 and then we'll allow any related testimony or questions
14 on them, probably be the easiest.

15 MS. DYER: The other two exhibits I shall
16 identify separately have to do with MTBE. They are
17 materials that we felt might be helpful to the board.

18 First is called "MTBE Biodegradation by Indigenous
19 Aquifer Microorganisms Under Natural and Artificial Oxidic
20 Conditions."

21 HEARING OFFICER STERNSTEIN: Are there any
22 objections to the submission of this exhibit?

23 The board will, therefore, admit the article
24 entitled, "Methy tert-Butyl Ether Biodegradation by

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1 Indigenous Aquifer Microorganisms Under Natural and
2 Artificial Oxidic Conditions" as Exhibit No. 19.

3 MS. DYER: And as Exhibit 20, we would like to
4 submit, "Widespread Potential for Microbial MTBE
5 Degradation in Surface-Water Sediments."

6 HEARING OFFICER STERNSTEIN: Any objections to
7 the admission of this Exhibit 20? Seeing none, we'll
8 admit, "Widespread Potential for Microbial MTBE
9 Degradation in Surface-Water Sediments" as Exhibit 20.

10 Ms. Dyer, are the color maps that are stapled to
11 Exhibit 19, those are a part of Exhibit 19, am I
12 correct?

13 MS. DYER: Correct.

14 HEARING OFFICER STERNSTEIN: They're not a
15 separate exhibit?

16 MS. DYER: No.

17 HEARING OFFICER STERNSTEIN: Okay. Do you have
18 any other exhibits to submit?

19 MS. DYER: No.

20 We did want to provide a statement in response
21 to a request from the board at the last hearing
22 regarding communications we've had with the records
23 commission on electronic reporting.

24 And Mr. Clay, Doug Clay on my right will provide

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1 that statement.

2 MR. CLAY: The Illinois Environmental Protection
3 Agency had several conversations with state records
4 commission with regard to electronic reporting. There
5 has not been any formal or written request for approval
6 to receive remediation plans and reports in electronic
7 format. The Illinois Environmental Protection Agency is
8 conducting a pilot project in the site remediation
9 program to evaluate electronic reporting process. The
10 pilot is expected to be completed in six months.

11 HEARING OFFICER STERNSTEIN: Is that all?

12 MR. CLAY: Yes.

13 MS. DYER: The board also had asked us at the
14 last hearing if our agreement with IDOT is final and
15 we'd like to confirm now that it is. And the exhibit
16 that we submitted is the final agreement.

17 HEARING OFFICER STERNSTEIN: That would be
18 Exhibit 18?

19 MS. DYER: Correct.

20 HEARING OFFICER STERNSTEIN: While we're on that
21 topic, is that agreement dated -- that says the 29th day
22 of September, is that 2000 or does that go back further?

23 MS. DYER: I can check that and I don't recall.
24 I believe it is 2000.

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1 I think actually it was 1999.

2 HEARING OFFICER STERNSTEIN: It was.

3 Okay. So 1999, to the best of your knowledge?

4 MS. DYER: Right.

5 HEARING OFFICER STERNSTEIN: Okay. Is there any
6 other -- are there any other testimony or exhibits that
7 you'd like to provide to the board?

8 MS. DYER: I don't know if you want our response
9 to the other requests that the board made that we
10 submitted in writing entered as an exhibit?

11 HEARING OFFICER STERNSTEIN: That was the
12 submission that came in I believe yesterday?

13 MS. DYER: It was dated March 30th. Yes, it
14 would have arrived yesterday.

15 HEARING OFFICER STERNSTEIN: Yes, why don't for

16 ease of following the record, if you wouldn't mind
17 admitting that as an exhibit as well.

18 MS. DYER: I'd like to ask that our -- the
19 Illinois Environmental Protection Agency response to
20 Pollution Control Board request that the hearing held
21 February 27, 2001, be entered as an exhibit.

