

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VOLUME II

IN THE MATTER OF:)
)
SITE REMEDIATION PROGRAM,) R97-11
35 ILL. ADM. CODE 740) (Rulemaking - Land)

The following is a transcript of a rulemaking hearing held in the above-entitled matter, taken stenographically by LORI ANN ASAUSKAS, CSR, RPR, a notary public within and for the County of Cook and State of Illinois, before Amy Hoogasian, Hearing Officer, at 100 West Randolph Street, Room 9-040, Chicago, Illinois, on the 26th day of November, 1996, A.D., commencing at the hour of 10:00 o'clock a.m.

** **

1

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

3

HEARING TAKEN BEFORE:

4

ILLINOIS POLLUTION CONTROL BOARD,
100 West Randolph Street

5

Suite 11-500

6

Chicago, Illinois 60601

(312) 814-4925

7

BY: MS. AMY HOOGASIAN,

HEARING OFFICER.

8 ILLINOIS POLLUTION CONTROL BOARD MEMBERS PRESENT:

Mr. Kevin Desharnais

9 Mr. Chuck Feinen

Mr. Tanner Girard

10 Ms. Kathleen Hennessey

Ms. Marili McFawn

11 Mr. J. Theodore Meyer

Ms. Jennifer Moore

12 Ms. Diane O'Neil

Ms. K.C. Poulos

13 Mr. Anad Rao

Mr. Hiten Soni

14 Ms. Marie Tipsord

Mr. Joseph Yi

15

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY MEMBERS

16 PRESENT:

Ms. Shirley Baer

17 Mr. Lawrence Eastep

Mr. Gary P. King

18 Mr. Rick Lucas

Mr. Bob O'Hara

19 Mr. Todd Rettig

Ms. Vicky L. VonLanken

20 Mr. Mark Wight

21 OTHER AUDIENCE MEMBERS WERE PRESENT AT THE HEARING,
BUT NOT LISTED ON THIS APPEARANCE PAGE.

22

23

24

1 I N D E X

2 PAGES

3 GREETING BY HEARING OFFICER.....307 - 308

4 QUESTIONS AND ANSWERS BY IPCB AND IEPA.....309 - 481

5 CLOSING COMMENTS BY HEARING OFFICER.....482 - 485

6 * * * * *

7

8 NO EXHIBITS MARKED THIS SESSION

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

1 THE HEARING OFFICER: Okay. Let's go
2 back on the record this morning.

3 Good morning to everyone. Welcome
4 back to the second day of hearings in R97-11 relating
5 to the matter of the site remediation program, which
6 relates to the Part 740 proposal as submitted by the
7 agency.

8 This morning, I just want to state
9 who is here from the board on the record. We have
10 our presiding board members who have been assigned
11 to this rulemaking Kathleen Hennessey, Marili McFawn
12 and Tanner Girard. We also have another board member
13 with us here today, Mr. Joseph Yi. We have two
14 members from our technical unit here today as well,
15 Anan Rao, who is sitting up here with us today, and
16 in the back it Hiten Soni. We also have Board Member
17 Girard's assistant, Marie Tipsord. I believe that's
18 all we have here today from the board.

19 We left off yesterday with
20 Section 740.420. How we have decided to proceed
21 this morning is again to go through the sections
22 with the prefiled and then take all follow-up
23 questions to that particular section at the end
24 of the prefiled questions that are specific to

1 that section.

2 So if you do have a follow-up
3 question to someone's specific question, we would
4 appreciate it if you would save those questions
5 to the end of that particular section just so we
6 can proceed in a much more organized fashion.

7 Let's start, then, with the
8 site remediation advisory committee's question
9 number thirty-five.

10 MR. RIESER: Thirty-five has to do
11 with not requiring remediation applicant's to
12 analyze all for contaminants and that's been
13 asked and answered.

14 We are now at thirty-six.

15 THE HEARING OFFICER: Okay. You
16 may proceed.

17 MR. RIESER: Okay. Please clarify
18 by way of example what is intended by the term
19 "contaminated materials" as used in Section
20 740.420(b)(2)(C) other than defined wastes and
21 hazardous substances?

22 MR. EASTEP: Requested material
23 could mean contaminated media such as groundwater,
24 soil or other products which may be contaminated

1 such as recyclable materials like used oil, asbestos
2 covered piping, et cetera.

3 MS. ROSEN: Thank you.

4 MR. RIESER: Is that in any way
5 different from contaminants of concern?

6 MR. EASTEP: Contaminated materials
7 could be contaminants of concern.

8 MR. RIESER: But they might not
9 be because they wouldn't be as a result of this
10 specified environmental condition, for example,
11 in the context of the focused site investigation?

12 MR. EASTEP: Again, this would be
13 site-specific.

14 MR. RIESER: Thank you.

15 THE HEARING OFFICER: Mr. Watson,
16 would you please proceed with question number
17 eight as submitted by Gardner, Carton & Douglas?

18 MR. WATSON: Okay. The question
19 is what is the agency's view on the use of
20 alternative investigative technologies, such as
21 geoprobes, as a standard and acceptable practice
22 of generating the data requested in the proposed
23 Part 740 regulations?

24 MR. EASTEP: If they are appropriate

1 for investigation, they are certainly allowable.
2 The agency has a geoprobe which it uses in the
3 conduct of its investigations.

4 MR. WATSON: So you would accept
5 geoprobe technology as an appropriate method for
6 conducting an investigation?

7 MR. EASTEP: If it's appropriate at
8 that site, yes.

9 MR. WATSON: How would you determine
10 whether or not it's appropriate at a site?

11 MR. EASTEP: You wouldn't use it on
12 surface water samples, for example.

13 MR. WATSON: But with respect to soil
14 sampling, you could, in fact, use geoprobes?

15 MR. EASTEP: Yes, if it's appropriate.
16 You may get into material like rock that it can't
17 go through. That may be a technical limitation for
18 you.

19 MR. WATSON: But it's generally
20 acceptable as a means to do sampling?

21 MR. EASTEP: Yes.

22 MR. WATSON: What about hydropunch
23 methodologies? Would those be appropriate for
24 site sampling activities?

1 MR. EASTEP: It might be, yes.

2 MR. WATSON: Again, would that be --
3 when you say it might be, is that that it would
4 be generally acceptable other than in extreme
5 circumstances?

6 MR. EASTEP: We don't normally
7 determine the equipment that people use other
8 than, you know, if there is some standard associated
9 with how you collect samples and they have to
10 demonstrate that the samples have been collected
11 so as not to be cross-contaminated. So it has
12 to be representative and stuff like that, but we
13 don't normally dictate what equipment people use.

14 MR. WATSON: Has the agency allowed
15 soil gas analysis to also be used in site
16 investigation activities?

17 MR. EASTEP: Yes, we have.

18 MR. WATSON: And that would also
19 be potentially appropriate for use under a site
20 remediation program?

21 MR. EASTEP: Yes.

22 MR. WATSON: Would the geoprobe
23 and hydropunch methodologies be appropriate for
24 confirming compliance with remediation objectives

1 under the site remediation program?

2 MR. EASTEP: In many instances, I
3 would certainly say a geoprobe would be appropriate,
4 yes.

5 MR. WATSON: But not a hydropunch?

6 MR. EASTEP: It might be. I just --
7 you know, I would feel more comfortable if I knew a
8 site-specific question of what you were doing and
9 how you were doing it.

10 MR. WATSON: Yes. We are just trying
11 to clarify that these methodologies are available
12 for people to do site characterization and
13 confirmation of remediation objectives on a general
14 basis. Obviously, we're understanding that there
15 may be certain instances where the agency would
16 not --

17 MR. EASTEP: I think I answered your
18 question in this regard.

19 MR. WATSON: That's all I have on
20 that.

21 THE HEARING OFFICER: Mr. Watson,
22 you also indicated yesterday that you had two issues
23 that you wanted to follow-up on or get into regarding
24 this section. Since we are finished with all of the

1 prefiled questions pertaining to this section, would
2 you like to address that at this time?

3 MR. WATSON: Yes. Thank you.

4 Mr. Eastep, we have been
5 talking about whether or not -- to what extent
6 the requirements for site characterization under
7 a Phase 2 site assessment would be consistent
8 with the requirements of the USEPA guidance on
9 conducting remedial investigation feasibility
10 studies, which is referenced as a document that
11 the agency relied on in developing its site
12 assessment requirements.

13 My question to you was what
14 is your understanding of the differences between
15 what is required for site assessment in the site
16 remediation program as opposed to the requirements
17 for conducting remedial investigations under the
18 USEPA guidance document?

19 I believe that you had given
20 me one item that you thought was different and
21 that was with respect to data collection
22 requirements.

23 MR. EASTEP: I think I mentioned data
24 quality.

1 MR. WATSON: Data quality. Okay. I'm
2 sorry. That's more accurate.

3 MR. EASTEP: I don't think we are
4 prepared to go down item-by-item cross-referencing
5 those.

6 MR. WATSON: Well, okay. Do you have an
7 understanding of any other --

8 MR. EASTEP: I don't think that I'm
9 prepared to go any further. I don't have any
10 documents with me.

11 MR. WATSON: So you do not have an
12 understanding as you sit here today of any other
13 distinctions between --

14 MR. EASTEP: I just said I'm not
15 prepared.

16 THE COURT REPORTER: Sir, would you let
17 him finish the question so we have a complete record.
18 Then, we'll let you have an opportunity as well.

19 MR. EASTEP: Thank you.

20 MR. WATSON: I'm not trying to confuse
21 you. I'm just asking you whether or not you have an
22 understanding today of any other differences between
23 the requirements of the site remediation program and
24 USEPA guidance?

1 If you know off the top of your
2 head, that's what I'm asking for. If you don't,
3 then, you can just say that.

4 MR. EASTEP: I just indicated that I'm
5 not prepared to sit down and compare the two.

6 MR. WATSON: So what you're saying is
7 today, other than the data quality standards, you are
8 not aware of any other distinctions?

9 THE HEARING OFFICER: Excuse me.
10 Let me interrupt for a moment.

11 Is this something that perhaps
12 Mr. Eastep could address at the next hearing?

13 MR. WIGHT: I'm not sure that I even
14 follow the relevance of the line of questioning.
15 I know that the issue was raised in the course of
16 our testimony as one of the things that we generally
17 considered, but I'm not sure where we are going
18 with this line of questioning with regard to why
19 it's important and what we have decided to do in
20 the site remediation program.

21 Perhaps if that were a little
22 more clear, then, maybe we could spend some time
23 clarifying it for the next hearing. What we have
24 proposed here may have generally brought up some

1 elements generally from that document. I'm not
2 sure what the importance of the question is with
3 regard to just how specifically we barred from
4 that document and what that document contains
5 compared to this.

6 MS. McFAWN: Can I just ask a
7 clarification?

8 THE HEARING OFFICER: Sure.

9 MS. McFAWN: Are we talking about
10 the guidance document called -- which guidance
11 document are we talking about?

12 MR. WATSON: This is from Exhibit 3,
13 page eleven. It is from the USEPA's Office of
14 Solid Waste and Emergency Response Directive
15 9355.3-01, (Guidance for Conducting Remedial
16 Investigation and Feasibility Studies under CERCLA).

17 MS. McFAWN: Thank you.

18 THE HEARING OFFICER: Did you want to
19 respond to that, then, Mr. Watson?

20 MR. WATSON: I would like for him to
21 answer my question, if he would.

22 Is he aware of any other
23 distinctions between the programs other than the
24 ones -- between the documents other than the ones

1 that he had articulated right now?

2 THE HEARING OFFICER: Well, I believe
3 that Mr. Eastep actually answered that question with
4 regard to the extent that he is able to answer it.
5 So with regard to the relevance of the document
6 today, do you have an argument that you could explain
7 so that we can proceed down that road? Otherwise,
8 we will just have to proceed with this hearing.

9 MR. WATSON: We are just trying to
10 get -- I'm just trying to clarify the scope of --
11 the general scope of site investigations between
12 the two programs and what each requires and whether
13 or not there is a consistency between the two.

14 MR. WIGHT: The proposal stands on
15 its own. What really is the issue here today is
16 what was proposed in 740 and not what's in the
17 other documents.

18 MR. WATSON: Okay. That's fine. I
19 don't want to belabor it anymore.

20 MS. McFAWN: Is this document in our
21 records?

22 MR. WIGHT: We haven't submitted it.
23 You have it in your own library, but we haven't
24 submitted it as a part of this proceeding.

1 MR. WATSON: The second issue that
2 we had --

3 THE HEARING OFFICER: Excuse me. May I
4 just interrupt for a moment? I would just like to
5 request on the record that we also have Board Member
6 J. Theodore Meyer who has joined us here today and
7 his assistant, K.C. Poulos. That's all.

8 Thank you. You may proceed.

9 MR. WATSON: The second issue that we
10 had had some discussion on yesterday related to the
11 scope of sampling requirements under the 740, Part
12 420.

13 I think that we established
14 yesterday that remedial applicants defined the
15 remediation site, is that correct? It's their
16 responsibility to define the boundaries of the
17 remediation site?

18 MR. EASTEP: Yes.

19 MR. WATSON: And I think we also
20 talked at some length yesterday about the fact
21 that the state is really unwilling to get involved
22 between disputes of landowners regarding perhaps
23 contamination that has migrated to another property,
24 is that right?

1 MR. EASTEP: In the context of these
2 rules, yes.

3 MR. WATSON: I also believe that it
4 is true -- and I think Mr. King had said this --
5 that the concerns regarding problems with adjacent
6 property owners is somewhat alleviated by the
7 flexibility of the program and the fact that really
8 the remediation applicant can define the boundaries
9 of its remediation site and, in fact, can get a no
10 further remediation letter for its site.

11 Then, I think we started to
12 talk about what the site investigation obligations
13 are of a remedial applicant and whether or not
14 those obligations extend to site investigation
15 activities at adjacent properties to determine
16 perhaps the extent constituents migrating off-site.

17 I guess I would like some
18 clarification as to what are the obligations of a
19 remedial applicant to conduct site investigations
20 that extend beyond the site boundaries of its own
21 property to the extent that the remedial applicant
22 wants to limit its remediation site to those site
23 boundaries?

24 MR. EASTEP: Can you shorten your

1 question so I can respond to it?

2 MR. WATSON: What are the obligations
3 of a remedial applicant to conduct site investigation
4 activities beyond its property boundaries?

5 MR. EASTEP: The obligation depends --
6 it's a site-specific obligation. At a minimum,
7 if we are presuming that there is off-site
8 contamination, they need to be able to address
9 that off-site contamination.

10 The extent of the requirement
11 to investigate that would be based upon a
12 site-specific case-by-case determination.

13 MR. WATSON: When you say that there
14 is an obligation to --

15 MR. WIGHT: Excuse me for just a
16 minute.

17 MR. EASTEP: It would also depend
18 upon what the goals of the remedial applicant
19 are, what they were attempting to get out of the
20 program.

21 MR. WATSON: Can you explain that
22 further?

23 What do you mean that it depends
24 upon the goals?

1 MR. EASTEP: If your goal is to
2 eliminate a groundwater pathway, then, you have
3 to know something about the location of wells
4 off-site and users of groundwater off your site
5 to be able to eliminate the pathway in accordance
6 with 742. That would be one example.

7 MR. WATSON: Well, all right.
8 Let's stay on that example.

9 Are there any specific
10 off-site sampling requirements that one would have
11 to comply with in order to have the information
12 required to eliminate a groundwater pathway for
13 a remediation site that is limited to site
14 boundaries?

15 MR. EASTEP: There is nothing in the
16 rules that specifically requires that.

17 MR. WATSON: So you could limit at
18 least the groundwater pathway without having to do
19 any off-site sampling, is that correct?

20 MR. EASTEP: In some instances, you
21 could. There might be instances where you might
22 have to, I don't know.

23 MR. WATSON: You don't know what
24 instances those would be?

1 MR. EASTEP: Well, if you were in a
2 situation where you weren't exactly -- you were
3 modeling stuff and you weren't exactly sure what
4 your model shows because the geology, say, was
5 very -- a non-homogenous geology with different
6 aquifers, perhaps, it got a little complicated
7 and you were proposing that the contaminants
8 from your site would not reach a well, say, 2,500
9 feet away, but you didn't know for sure and you
10 couldn't verify the model without going off-site,
11 then, in order for you to have to verify your model,
12 it might be necessary in that circumstance to go
13 off-site, but there could be other circumstances
14 where just sampling on your site was sufficient
15 to be able to verify your model and satisfy
16 requirements for eliminating a groundwater pathway.

17 MR. WATSON: There is not a
18 requirement in the regulations, though, to define
19 the extent of contamination necessarily at a
20 site, is that correct, or that would extend beyond
21 the limits of a remediation site? I mean, the
22 rules require you to determine the nature and
23 extent of contamination at the remediation site,
24 is that correct?

1 MR. EASTEP: That's correct.

2 MR. WATSON: So then that obligation
3 to necessarily follow a plume of contamination
4 off-site or beyond the remediation site boundaries
5 is not required under this program, is that correct?