22 HEARING OFFICER STERNSTEIN: Are there any
23 objections from the audience?

24 MR. RIESER: Are there copies of this available?

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1 MS. DYER: It went out to the whole service list
2 and we have extra copies.

3 MR. RIESER: No objection. Sorry.

4 HEARING OFFICER STERNSTEIN: Seeing none, the
5 document entitled Environmental Protection Agency
6 Responses to Pollution Control Board Requests at Hearing
7 Held February 27, 2001, will be admitted as Exhibit 21.

8 Anything else, Ms. Dyer?

9 MS. DYER: I'd like to follow up on Board Member
10 McFawn's question regarding off-site access and what the
11 Illinois Petroleum Council provided today.

12 We have not had an opportunity to discuss that
13 internally, the Agency has not. At this point we would
14 stand on our original proposal, the language we
15 proposed, and if the board has questions regarding our

16 reaction to their proposal, we'd like to take those back
17 and respond to them in written comments.

18 MR. MELAS: Yes. We would definitely appreciate
19 that. You have two separate versions, in his testimony,
20 quiet different.

21 MS. McFAWN: Sure. Specific question from the
22 board comparing the two, the Agency's proposal and that
23 language proposed by IPC would be helpful but I think
24 what Member Melas and the members of the board in its

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1 entirety would appreciate is your feedback on that
2 proposal. I think through the course of discussing with
3 IPC their proposed language, they did identify the two
4 parts of it, which Mr. Melas just referenced, the part
5 having to do with the notice letter and the second part
6 having to do with how to obtain NFR when you're denied
7 access. Maybe if you could today even address either of
8 those points, it would be helpful and we could maybe
9 then even give you additional questions for you
10 to answer. If you -- if you could testify today about
11 what they talked about as far as the NFR or not the NFR
12 but the notice letter to the property owner? Do you
13 have any comments on that?

14 MS. DYER: I would prefer that we not do that

15 off-the-cuff. I really would prefer we go back and
16 discuss it and consider it carefully and then respond in
17 writing. We'll certainly respond fully.

18 MS. McFAWN: That would be fine. Since you had
19 suggested questions from us, I thought, let's have a
20 dialogue.

21 HEARING OFFICER STERNSTEIN: Are there any
22 further questions to the Agency regarding the testimony
23 they've just provided and the exhibits they've just
24 submitted?

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1 MS. KEZELIS: Actually, I would --

2 HEARING OFFICER STERNSTEIN: Was there somebody
3 in the audience? Go ahead, Mr. Rieser.

4 MR. RIESER: Let me just slide over here. I'd
5 like to follow up with Mr. Clay on just an issue that
6 board Member McFawn raised having to do with sort of the
7 background of this.

8 There was a time, if I'm not -- isn't it
9 correct, that the Agency did issue NFR letters to sites
10 where people had not obtained off-site access, had not
11 resolved off-site issues, isn't that correct?

12 MR. CLAY: That's correct.

13 MR. RIESER: And the Agency changed that policy
14 at some point?

15 MR. CLAY: That is correct.

16 MR. RIESER: Did the Agency announce that
17 change in policy in any format?

18 MR. CLAY: I believe there is a TACO fact sheet
19 that revised that, our position on that, and I think it
20 was also made available on the Web.

21 MR. RIESER: What was the basis for the change?

22 MR. CLAY: It was a legal interpretation by our
23 division legal counsel.

24 MR. RIESER: A legal interpretation that the

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1 Agency wasn't authorized to issue NFR letters without --
2 one side without resolving off-site issues?

3 MR. CLAY: That's correct.

4 MR. RIESER: Understanding you're not a lawyer,
5 but was there a change in the statute in the
6 Environmental Protection Agency act that led to that
7 interpretation?

8 MR. CLAY: No.

9 MR. RIESER: Was this interpretation included in
10 the -- or the basis for this interpretation included in
11 the TACO fact sheet notice that was sent out?