6 MR. EASTEP: That is not specified
7 under the program. As I mentioned, it might be
8 necessary to do some of that to prove your case
9 to get a comprehensive release for your site.

10 MR. WATSON: Right. And the way
11 it comes is when you are trying to, as you say,
12 exclude a pathway, you have to comply with
13 certain showings or whatever to establish that
14 it's appropriate, that no risk exists, and then
15 you are able to exclude a pathway, right?

16 MR. EASTEP: Again, that was a pretty
17 long question. I'm not sure exactly what you are
18 asking.

19 MR. WATSON: Okay. I'm just trying
20 to clarify that there was no -- the obligation to
21 go beyond your site only arises and do sampling
22 beyond your site boundaries only arises when you
23 are trying to do things such as excluding pathways,
24 correct?

1 MR. EASTEP: Well, the obligation is
2 on a case-by-case basis or site-by-site basis. It
3 certainly -- exposure pathways would be very critical
4 to a determination of how extensive your sampling may
5 be.

6 MR. WATSON: I think that's all I have
7 on that question.

8 THE HEARING OFFICER: Does anyone
9 else have any further follow-up question to this
10 Section 740.420?

11 Hearing none, let's now proceed
12 to -- there were two general questions filed by
13 Gardner, Carton & Douglas, questions nine and ten.
14 If we could, let's take those at this point, please,
15 Mr. Watson?

16 MR. WATSON: Question nine says, can
17 parties avail themselves of innovative modeling
18 techniques, such as those set forth in Part 742,
19 to assist with the characterization of contamination
20 at a site? I think we have already answered that
21 you can do that. So I'll move on.

22 THE HEARING OFFICER: Okay. Again,
23 I just want to note for the record that Part 742
24 is the same -- it's noted as R97-12 and docketed

1 as such by the clerk of the court.

2 Did you want to proceed with
3 question ten?

4 MR. WATSON: Yes. Question ten is
5 will the agency accept data from the geological
6 investigation such as that required under Part 732,
7 which is the underground storage tank regulations,
8 as evidence that a groundwater investigation is not
9 required?

10 THE HEARING OFFICER: Docketed, for
11 the board, as R97-10.

12 Go ahead, please.

13 MR. WATSON: I believe that last part
14 of my question was as evidence that groundwater
15 investigation is not required.

16 MR. EASTEP: You're going to have
17 to still address groundwater and your geology
18 might be a significant factor in the extent of
19 how you would address it.

20 MR. WATSON: How does the issue of
21 geology affect the site investigation portion of
22 a remedial applicant's obligations?

23 MR. EASTEP: I'm not sure I
24 understand.

1 MR. WATSON: The question is under
2 the tank program, you go out and you do a 50-foot
3 boring and if you don't find groundwater, you are
4 done, or you do your 15 feet below the tank invert.
5 If you don't have the groundwater, then, you don't
6 have to proceed.

7 In here, it requires you
8 to conduct site characterizations and determine
9 groundwater. The question is, you know, how far
10 does the remedial applicant have to go in terms
11 of costs and investigation to characterize
12 groundwater?

13 Does the agency require,
14 for instance, that you install a monitoring
15 well that goes down 80 feet into bedrock to
16 confirm that there is no groundwater or is
17 there a tough point where you can rely on the
18 geology and information regarding the lack
19 of groundwater to say that there was no
20 groundwater investigation requirement?

21 MR. EASTEP: Let me respond in
22 two ways. First of all, I have -- I am not
23 particularly familiar with the LUST regulations,
24 the underground tank rules. We have no provisions

1 such as they have for -- there is an automatic
2 exclusion of 15 feet.

3 By the same token, if you
4 have done a characterization and the extent of
5 contamination is -- and you can professionally --
6 reasonably and professionally ascertain that you
7 haven't impacted groundwater, then, you may not
8 have to sample groundwater. That could happen
9 at a lot of sites.

10 MR. WATSON: So you would allow a
11 remedial applicant to make a showing or attempt
12 to make a showing that they have done enough
13 sampling or they have enough information regarding
14 the geology of a site to show that there was no
15 impact to groundwater, is that right?

16 MR. EASTEP: Yes.

17 MR. WATSON: I mean, that's a real
18 practical problem and one that's confronted a lot.
19 I'm just trying to get a sense of where you are
20 at on that. I think that's helpful.

21 I have one final question on
22 this point. Do you have an understanding as to
23 why the geology considerations are not a part
24 of this site remediation program rulemaking?

1 MR. EASTEP: I think, first of all,
2 geology is part of 742 in the way we determine
3 remediation objectives.

4 Secondly, I think under 425 --
5 excuse me -- 740.425, we have asked for a site
6 characterization which does deal with facility
7 geography, hydrogeology, existing and potential
8 migration pathways, exposure routes, which also
9 certainly deal with the geology of the site.

10 MR. WATSON: Okay. Let me just
11 follow-up on the first one. To what extent do
12 you believe that the site remediation program
13 considers geology?

14 MR. EASTEP: In many sites, it's
15 a critical factor in determining remediation
16 objectives?

17 MR. WATSON: Would that be part of
18 a Tier 3 analysis?

19 MR. EASTEP: It wouldn't have to be.

20 MR. WATSON: In what other circumstance
21 does it come up?

22 MR. EASTEP: Well, under Tier 2, a lot
23 of your groundwater stuff can be done under Tier 2.
24 Tier 2 does look at the physical characteristics of

1 the site, the geological characteristics.

2 MR. WATSON: With respect to Tier 3,
3 you could also rely on certain geological
4 restraints?

5 MR. EASTEP: Certainly.

6 MR. WATSON: That's it.

7 THE HEARING OFFICER: Does anyone have
8 any follow-up questions?

9 MR. RAO: I have a follow-up question.

10 Mr. Eastep, does Part 742,
11 the proposal under R97-12, did they specify
12 requirements for a geological investigation site
13 or does it depend on other programs to provide
14 such information?

15 MR. EASTEP: Well, it tends to be
16 program-specific generally. You need it to do
17 some of the things you are doing under 742 with
18 the development of remediation objectives. I guess,
19 I'm saying the way you do it is program-specific.

20 MR. RAO: Supposing somebody is in
21 this 740 program and they use 742 to handle
22 their remediation objectives, at what point would
23 they collect all of the geologic information that
24 may be required under 742?

1 Would it be under this program,
2 740, or would they do it at a point where they
3 develop remediation objectives?

4 MR. EASTEP: It would be under
5 this program, under 740. It's a Phase 2 site
6 investigation.

7 MR. RAO: But in the proposed rules
8 under 740, you don't have any specific requirements
9 for site geologic investigations. So is the intent
10 here to keep it more flexible and include it on a
11 site-specific basis or is it left to the judgment
12 of the professional engineer who does the
13 investigation to see what information you are
14 requiring to develop remediation objectives?

15 MR. EASTEP: It was intended to be
16 very flexible. As I recall, when we were discussing
17 this, we were looking at some of the requirements
18 under the different programs. For a lot of the sites
19 that we had, your knowledge of the geology might
20 have to be very limited in order to be able to get
21 a release from the program.

22 A lot of our sites are fairly
23 small and fairly straightforward. There are a lot
24 of them, however, that are comparable to, say,

1 Super Fund sites almost.

2 In that case, your geologic
3 requirements to develop geologic information would
4 be significantly greater. So it would be very
5 difficult to put in requirements other than very,
6 very general requirements to cover the broad
7 spectrum of the program.

8 MR. RAO: Okay. Thank you.

9 THE HEARING OFFICER: Is there anything
10 further.

11 Mr. Rieser?

12 MR. RIESER: Mr. Eastep, wouldn't
13 you say the purpose of the 740.420 site investigation
14 is to really develop the nature and extent of the
15 contamination if environmental -- and identify the
16 actual environmental conditions of the site and
17 that geology and issues like that might be a part
18 of the remedial objectives report, which is also
19 required, and that under that, an engineer would
20 look at the 742 factors and the requirements under
21 742 as to what information would be necessary to
22 develop remedial objectives and might do it under
23 that context as well?

24 MR. EASTEP: The use of 740 and 742,

1 they are designed to go hand in hand. Does that
2 answer your question?

3 MR. RIESER: Partly. To the extent
4 you need to develop geology, you might do that in
5 the remedial objectives report requirement under
6 the 740 rules, right?

7 MR. EASTEP: You develop the
8 information as part. When you start establishing
9 your goals and looking at where you are headed
10 early in the program, what you want to achieve
11 out of the program, that will give you a clue
12 as to the nature of your site investigation.

13 At that point, you develop your
14 objectives -- excuse me -- you develop the
15 information on the geology and you use that to
16 support the development of your objectives. So
17 when they come in, the use of the geology is
18 very critical in a lot of instances to the
19 development of your remediation objectives
20 and that would show up in your remediation
21 objectives report.

22 MR. RIESER: Thank you.

23 MR. EASTEP: Okay.

24 THE HEARING OFFICER: Is there

1 anything further at this point?

2 MR. RAO: Yes. I have a follow-up
3 question.

4 Mr. Eastep, you were saying
5 how geology can play a very important rule in
6 the development of remedial objectives. I was
7 wondering under Section 740.425(b)(2)(C) where
8 you have a site where you listed a number of
9 items that you need to describe the characteristics
10 of the site and you list geography, hydrogeology,
11 existing and potential migration pathways, et cetera,
12 should geology -- site of geology also be listed
13 under this site description?

14 MR. EASTEP: I think we perceive that
15 geology is part of that.

16 MR. RAO: Would it be acceptable to
17 list it like you have done under Section 740.430,
18 under Subsection (a)(4), you say any other
19 environmental, geologic, geographic, hydrologic,
20 or physical release?

21 MR. EASTEP: I think that would
22 be a useful suggestion, and I would like to
23 be able to confer with other agency staff about
24 the possibility of adding that. I think that's

1 probably our intent. Let us consider that.

2 MR. RAO: Thank you.

3 THE HEARING OFFICER: Is there anything
4 further at this point?

5 MR. WATSON: No. Thank you.

6 THE HEARING OFFICER: With that
7 reference, then, we will go to Section 740.425.
8 Let's proceed into those questions. The advisory
9 committee has three questions on that.

10 MR. RIESER: Question number
11 thirty-seven says, does Part 740 require the
12 determination of and subsequent attainment of
13 remediation objectives in the form a numeric
14 concentration of contaminants in all cases?

15 MR. EASTEP: No. Goals may be
16 included in your institutional engineering controls.

17 MR. RIESER: Will the agency clarify
18 that if the initial report prepared pursuant to
19 this section identifies no contaminants which
20 exceed the Tier 1 screening levels, that this
21 report can be used as the remediation completion
22 report?

23 MR. EASTEP: I think this is the rule.

24 MR. RIESER: Will there be agency forms

1 for each report which the remediation applicant will
2 have to fill out?

3 MR. ESTEP: It's our intention now
4 that we have a generic form that would accompany
5 every submission by an applicant. That would be
6 specific to that particular application that's
7 going through the process. Specific submissions
8 probably would have a form. For example, we are
9 intending that we would have a remedial completion
10 report.

11 MR. RIESER: So you could submit your
12 site investigation report which documented the type
13 of completion this question presents and that would
14 be the only form that you would submit? That would
15 be the only report that you would submit?

16 MR. EASTEP: It would be the only form
17 that you would submit. You would have to -- the
18 report would contain documentation.

19 MR. RIESER: Will the agency clarify
20 whether it intends to review reports which indicates
21 that no release has occurred at the site?

22 MR. EASTEP: We don't intend to review
23 these.

24 MR. RIESER: At what point will you be

1 able to make that determination?

2 MR. EASTEP: Is that part of your next
3 question?

4 MR. RIESER: Well, I can ask the next
5 question and then we'll see if that answers it.

6 Will it issue NFR letters under
7 those circumstances?

8 MR. EASTEP: An NFR can be issued for
9 those sites that have no identified release provided
10 they are enrolled in the site remediation program
11 and have done the necessary investigations.

12 MR. RIESER: So how do we square that
13 answer with your first statement that if there is
14 no release, you don't intend to review the reports?

15 MR. EASTEP: We don't want to get
16 burdened down in a lot of cases seeing Phase 1
17 investigations that show no evidence of release.

18 We think that's probably a waste
19 of agency resources to spend time following up on
20 those when they arguably have that release under
21 the act anyway. If someone --

22 MR. RIESER: I'm sorry. When you
23 say "the release," you are talking about the
24 legal release or the potential legal release

1 from liability and not the release of gaseous
2 materials?

3 MR. EASTEP: That's corrct.

4 MR. RIESER: Okay. Go ahead. I'm
5 sorry.

6 MR. EASTEP: Excuse me. If somebody
7 wants to come in and do an investigation to confirm
8 that they have no contamination on-site that would
9 need to be addressed, then, they could probably get
10 in a program like that.

11 There might have been a situation
12 in the past where they don't think they had anything,
13 but they are going to need to go out and do further
14 investigation to prove that, that would be the type
15 of situation where they could come into the program.

16 MR. RIESER: So if their initial
17 Phase 1 documents show satisfactorily that there
18 are no releases, then, you would not consider --
19 at this point you would stop and not deal with these
20 people any further and you wouldn't accept them into
21 the program, but if there is documentation of any
22 potential releases they intend to sample to rule
23 out and perform some type of Phase 2 at that point,
24 that would be considered?

1 MR. EASTEP: There is probably some
2 level, yes, where we start accepting -- we just
3 didn't want to get a lot of -- we wanted to try and
4 avoid a lot of Phase 1's that don't really show
5 anything that would put us through the hoops and
6 just issuing an NFR letter if we didn't perceive one
7 as really being necessary.

8 If somebody needed to do some
9 work, no matter how minimal, and they still wanted
10 to get into the program, they probably have that
11 right.

12 Excuse me. For purposes of
13 clarification, if it wasn't real clear, we don't
14 think that the statute allows you to only do a
15 Phase 1. We think that Title 17 requires the
16 conduct of a Phase 2 investigation. No matter
17 how minimal or extensive, it still requires a
18 Phase 2 in order to be able to get into the
19 program and fulfill all of the requirements.

20 MR. RIESER: Is that because the
21 statute requires that there has to be a documented
22 release?

23 MR. EASTEP: I think we would perceive
24 the statute is just requiring that the Phase 2 be

1 there to document that there was no risk and that
2 you can meet your objectives.

3 MR. RIESER: It's the agency's
4 intent that this program not be used to have
5 agency certification of a clean Phase 1, is that
6 correct?

7 MR. EASTEP: That's correct.

8 MR. RIESER: How and at what point
9 will the agency exclude persons who would submit
10 such documentation to the agency?

11 How will you exclude them from
12 the program or what device or how and at what point
13 will that be done?

14 MR. EASTEP: If somebody submitted
15 a report and they had not done their Phase 2, I
16 think one of our options would be just to reject
17 the report or potentially terminate their enrollment
18 in the site remediation program.

19 MR. RIESER: You would reject the
20 report as being incomplete and if they didn't
21 complete it, that would be grounds for termination?

22 MR. EASTEP: And its not consistent with
23 Title 17.

24 MR. RIESER: Thank you.

1 THE HEARING OFFICER: Are there any
2 further follow-up questions to this section?

3 MS. SHARKEY: I have a follow-up
4 question.

5 THE HEARING OFFICER: Ms. Sharkey?

6 MS. SHARKEY: When you said that a
7 Phase 2 must accompany it, are we meaning the
8 sampling must accompany the report that goes to
9 the agency, the site investigation report?

10 MR. EASTEP: Typically, we would
11 expect to see some sampling, yes.

12 MS. SHARKEY: In every circumstance?
13 Are there instances where --

14 MR. EASTEP: I think every is pretty
15 inclusive.

16 MS. SHARKEY: What kind of scenarios
17 might it not be required?

18 MR. EASTEP: Well, I haven't thought
19 a whole lot about that. Offhand, I don't know.
20 I would hate to rule out the possibility, though,
21 that if we thought there was evidence of
22 contamination, for example, and perhaps we agreed
23 somebody had sufficient engineering and institutional
24 controls, there might be a possibility.

1 It would be unlikely because
2 you have to have some idea what the constituents of
3 concern were in order to fulfill the requirements of
4 the program and do the NFR. You have to identify
5 what type of risks we are controlling, I guess.

6 MS. SHARKEY: Some of what I wondered
7 about as you were talking about the Phase 1 that
8 showed no release is if, in fact, Phase 1 shows that
9 there had been a release, that it had been
10 remediated, and end up -- I'm taking it with the
11 conclusion that the work is done.

12 In that instance, without going
13 through a formal demonstration that objectives have
14 been met, in that instance, would the agency reject
15 a report like that or would the agency want to see
16 sampling to confirm that.

17 What route would you suggest
18 somebody take who has that situation?

19 MR. EASTEP: We probably would want
20 to sit down and go through it with them. My first
21 thought is it might be a candidate for a 4(y) letter
22 as opposed to an NFR. Alternatively, if they were
23 going to get an NFR, we probably would want to see
24 confirmation sampling to demonstrate that, in fact,

1 they had in fact remediated their release.

2 A circumstance like that would
3 require us to exhibit quite a bit of flexibility
4 with regard to how we would deal with an incident
5 like that.