12 MR. CLAY: I don't believe it was, but I don't
13 have that in front of me and I would prefer to review

14 that before I comment.

15 MR. RIESER: All right. Thank you very much.

16 HEARING OFFICER STERNSTEIN: Are there any other
17 questions for the Illinois Environmental Protection
18 Agency from the audience? Yes, sir. Could you please
19 stand and identify yourself?

20 MR. ST. JOHN: My name is Ron St. John. I'm
21 with the Illinois Chapter of the American Institute of
22 Professional Geologists and I have a question for Mr.
23 Clay.

24 MR. CLAY: Yes.

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1 MR. ST. JOHN: I believe one of the exhibits in
2 question is the response to the February 27th hearing
3 that the Agency has put into --

4 HEARING OFFICER STERNSTEIN: Exhibit 2.

5 MR. ST. JOHN: Yes, I believe it is Exhibit 2.
6 Is part of that the attachment September 20th, 2000,
7 letter from the Department of Regulation, is that
8 correct?

9 HEARING OFFICER STERNSTEIN: Attachment 1 to
10 Exhibit 1, right.

11 MR. ST. JOHN: There just appears to be a typo
12 in the beginning of these smaller case paragraphs in the
13 middle of that letter, and I would like Mr. Clay to

14 confirm that, at least on the copy that I have, one
15 actually refers to the Professional Engineering Practice
16 Act, the other refers to the Professional Geologist
17 Licensing Act, and it appears that the paragraphs have
18 been switched or that the titles have actually been
19 switched for the appropriate paragraphs.

20 MR. CLAY: It does appear that way.

21 HEARING OFFICER STERNSTEIN: Will the Agency be
22 able to clarify that in post-hearing comments as far as
23 which -- if the -- if -- I guess I'd actually just like
24 to see if the citations to the Illinois Compiled

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1 Statutes are correct.

2 MS. DYER: We can check that. This came from
3 the Department of Professional Regulation. We'll check
4 it for them.

5 HEARING OFFICER STERNSTEIN: Just so it is --

6 MR. MELAS: As long as it didn't come from the
7 Environmental Protection Agency.

8 HEARING OFFICER STERNSTEIN: Just so long as it
9 is clarified in post-hearing comments, those citations
10 to the Illinois Compiled Statutes are either referring
11 to the engineering practice act or the geologist
12 licensing act, that would be a big help. Thanks for

13 clearing that up, Mr. St. John.

14 Any other questions from the audience, for the
15 Illinois Environmental Protection Agency?

16 MS. McFAWN: Well, I'm sorry, I didn't mean to
17 jump right in there but I'm part of the audience as
18 well.

19 I had a question about the language and I was
20 quickly going over your pre-filed testimony from the
21 last hearing, I didn't review the transcript with this
22 question in mind so maybe you already addressed it, and
23 that is you have proposed new language 732.411A, which
24 the IPC, Illinois Petroleum Council, relocated to

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1 Subparagraph F, and that language is the owner or
2 operator is not to release any responsibility to clean
3 up a release that has migrated down the property
4 boundary even where off-site access has been denied.

5 Can you -- probably you, Mr. Clay, tell me why
6 the Agency has suggested this language in the pre-filed
7 testimony? It was addressed directly.

8 MR. CLAY: We didn't feel like the Agency had
9 the authority to release a tank owner, operator from a
10 release of petroleum to the environment without
11 addressing the entire release, which would be on-site
12 and off-site.

13 HEARING OFFICER STERNSTEIN: Off the record for
14 a second.

15 (Off the record.)

16 HEARING OFFICER STERNSTEIN: Let's go back on
17 the record.

18 Board Member McFawn, you just asked a question.

19 MS. McFAWN: I had and Mr. Clay had answered it.
20 During the break I was doing some other reading. Could
21 you read back the record?

22 (Record read.)