6 MS. SHARKEY: When you say
7 "confirmation sampling," is that different from the
8 type of sampling that would take place in a Phase 2
9 normally or can a Phase 2 encompass both confirmation
10 sampling and/or and investigatory sampling?

11 MR. EASTEP: I think there is a
12 provision there where you set up objectives at a
13 site where there has been a release and your sampling
14 those that you are going to meet your objectives.
15 Then, that information is useful and can be utilized
16 to demonstrate compliance.

17 MS. SHARKEY: In that case, then,
18 your package -- your coming up with your site
19 investigation package would actually be combined
20 or might be combined with your package for the
21 establishment of objectives?

22 MR. EASTEP: That's possible.

23 MS. SHARKEY: I would like to go back
24 to the idea of what kind of letter somebody gets

1 back who may have stumbled into this process and
2 submitted a report that shows that its property is
3 actually clean and doesn't have any releases on the
4 property. I have some concern about what type of
5 letter of response they get from the agency.

6 When a report comes in, is it
7 correct to say that the agency would do a preliminary
8 view simply to see if a Phase 2 was there if any type
9 of sampling or data was accompanying the package?

10 MR. EASTEP: We would look at the
11 report to see if a Phase 1 and a Phase 2 had been
12 done. We have had instances where persons come in
13 and they know there has been a release at some point
14 in the past and they have gone out and they know
15 the constituents of concern and they established
16 objectives and collected their samples and they
17 say, huh-huh, all my constituents of concern meet
18 my objectives and at that point, assuming they
19 have crossed their T's and dotted their I's in the
20 program, then, they are eligible to get an NFR
21 letter.

22 MS. SHARKEY: They have done sampling
23 to confirm all of that?

24 MR. EASTEP: Yes.

1 MS. SHARKEY: I'm back to the example
2 of the party who has come in with just the Phase 1
3 and doesn't have a Phase 2. My concern is what
4 type of letter the agency would give back. It's
5 my understanding of what you said earlier is that
6 if it didn't have Phase 2, it might be simply be
7 rejected as incomplete?

8 MR. EASTEP: Correct.

9 MS. SHARKEY: Is there a -- some of
10 the concern that, I suppose, I would have if I had
11 a piece of property that I thought I legitimately
12 had in the program and then was basically getting
13 a letter back that it was incomplete would be that
14 I have somehow opened up a question mark on my
15 property's status.

16 I'm wondering if -- what is a
17 party like that to do? They believe they have a
18 piece of property that may qualify for the program.
19 They think it doesn't need Phase 2 sampling. The
20 only instance which that would be a possibility
21 would be -- is the answer it's already done, it's
22 remediated, it doesn't require anything?

23 MR. EASTEP: They still need to do
24 a Phase 2. The extent of that is determined on a

1 site-specific basis.

2 MS. SHARKEY: So they have had the
3 option of doing some sampling and coming back to
4 you and showing you the results of the sampling
5 as a way of closing up that open question?

6 MR. EASTEP: Yes. They would have
7 to have an indication that there was a release
8 of some kind. I think our rules are sufficiently
9 flexible enough to allow that scope to be very,
10 very limited in terms of what you do for sampling
11 or it could be much greater.

12 MR. WIGHT: Maybe I can shed some
13 light on the relationship between the Phase 1 and
14 the Phase 2. It goes to some extent to a line of
15 questioning that you were pursuing yesterday about
16 the reasons that the Phase 1 was developed in a
17 real estate transaction context and the support
18 of the innocent landowner defense under CERCLA.

19 We had discussions with the
20 advisory committee about how we should approach
21 the site investigation and we actually presented
22 to the advisory committee a step-by-step
23 investigation where we could not incorporate
24 Phase 1 as the procedure to do that.

1 Then, as an alternative, we
2 suggested that Phase 1 might be more appropriate.
3 I think generally the committee agreed that Phase 1
4 is a better way to go because of familiarity within
5 the field and the engineers knew how to do that and
6 so on.

7 Rather than taking our
8 step-by-step procedure, which was a little different
9 than that, we felt that it would be easier to
10 incorporate a document that people were more
11 familiar with. But given the fact that the Phase 1
12 developed for a somewhat different purpose and
13 given the fact that in the NFR letter, the agency
14 is being asked to certify that a property is no
15 threat to human health or the environment, we
16 felt because the Phase 1 was developed for that
17 limited purpose and that we couldn't issue an NFR
18 letter based on just the Phase 1.

19 In other words, as your innocent
20 landowner defense, and the ASTM document does
21 explain all of this, if you care to read the document
22 as to why it was developed, but, in essence, for a
23 purchaser to be able to maintain deniability, in
24 other words, to say he had no reason to know when

1 he purchased the property there was no contamination
2 there, we feel in order to issue the NFR letter,
3 that a higher level certainty on what the Phase 1
4 provides is necessary.

5 That's why we required the
6 Phase 1 as the starting point, but additional
7 sampling or work at the site to be done confirmed
8 that. I don't know if that clarifies or helps
9 understand the relationship there or not, but
10 that was the thinking on requiring the two and
11 not relying on just the Phase 1 in order to
12 issue an NFR letter.

13 MS. HENNESSEY: Can I ask a
14 clarification question?

15 THE HEARING OFFICER: Certainly.

16 MS. HENNESSEY: You can enroll in
17 the program without having done a Phase 1, correct?

18 MR. EASTEP: Correct.

19 MS. HENNESSEY: Say you are wanting
20 to get a loan on a piece of property, the bank says
21 I want to make sure this is clean and I want you
22 to enroll into this program, it may not be the
23 rational thing to do, but if you applied and then
24 through your Phase 1, you find absolutely no

1 recognized environmental conditions, at that point,
2 are you going to be thrown out of the program because
3 there is nothing for you to investigate in the Phase
4 2, is that correct?

5 MR. EASTEP: That would be --
6 basically, the act requires the further
7 investigation. So it would be in compliance
8 with Title 17. They wouldn't be able to -- just
9 with a Phase 1, they wouldn't be able to comply
10 with Title 17.

11 MS. HENNESSEY: What exactly would
12 they investigate in the Phase 2 if they found no
13 evidence of any recognized environmental conditions?

14 MR. EASTEP: Probably nothing. The
15 program probably wouldn't be appropriate for
16 persons under those circumstances. They should
17 be getting good enough advise -- it's not like
18 they have never seen the property that they are
19 involved with before.

20 Somebody arguably has to know
21 something about it. So that type of person
22 probably is not a good candidate to begin with.
23 When we talk to them, we try and discourage people
24 from that. I understand the relationship with

1 the banks.

2 MR. WIGHT: The Phase 1 might satisfy
3 the bank. If that's all the bank wanted, it might
4 be appropriate, but the question as to whether we
5 can certify that the property is no threat to human
6 health or the environment as opposed to whatever
7 level of certainty that the bank would need in
8 terms of is there any reason to believe there is
9 contamination there, that's a different question
10 than what we are asking to provide an answer to
11 with the NFR letter.

12 MS. HENNESSEY: Would that actually
13 be grounds for terminating someone from the program
14 if they submitted a report that shows no
15 contaminants?

16 MR. WIGHT: I think as Mr. Eastep
17 answered earlier, and just to repeat the answer,
18 if you don't do the Phase 2, you haven't completed
19 the site investigation requirements and we wouldn't
20 approve that report.

21 Then, it would be your choice
22 to do what is necessary to complete the requirements
23 get the report approved and you move ahead or drop
24 out.

1 MS. HENNESSEY: Go ahead.

2 THE HEARING OFFICER: Go ahead,
3 Mr. Meyer.

4 MR. MEYER: Following up on the same
5 line of thinking, I would assume that banks would
6 be more comfortable if they had this letter in their
7 hands, isn't this true?

8 MR. WIGHT: I don't know.

9 MR. MEYER: I mean as opposed to not
10 having it.

11 MR. EASTEP: I would think that the
12 bankers were -- my understanding is the bankers
13 were the ones that were instrumental in getting
14 legislation passed that we referred to as the
15 Banker's Bill, and that's 22.2(j)(6)(E), which
16 offers the presumption that if you have gone through
17 Phase 1 and you find nothing, there is a presumption
18 that there has been no release and since the bankers
19 argued for that legislation, then, I would assume
20 they should be happy with that. That offers them,
21 to my way of thinking, the relief that is really
22 necessary.