23 MS. McFAWN: Okay. That makes sense to me, but
24 in issuing an NFR letter, the four corners of the letter

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1 would not necessarily mean that you had, in fact,
2 released them for an off-site release, and so are you
3 putting this in as notice to put the site remediator on
4 notice that even if you issue an NFR letter, they will
5 not be relieved of their legal responsibilities to
6 perhaps in the future address an off-site release?

7 MR. CLAY: Yes.

8 MS. McFAWN: I did quickly review the transcript
9 on this point as well as your pre-filed testimony and
10 Mr. Rieser asked you some questions about this
11 paragraph, and he asked some questions, which I didn't

12 really quite follow the context of, maybe you or Mr.
13 Rieser could enlighten me. It was something like --
14 perhaps this was to address collusion, and when I reread
15 the transcript, I don't quite understand -- I didn't
16 find that in the context of the rule or in your
17 statement of reasons, so do you know what was meant by
18 that question?

19 MR. CLAY: We had had at least a couple of
20 instances where someone had been denied access to an
21 adjacent property owner. In one case the name of the
22 property owner was the same as the name of the -- the
23 owner -- that the property owner that had the release.
24 In addition, the activities that had taken place on that

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1 adjacent property potentially that there could have been
2 release, I think it was a fertilizer facility, and so
3 the reasons -- we were unclear as to the reasons why
4 access had been denied and in those cases the Agency
5 wants to make sure there isn't a threat to human health
6 and the environment, if we issue a no further
7 remediation letter, when off-site access has been
8 denied.

9 MS. McFAWN: Well, how would the proposed
10 language in 732.411 in general or at paragraph A get you
11 that assurance?

12 MR. CLAY: We would be looking at the conditions
13 that were going off the site where the release occurred
14 onto the adjacent property, we would be looking at a
15 number of factors, which we have in our proposal under
16 D. And in looking at what the potential impact to human
17 health and the environment would be by not addressing
18 that off-site release, the issue of whether or not there
19 is collusion of the two property owners is not the focus
20 so much as what the impact of that off-site, the
21 contamination off site if it was not addressed would be
22 on human health and the environment.

23 MS. McFAWN: Okay. Of course, that impact could
24 be complicated by other conditions existing at the

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1 off-site property, right?

2 MR. CLAY: That's true.

3 MS. McFAWN: If that was the case, how would the
4 Agency go about requesting the original site remediator
5 to conduct its investigation? Would they have to
6 analyze the combined impact?

7 MR. CLAY: We would require the tank owner,
8 operator that had the release removed to investigate the
9 off-site property for the contaminate of concern that
10 were the subject of the tank release. We wouldn't

11 require them to look at other compounds, if that's what
12 you're asking. If there were conditions that were made
13 aware -- that we were made aware of, we may consider
14 those but we wouldn't be asking them to sample and
15 analyze any additional compounds because of the
16 conditions on the off-site property. Is that what
17 you're asking?

18 MS. McFAWN: Yes, it was. Thank you.

19 Now, my next question would be, would you ever
20 issue an NFR letter to a site that was involved in the
21 an off-site access dispute, obtained access and then
22 can't remediate to the neighboring property?

23 MR. CLAY: Under our proposal, you could --
24 potentially, wouldn't issue an NFR letter unless we

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1 determined that, you know, there was a threat to human
2 health and the environment, that we felt had to be
3 addressed before we could issue that. So even though
4 they had investigated the off-site property, we would --
5 could issue the NFR letter, if they were denied access
6 for remediation under our proposal.

7 MS. McFAWN: Okay. Now, the IPC has proposed
8 that that be a three part test, and that would include
9 an imminent threat to health or the environment. Would
10 that satisfy -- would that be a good test for you in

11 that kind of situation?

12 MR. CLAY: There could be more factors than the
13 three that IPC identified and we would like to respond
14 to that in writing.

15 MS. McFAWN: Okay. When you do that, could you
16 tell me if those factors are under the umbrella of the
17 three that the IPC articulates or if they are separate
18 and distinct? Do you understand what I mean? Those are
19 pretty general factors, the IPC has put out. I'm just
20 wondering if you're maybe not talking about subfactors,
21 so to speak.

22 MR. CLAY: Okay.

23 HEARING OFFICER STERNSTEIN: Anybody else have
24 any comments? Mr. St. John.

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1 MR. ST. JOHN: This question is for Mr. Clay.

2 Mr. Clay, is it fair to say that in submissions
3 to the Illinois Environmental Protection Agency
4 involving sites that -- where there are underground
5 storage tank releases, that if a potential metrics
6 surface map is -- a groundwater flow map is constructed
7 for that site that the Illinois Environmental Protection
8 Agency would require that a licensed surveyor would have
9 surveyed in the well?

10 HEARING OFFICER STERNSTEIN: Mr. St. John, what
11 kind of map was that again?

12 MR. ST. JOHN: A groundwater flow map.

13 HEARING OFFICER STERNSTEIN: Okay.

14 MR. ST. JOHN: And that would be consistent
15 with the surveyor's licensing act, which oftentimes is
16 cited at the end of many of the Illinois Environmental
17 Protection Agency documents to the public?

18 MR. CLAY: We wouldn't require that because we
19 don't -- we don't enforce the professional regulations
20 requirements. Our -- currently, the regulations require
21 PE certification, but I don't believe there is any
22 reference to professional surveyor certification on
23 documents that are submitted to the Agency.

24 MR. ST. JOHN: Right. But is it fair to say

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1 that many of the Agency's documents go out and have --
2 contained in them citations towards the work being done
3 subject to the laws governing professional services,
4 such as Illinois professional land surveyors, Land
5 Surveyors Act of 1989?

6 MR. CLAY: I'm not sure what forms that you're
7 referring to, if you could provide them --

8 MR. ST. JOHN: Okay. Let me just ask another
9 question. With respect to your September 20th letter

10 from the legal counsel at the Department of Regulation,
11 with the exception of the one error that I pointed out
12 earlier in that letter, is it fair to say that the -- in
13 the last sentence of the -- second to the last
14 paragraph, that the legal counsel is agreeing with all
15 of your suggested changes to Part 732, and their
16 appropriateness as they authorized geologist to perform
17 work under the act?

18 MR. MELAS: It doesn't say that.

19 MR. ST. JOHN: Where it reads, the remainder of
20 this section of these draft rules also appear to
21 appropriately authorize geologists to perform tasks
22 contained in their practice definitions, thus there
23 appears to be no conflicts with the geology or the
24 Professional Engineers Practice Act. That is in

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1 specific reference to the mod -- your modifications, the
2 Illinois Environmental Protection Agency's modifications
3 to the 732, is that correct?

4 MR. CLAY: Yes, that's what it says. Yes.
5 Correct.

6 MR. ST. JOHN: Thank you .

7 HEARING OFFICER STERNSTEIN: Any further
8 questions for the Agency?

9 MS. McFAWN: I wonder if the Agency could
10 submit to the board a copy of that fact sheet you
11 referenced under TACO or the TACO fact sheet submitted
12 in this proceeding?

13 MR. CLAY: Yes.

14 HEARING OFFICER STERNSTEIN: Any further
15 questions for the Agency?

16 MS. LIU: Good afternoon, Mr. Clay.

17 You took the initiative to seek the opinion of
18 the Illinois Department of Professional Regulation in
19 regard to the practices of geology and engineering.

20 And in the last sentence of your letter, they
21 said the office of the attorney general renders the
22 official opinions regarding statutory interpretation.

23 I was wondering whether or not the Agency was
24 considering taking the initiative to ask the attorney

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1 general what their interpretation might be?

2 MR. CLAY: We had not contemplated that.

3 MS. LIU: Okay.

4 MR. MELAS: When you -- Ms. Dyer, when you
5 submit your other comments wrapping up everything on
6 this, do you intend to address the points that were made
7 by Mr. Bonczyk as far as the Professional Engineering
8 Act and the fact that it doesn't specifically mention

9 the geologists in there?