23 MR. MEYER: I would certainly feel
24 more comfortable if I was a lender and I had a

1 letter certifying that there were no problems on
2 this particular piece of land --

3 MR. EASTEP: I suspect some --

4 MR. MEYER: -- as distinct from not
5 having this.

6 MR. EASTEP: I suspect some banks
7 would probably be more conservative and would want
8 that, yes.

9 MR. MEYER: Yet apparently, if you
10 don't have any problems, you are going to be booted
11 out of the program and yet if you have problems and
12 they can be cleared up, you will certify that
13 everything is okay.

14 MR. EASTEP: Well, I think part of
15 our -- part of the agency's position has been there
16 is an awful lot of Phase 1's going on out there
17 and that we might run into a resource problem just
18 trying to evaluate all of the Phase 1's that are
19 generated in Illinois.

20 THE HEARING OFFICER: Ms. Sharkey?

21 MS. SHARKEY: I would like to come
22 at it from just a slightly different question.

23 Understanding your resource
24 concern and understanding the concern that a

1 property owner may have if they have a piece
2 of property where they entered a program and
3 maybe there is an implication they are supposed
4 to do something more now even though they have a
5 clean piece of property, they are going to get a
6 letter that basically tells them that your
7 application is incomplete.

8 Is the agency's understanding
9 that that letter that says your application is
10 incomplete, does not imply that the party needs
11 to do anything more on that property?

12 MR. EASTEP: I'm not -- I know we
13 have talked to people about this. I don't know
14 that we actually -- I suspect that some people
15 just voluntarily accepted the relief that Phase 1
16 offers. I'm not sure how we would actually write
17 a letter.

18 I mean, my interpretation is
19 that it doesn't satisfy Title 17 and that's grounds
20 for termination. I don't think -- our goal in the
21 program is to get things cleaned up, not to stir up
22 any problems or backlog sites or anything like that.

23 If we terminated somebody in the
24 program simply because they couldn't fulfill the

1 Phase 2 requirements, I don't think we would make
2 any implication that the site is contaminated.

3 MS. SHARKEY: You use the term
4 couldn't, but just simply didn't fulfill the
5 Phase 2 requirements.

6 MR. EASTEP: Right.

7 MS. SHARKEY: In that instance, there
8 is no implication that they need --

9 MR. EASTEP: I think that our letter --
10 I would try to make the letter very objective and
11 directed towards the fact that it just didn't
12 satisfy Title 17.

13 MS. SHARKEY: Okay.

14 MR. EASTEP: I don't think there would
15 be any implication of contamination.

16 MS. SHARKEY: Thank you.

17 THE HEARING OFFICER: Mr. Rieser?

18 MR. RIESER: Just to follow-up on
19 all of this, in terms of the goal of the entire
20 statute, wouldn't you agree that the goal of the
21 statute falls under, I believe, the site remediation
22 act, which is to deal with sites where there are
23 identified releases and get them remediated and
24 get the agency documentation that the site is as

1 clean as it needs to be for the use that's being
2 made of the property?

3 MR. EASTEP: If I haven't made that
4 clear before, that's certainly our intention.

5 MR. RIESER: Okay. And so the
6 program is really not established to simply
7 provide letters reflecting that clean property
8 is, in fact, clean or that there is agency
9 agreement that clean property is clean, that
10 that is not the intent of the program?

11 MR. EASTEP: Thank you.

12 MR. RIESER: You would agree with
13 that?

14 MR. EASTEP: Yes.

15 MR. RIESER: Okay. Thank you.

16 THE HEARING OFFICER: Mr. Homer, do
17 you still have a question?

18 MR. HOMER: Yes. My name is Mark
19 Homer. I'm with the Chemistry Industry Council
20 of Illinois.

21 Mr. Eastep, is it possible for
22 a remedial applicant to do a limited sampling --
23 random sampling in some situations that would
24 basically satisfy that the Phase 2 that you guys

1 need to issue an NFR even after their Phase 1
2 came back clean? Is it impossible to do a Phase 2
3 when Phase 1 comes back clean?

4 MR. EASTEP: Again, impossible
5 is a pretty broad term. We handle that on a
6 case-by-case basis. If it showed absolutely no
7 contamination and they were just going out to
8 do sampling for sampling sake.

9 MR. HOMER: Wouldn't the sampling
10 still satisfy a Phase 2?

11 MR. EASTEP: And they had absolutely
12 no indication of a release?

13 MR. HOMER: Yes.

14 MR. EASTEP: I think I would do
15 everything possibly to discourage that person
16 from coming through the program. Excuse me a
17 second.

18 MR. HOMER: Mr. Eastep, I would like
19 to withdraw the question.

20 MR. EASTEP: Okay.

21 MR. HOMER: Thanks.

22 THE HEARING OFFICER: Are there any
23 further follow-up questions, then, to Section 740?

24 MR. MEYER: Yes. May I have a minute?

1 THE HEARING OFFICER: Sure.

2 MR. MEYER: Getting back to my
3 original thought, I think every banker is going
4 to have a little box with a check mark on it. If
5 you don't have an NFR letter, you won't get any
6 credit. I mean, that may be their standard operating
7 procedure. For the poor devil who has a clean piece
8 of property that's in a questionable area, is this
9 going to be --

10 MR. EASTEP: Well, if you are saying
11 questionable area, and there is evidence that there
12 might have been something, and we need to do
13 something about it, that's a different story.

14 MR. MEYER: I represented Lake Calumet.
15 You can't get a lender in the whole world to make a
16 loan over there now.

17 MR. EASTEP: I would venture a guess
18 that in the areas surrounding Lake Calumet, it
19 would be very difficult to get a legitimate Phase 1
20 that indicated no release.

21 Well, I would think that in
22 many areas, industrial areas of the state, and
23 particularly South Chicago, that almost every
24 Phase 1 legitimately should show some possibility

1 of release, no matter how remote, and that person
2 would have every right to come in and say, yes,
3 I think I need to go in and do a little sampling
4 here, maybe only one or two samples, to verify,
5 in fact, my site is clean even though in this
6 area. I think those types of people could benefit
7 from the program.

8 THE HEARING OFFICER: Ms. Sharkey?

9 MS. SHARKEY: If a party were to
10 come in with a piece of property in a Phase 1
11 that included potentially a description of the
12 property and an indication that a single area
13 needed sampling and then accompanied by sampling --
14 Phase 2 sampling for that area, am I correct
15 that the agency would review the entire Phase 1
16 although they were only sampling for a single
17 area?

18 MR. EASTEP: That type of thing has
19 happened before, yes.

20 MS. SHARKEY: In other words, there
21 may be portions of a Phase 1 that show no problem
22 and those would be reviewed along with everything
23 else and as long as there is any Phase 2 sampling
24 along with it, it will not be rejected as

1 incomplete?

2 MR. EASTEP: Right. We see that
3 frequently where the Phase 1 really serves to
4 narrow the scope of what you have to do with
5 your Phase 2. That's common.

6 MS. SHARKEY: I'm just trying to
7 get to say --

8 MR. EASTEP: Yes.

9 MS. SHARKEY: -- it may, in fact,
10 be an avenue if some banker is out there and
11 really wants to get this in to go and do some
12 sampling and get their entire Phase 1 into the
13 program and they may come out with a clean bill.

14 I have one other sort of
15 question on this. This came up in Mr. Rieser's
16 questioning. It was the second time it came up
17 and I realized that I still don't completely
18 understand it.

19 The notion that you can
20 have a goal that is an institutional control
21 or an engineered barrier, I wondered if you
22 could give me an example where you would not
23 have a numeric concentration limit, but would
24 simply have as a goal a barrier or institutional

1 control, or maybe an example of each.

2 MR. EASTEP: I think we brought
3 this up before. One example might be where,
4 using T.A.C.O., you have eliminated a pathway.
5 Let's say you have eliminated an ingestion
6 pathway because your contamination is very
7 deep and you have satisfied all of the other
8 criteria.

9 Then, your institutional
10 control or your engineered barrier might be,
11 say, three-foot of cover over that contamination.
12 That would be your goal. You might not -- because
13 you have eliminated the industrial pathway, you
14 don't have a numeric objective for your
15 contaminants of concern.

16 MS. SHARKEY: In that instance,
17 there's actually -- it's an instance in which
18 there is no remediation that would be recommended
19 in the program?

20 MR. EASTEP: Well, I would say
21 that the remediation constitutes satisfying
22 the requirements for the engineered barrier
23 being three-foot.

24 MS. SHARKEY: Conceptually, is it

1 something like a containment approach as opposed
2 to eliminating the contamination?

3 MR. EASTEP: That would certainly
4 be an option in some cases, yes.

5 MS. SHARKEY: Okay. So in that
6 instance, the party would not need to go through
7 developing an objective under a numerical
8 objective under Tier 1 or Tier 2 or Tier 3, for
9 that matter, under any of the tiers?

10 MR. EASTEP: Right. If you were
11 eliminating the pathway, in the example that I
12 gave you, you would not need to develop a numeric
13 objective.

14 MS. SHARKEY: Okay. And you might
15 actually avoid that all the way through the
16 process of getting to the determination of the
17 engineered barrier?

18 MR. EASTEP: It might.

19 MS. SHARKEY: It may be that you
20 need to come up with the numbers -- I guess part
21 of my question is if you had an engineered barrier,
22 I had assumed that you would also need to know
23 the numbers that are under or either side of
24 that barrier and you are saying that in some

1 situations, you may not need to know that?

2 MR. EASTEP: Well, I qualified it.
3 You have to meet the requirements for elimination
4 of an engineered barrier, which requires -- excuse
5 me -- elimination of the ingestive pathway, which
6 would be demonstrating source removal depending
7 on the program that you are in. Part of it is
8 elimination of free product and that type of
9 thing. You would know something about it.

10 MS. SHARKEY: All right. How about
11 the institutional control?

12 MR. EASTEP: Typically, the
13 institutional controls that we have looked at
14 have been proposals dealing with local ordinances
15 that would prohibit groundwater usage, for example.
16 That would be a type of institutional control
17 that might be placed on an NFR letter that dealt
18 with groundwater, for example, or the elimination
19 of a groundwater pathway.

20 MS. SHARKEY: There has been an
21 instance which an institutional control such
22 as an ordinance prohibiting drinking use of
23 groundwater that one might avoid having to set
24 numerical standards?

1 MR. EASTEP: It's possible, certainly.

2 MS. SHARKEY: Can you describe a
3 situation in which that might occur?

4 MR. EASTEP: You could eliminate the
5 groundwater pathway if you assume that you had --
6 if you assume that Chicago had an ordinance that
7 prohibited the use of groundwater for drinking
8 purposes, which you haven't -- I don't think that's
9 the case now, but it might be, and you had a site
10 that had slightly contaminated groundwater and they
11 met the requirements for elimination of a groundwater
12 pathway, then, the institutional control would be
13 the ordinance.

14 MS. SHARKEY: In that instance, would
15 groundwater sampling be required?

16 MR. EASTEP: It may or it may not.

17 MS. SHARKEY: So there is a possibility
18 that with an ordinance such as that, you not only
19 don't need to set a numerical groundwater objective
20 and then determine how you have met it, but you may
21 not even need to sample?

22 MR. EASTEP: I would think if you are
23 eliminating groundwater, in most instances, you would
24 probably need to do some groundwater sampling.

1 MS. SHARKEY: I'm trying to get to
2 those instances where you wouldn't.

3 MR. EASTEP: Okay.

4 MS. SHARKEY: What would be different
5 about the instances where you wouldn't?

6 MR. EASTEP: Well, somebody might come
7 in and they might be sitting on 50-foot of clay above
8 the nearest useful aquifer and they might have minor
9 contamination in the clay and they don't want to
10 worry about groundwater and maybe they think that's
11 an option that's the cheapest way for them to get
12 out.

13 So we define the extent of
14 contamination being well above the groundwater
15 table and having an impermeable layer and they
16 might not have to.

17 MS. SHARKEY: Okay. Thank you very
18 much.

19 THE HEARING OFFICER: Is there anything
20 further at this time?

21 MR. RAO: I have a follow-up question.

22 Mr. Eastep, when you were talking
23 about the institutional control like an ordinance
24 which says you cannot use groundwater for drinking

1 purposes, would there be any conditions as to the
2 NFR letter which says if such control is like an
3 ordinance, there would be a numerical objective that
4 they would have to meet?

5 MR. EASTEP: We would send the
6 NFR letter conditioned upon the existence of the
7 ordinance remaining in effect. I suppose if that
8 condition changed, then, that would be a reason
9 for voidance of the NFR.

10 MR. RAO: So they would have to go
11 back through the process?

12 MR. EASTEP: They may, yes.

13 THE HEARING OFFICER: Is there anything
14 further then?

15 Okay. Before we take a short
16 break, we are just going to do the -- we have two
17 questions on Section 740.435 and the remediation
18 advisory committee has question forty.

19 MS. ROSEN: As required by
20 Section 740.435(b)(3), to what extent does a
21 remediation applicant need to evaluate environmental
22 enforcement actions for areas not under its control
23 or responsibility or areas beyond the remediation
24 site?

1 MR. EASTEP: For areas within the
2 remediation site, I guess a general answer would
3 be only to the extent they know or can readily
4 ascertain such information.

5 MS. ROSEN: Could you clarify what
6 you mean by readily ascertain? Like, what steps
7 would I have to do?

8 MR. EASTEP: If you go beyond the
9 remediation site, it would be, I think, very useful
10 to know if you were adjacent to a site listed on
11 a national priority list.

12 We would consider an enforcement
13 action and certainly that's public knowledge. You
14 would know that. I don't know with other types of
15 enforcement actions how you would know unless they
16 were just a public record.

17 The need for some of that is
18 the fact that if there is an enforcement action,
19 that would cause them to do some sort of remedial
20 activity on the adjacent property, that could
21 impact your property.

22 MS. ROSEN: Would you require a
23 Freedom of Information Act request of all of the
24 adjoining properties?

1 MR. EASTEP: I don't think we require
2 that.

3 MS. ROSEN: I have nothing further.

4 THE HEARING OFFICER: Mr. Watson, I
5 believe question fourteen pertains to this section.

6 MR. WATSON: Yes. This relates to
7 the requirement to complete an endangerment
8 assessment as part of your site investigation
9 report.

10 The question is one of the
11 requirements associated with that in that you have
12 to compare concentrations of -- contaminants of
13 concern with applicable Tier 1 remediation
14 objectives. I guess I'm wondering why has the
15 agency limited this comparison to Tier 1 objectives
16 rather than to applicable Tier 1, Tier 2, or
17 Tier 3 objectives?

18 MR. EASTEP: It simply a means of
19 comparison to be able to know where you are headed
20 in the program. If you are below the Tier 1, then,
21 you don't need to develop Tier 2 or Tier 3. If
22 you are above there, then, you need to start making
23 decisions about whether you have cleaned to that
24 level or whether you develop objectives to the other

1 level.

2 MR. WATSON: Right. I guess
3 my concern is that you are comparing your
4 contaminants -- you are required to make a
5 comparison contaminants of concern to a standard
6 that may be completely inapplicable to a site.
7 I don't know if that's necessarily an appropriate
8 thing to do.

9 MR. EASTEP: Correct. That might not
10 be applicable on that site. That's just a basis of
11 comparison.

12 MR. WATSON: Would there be another
13 option with respect to handling this issue?

14 MR. EASTEP: You could propose Tier 2
15 or Tier 3 at that point.

16 MR. WATSON: At that point we would
17 have an understanding, I believe, of where we were
18 going in terms of what tier we believed, at least
19 initially, was appropriate. I guess one question
20 is whether or not we could -- if we had an
21 understanding at that point, whether or not we could
22 reference that tier as being the appropriate tier
23 for an investigation or the development of remedial
24 objectives at the site.

1 MR. EASTEP: If you develop Tier 2,
2 you would have -- you would have already made your
3 comparison to Tier 1 anyway. That would indicate
4 it was above Tier 1. I mean, this isn't meant to
5 be a large imposition on anybody.

6 MR. WIGHT: I think you are not making
7 any commitment at that point to clean up to the
8 Tier 1, but if you were already under the Tier 1,
9 there would be little point in either you or us
10 spending a whole lot more time and resources in
11 gathering the data that would be necessary to do
12 a Tier 2 and Tier 3.

13 MR. WATSON: Right. I mean, if it's
14 applicable, that's fine. To the extent there is
15 an attempt to do something entirely different and
16 these are completely inapplicable, then, I would
17 be concerned about a commitment that says I have
18 to make that comparison.

19 MR. WIGHT: Well, I would suggest
20 if we had the raw data, we could make the comparison
21 whether you made it or not because. . .

22 MR. WATSON: I would agree with that.
23 Again, it's the -- it's not an appropriate comparison
24 to make if those objectives are inapplicable to a

1 site. I'm wondering whether or not we could have
2 in the rules something that says that we could use
3 Tier 1 to the extent applicable or other tiers if
4 appropriate.

5 MR. EASTEP: I have a couple things.

6 One, I suppose if you provided
7 your list of constituents and we could get out a
8 table and match it up and compare it, that might
9 take us more time.

10 From what I heard yesterday,
11 we're trying to make the process as efficient
12 as possible. Comparing it to Tier 1 indicates
13 where your potential -- what the potential
14 constituents you have to concern yourself with.