10 MS. DYER: I believe we're on the same
11 wavelength. I was waiting for all of the questions to
12 be asked and then I was going to address one more point.

13 Our understanding is that the motion and
14 supporting memorandum of law submitted by Mr. Bonczyk
15 were going to be deemed final -- written comments.

16 HEARING OFFICER STERNSTEIN: Public comments,
17 exactly.

18 MS. DYER: And we intended to address -- to
19 respond to those also as written comments.

20 MR. MELAS: Fine. You do -- that is what I was
21 waiting to hear. Thank you.

22 MS. DYER: You're welcome.

23 MS. LIU: I have one last question for you, Ms.
24 Brockamp.

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1 In the Agency's proposed revisions, they add
2 PCBs to Appendage B because it was inadvertently left
3 out.

4 And I was wondering, although the admission of
5 PCBs was inadvertent, did the Agency typically require
6 Pollution Control Board sampling along with other
7 indicators of contaminants when it was appropriate in

8 the past?

9 MS. BROCKAMP: I believe that that is for a very
10 limited area of product released -- products
11 specifically to the -- I believe it is the hydraulic,
12 the transformer oils, rarely would we see that. So I
13 think that this is when it came up that it was -- had
14 been an omission was -- when we had that situation. I
15 don't remember in that situation whether we went ahead
16 and required it to -- knowing it had been an omission or
17 not.

18 MS. LIU: Thank you.

19 HEARING OFFICER STERNSTEIN: Mr. Rieser, I
20 believe you had a question.

21 MR. RIESER: Just to follow up on this issue of
22 the TACO fact sheet that board member Ms. McFawn asked
23 Mr. Clay for.

24 Is that something called fact sheet 12, do you

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1 know if that is the name?

2 MR. CLAY: I don't know, if that is the -- the
3 fact sheet. I'd have to look at the fact sheet.

4 MR. RIESER: Do you know if it is still current
5 or has the Agency withdrawn it from its Website?

6 MR. CLAY: I believe we have withdrawn it from
7 the Website.

8 MR. RIESER: Okay. So what is the status of
9 that if it was issued and then withdrawn?

10 MR. CLAY: I don't understand. What do you mean
11 by status --

12 MR. RIESER: Well, I guess the question that --
13 the overriding question is the Agency issuing a fact
14 sheet identified how it would handle off-site issues to
15 a certain extent, although we don't know the extent,
16 explain the basis for it, the Agency has since then
17 withdrawn the fact sheet from its Website, one assumes
18 with the intention that it wouldn't be valid or current
19 anymore.

20 So I guess the question is, what impact does
21 that fact sheet have on the Agency's actions now?

22 MR. CLAY: The Agency is not relying on that
23 fact sheet anymore at this time.

24 MR. RIESER: But the Agency's -- this fact sheet

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1 contained a statement by the Agency that from the point
2 of the issuance of that fact sheet forward, it would no
3 longer issue NFR letters unless off-site issues were
4 addressed, correct?

5 MR. CLAY: Correct.

6 MR. RIESER: So in withdrawing that fact sheet

7 from its Website -- strike that.

8 So even though the Agency has withdrawn that
9 fact sheet from its Website, it is still taking that
10 position, correct?

11 MR. CLAY: We have issued letters with regard to
12 off-site access, once we went through that fact sheet,
13 with the proposed language in it, providing guidance to
14 owner, operators as to what they needed to do to make
15 that demonstration.

16 MR. RIESER: I'm sorry. You've issued NFR
17 letters to owners and operators of underground storage
18 tanks where the off-site access was not addressed?

19 MR. CLAY: Not NFR letters. We have issued
20 letters, review letters with regard to what needed to be
21 done to demonstrate off-site access denial.

22 MR. RIESER: So you have -- and these letters
23 were refusals to issue NFR letters, unless the owners or
24 operators issued the letter that you described in that

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1 letter?

2 MR. CLAY: They were denials for issuing an NFR
3 letter until what was issued in the denial letter was
4 met, yes, conditions were met in the -- I'm sorry,
5 conditions were met in the denial letter.

6 MR. RIESER: Thank you.

7 HEARING OFFICER STERNSTEIN: Mr. St. John, I
8 see you have another question for the Agency.

9 MR. ST. JOHN: Yes. Actually a question --
10 another question on my part, I'd just like to ask is the
11 Agency familiar with any enforcement actions they've
12 taken part in with the attorney general most recently,
13 you know, where you've dragged a third party to the
14 table, where actually the attorney general has included
15 in that consent decree the requirement for a licensed
16 professional engineer and a licensed professional
17 geologist to perform work on the part of the consent --
18 the party signing into the consent decree, and thereby
19 at least applying the attorney general's statutory
20 interpretation? Are you familiar with that?

21 MR. CLAY: I personally am not aware of that,
22 but I can't speak for the whole Agency. I personally
23 don't recall reading something to that effect.

24 MR. ST. JOHN: Okay.

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1 HEARING OFFICER STERNSTEIN: Further questions
2 for the Agency?

3 Okay. Thanks very much.

4 We'll begin to wrap this up.

5 Before I do, does anybody present have any

6 further comment on this rulemaking R01-26 or the
7 decision by DCCA not to conduct an economic impact
8 study?

9 Okay. Requests for additional hearings will be
10 accepted pursuant to the board's procedural rules at 35
11 Illinois Administrative Code 102.412B, those are the new
12 procedural rules, which requires the proponent or any
13 other participant to demonstrate in a motion to the
14 board that failing to hold an additional hearing will
15 result in material prejudice to the movant.

16 A note on the transcript here. The transcripts
17 for this hearing should be available before April 17th,
18 2001, which is 10 business days away. If anyone would
19 like a copy, you can speak to the court reporter
20 directly, you can contact the board's clerk office in
21 Chicago for a hard copy or -- although that cost 75
22 cents a page, you can also download the hearing from the
23 board's Website or you can contact me.

24 Public comment in this matter must be filed by

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1 Tuesday, May 2nd, 2001. The mailbox rule will not
2 apply. Anyone may file public comments with the clerk
3 of the board. When filing comments with the board an
4 original and 9 copies are required. You must also
5 simultaneously deliver your comments to all persons on

6 the service list and include an attachment notice sheet,
7 proof of service and a copy of the current service list.
8 You should contact the clerk's office or check the
9 board's Website to insure that you have an updated copy
10 of the service list when submitting those public
11 comments.

12 And for the record, Ken Liss, who testified at
13 the first hearing, who was one of the geologists, he has
14 just fax filed what looks to be testimony. Yes.
15 Testimony, five pages of testimony. It appears that he
16 did not do it properly. So I'll inform him of that.
17 And if that is going to be included as a public comment,
18 he will have to properly file that with everybody on the
19 service list.

20 Just a reminder, public comments may also be
21 filed in this matter after the issuance of the first
22 notice opinion and order as well.

23 Is there anyone else present who wishes to
24 testify today? Seeing no such person, that concludes

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1 today's hearing.

2 Thank you very much for your time and attention,
3 and the hearing is adjourned.

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1 STATE OF ILLINOIS)
)SS:
2 COUNTY OF DU PAGE)

3 I, ROSEMARIE LA MANTIA, being first duly sworn,
4 on oath says that she is a court reporter doing business

5 in the City of Chicago; that she reported in shorthand
6 the proceedings given at the taking of said hearing, and
7 that the foregoing is a true and correct transcript of
8 her shorthand notes so taken as aforesaid, and contains
9 all the proceedings given at said hearing.

10

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ROSEMARIE LA MANTIA, CSR
License No. 84 - 2661

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Subscribed and sworn to before me
this day of , 2001.

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Notary Public

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