15 If you have less than Tier 1,
16 you don't have to worry about it. As I mentioned,
17 if you have greater than Tier 1, then, that's the
18 point where you start making decisions about
19 how you are going to manage that contamination.

20 MR. WATSON: Ultimately, we're going
21 to have to make a showing that we have complied
22 with remediation objectives. That's incumbent
23 on us to do that. We will do that at some point
24 regardless of what tier approach that we have

1 chosen.

2 The question is why is that
3 comparison relevant at all if that tier is not
4 applicable?

5 THE HEARING OFFICER: Dr. Girard?

6 DR. GIRARD: I have a question.
7 The board can probably take care of the language
8 here. It sounds to me like the parties aren't
9 very far apart.

10 It's the way it's stated that
11 makes it seem like Tier 1 is applicable. We
12 could even say the applicable Tier 1, Tier 2,
13 and Tier 3 remediation objectives. Would that
14 be appropriate in these appropriate sections in those
15 two areas?

16 Obviously, if the concentration
17 for contaminants is below the Tier 1, then, it's
18 going to be below Tier 2 and Tier 3. If an applicant
19 comes in and shows where the concentration is in
20 relation to each one of those objectives, then, you
21 are going to be able to make your determination.
22 So why can't we just write in Tier 2 and Tier 3 here
23 so it looks like it is not constrictive to only Tier
24 1.

1 MR. EASTEP: I don't know whether
2 that would imply that they would have to develop
3 their remedial objectives at that point. Some
4 people may not at this point where they have done --

5 DR. GIRARD: The language says
6 compare.

7 MR. EASTEP: Right.

8 MS. McFAWN: Can I ask a clarification
9 question?

10 THE HEARING OFFICER: Yes.

11 MS. McFAWN: I think you have already
12 testified about this. You have to exceed the levels
13 in Tier 1, which are hard numbers, to get to the
14 analysis required under Tiers 2 and 3, right?

15 MR. EASTEP: Right.

16 MS. McFAWN: So you're not going to
17 have to make your comparison to Tier 2 or Tier 3
18 until they have demonstrated to you that they are
19 above the hard numbers in Tier 1?

20 MR. EASTEP: Right.

21 MS. McFAWN: Does that help,
22 Dr. Girard?

23 DR. GIRARD: Yes.

24 MS. McFAWN: If you put in Tier 2 and

1 Tier 3 at this point, you might be getting ahead of
2 what the applicant has to do.

3 MS. HENNESSEY: I wonder if the problem
4 just isn't with the word applicable. Just remove
5 the word applicable and would that take care of the
6 concerns here?

7 MR. EASTEP: Well, I have a couple
8 comments. What Ms. McFawn said is correct. At this
9 point, the persons may not -- you have to take that
10 information and start doing something with it that
11 you have collected on your Phase 2.

12 So people may not have developed
13 Tier 2 or Tier 3 objectives at the point they have
14 done this endangerment assessment that comes with
15 the site investigation.

16 That comparison of those two
17 may not be available because it may entail doing
18 a Tier 3 risk assessment. That could bring in a
19 number of different factors that we haven't even
20 looked at because you have just identified
21 them as being factors.

22 If they were there and somebody
23 had made that decision and had done the calculations,
24 I think that would be acceptable.

1 Okay. If you just say Tier 1
2 or Tier 2 without applicable, we would probably
3 understand, but then again, there could be the
4 implication there that they have to be there.

5 DR. GIRARD: Can I ask a question
6 about this? Does the term applicable refer to
7 specific chemical species or does it imply something
8 else?

9 MR. WIGHT: If I may answer, I think
10 it refers to specific chemical species. I mean,
11 the applicable Tier 1 objectives would be the ones
12 that would apply for the constituents which you
13 have identified at your site.

14 DR. GIRARD: Maybe we could replace
15 applicable with specific?

16 MR. WIGHT: Excuse me.

17 MS. McFAWN: You seem to be discussing
18 this. Dr. Girard made a suggestion and maybe you
19 want to think about it and give us some feedback
20 later.

21 MR. WIGHT: I think we can.

22 DR. GIRARD: Thank you.

23 MR. WIGHT: The question specifically
24 in whether or not the word applicable could be

1 completely deleted or whether some alternative can
2 be --

3 DR. GIRARD: Replaced with specific.

4 MS. SHARKEY: I was going to suggest
5 that maybe it makes sense to take a break and
6 everybody think about it because I don't feel
7 we are all focused on the same issue even with
8 regard to this point. It's not the biggest point
9 in the world, but I do think there is a point
10 here and I kind of see us going in different
11 directions on it. I think if both groups have
12 time to think about it, it might help.

13 THE HEARING OFFICER: That's a fine
14 idea. Why don't we take five minutes and resume
15 at 10:45.

16 (Whereupon, after a short
17 break was had, the
18 following proceedings
19 were held accordingly.)

20 THE HEARING OFFICER: Okay. Then,
21 let's proceed back on the record. I know we are
22 in the middle of some discussion regarding Section
23 740.435.

24 As far as some follow-up

1 clarification, is there anything that the agency
2 would like to say?

3 MR. WIGHT: There were two or three
4 options. This isn't testimony. This is just a
5 discussion that occurred in the hall.

6 There were two or three options
7 that were discussed from deleting the word applicable
8 to deleting the entire requirement to coming up with
9 different phraseology. I think from our point of
10 view, we would like to just carry on discussions
11 and report back at the second set of hearings rather
12 than making some decision today. That way, we can
13 take it back and put it before the entire board and
14 we can figure out what he would like to propose and
15 let you know.

16 THE HEARING OFFICER: That would be
17 fine. We will have that as one of the initial things
18 that we will address at the initial hearing on
19 December 17th.

20 Furthermore, is there any
21 follow-up questioning?

22 MR. WATSON: Yes. I would just like
23 to clarify that.

24 After evaluating it, it clearly

1 is a point that only a lawyer would make, but I
2 think it does certainly bear some examination
3 simply because you have a report and you have a
4 section in the report that talks about endangerment
5 assessments and then you have a comparison of a
6 table to some numbers that may be completely
7 irrelevant to appropriate remediation objectives
8 for a site, yet I would guess supporting Board Member
9 Meyer's concerns about lenders and other people that
10 look at reports and jump to conclusions regarding
11 information and I think that there was a potential
12 that this could be misleading and I guess that we
13 would -- I would propose that either (5)(D) be
14 deleted or that we added some sort of language
15 at the end that said -- compared the concentrations
16 of the contaminants of concern with specific Tier 1
17 remediation objectives or provide a statement that
18 the remediation applicant elects to develop
19 remediation objectives appropriate for the
20 remediation site using Tier 2 or 3 procedures,
21 something along that lines, I think, would clarify
22 my concerns regarding this.

23 MS. McFAWN: Can I ask you a question?

24 MR. WATSON: Sure.

1 MS. McFAWN: If an applicant was
2 going to make a comparison to Tier 2 remediation
3 objectives, under the 742 process, would they still
4 have to go through Tier 1 comparisons?

5 MR. WATSON: No, I don't believe, no.

6 MS. McFAWN: They could just jump over
7 Tier 1?

8 MR. WATSON: Part and parcel, I believe
9 the process is to -- I mean, every one is going to
10 look at Tier 1 first to see if you can get your --
11 get to clean without having to do any cleanup, but
12 you don't have to go through a formal process of
13 comparison or evaluation.

14 MS. McFAWN: But you probably compare
15 the numbers?

16 MR. WATSON: You would compare the
17 numbers.

18 MS. McFAWN: Thank you.

19 THE HEARING OFFICER: All right.
20 We will defer further discussion on this until
21 December 17th and when the agency comes back with
22 further conferencing on this particular section.

23 Are there any further follow-up
24 questions, then, pertaining to 740.435?

1 Hearing none, let's proceed,
2 then, to Section 740.440. Mayer, Brown & Platt has
3 question ten.

4 MS. SHARKEY: My first question on
5 this section, which is determination of remediation
6 objectives, I think, also applies -- it's a
7 terminology question. I think it may apply in a
8 number of other provisions that follow, including
9 those in 445 for remediation objectives report.

10 I'm wondering why we continue
11 to focus on recognized environmental conditions,
12 that term that came out of the ASTM, and has been
13 redefined up in our definition section here, but
14 that really is a Phase 1 concept involving issues
15 of likely presence and suspected releases, et
16 cetera.

17 Why are we focusing on that
18 kind of concept at this later stage when we are
19 now at a remediation objective stage? In other
20 words, at this point the applicant should have
21 completed the remedial site investigation process
22 and yet in 740.440(a) and 445(a), I believe we
23 go back to the concept set of recognized
24 environmental conditions.

1 My real question is why are we
2 not focusing at this point on contaminants of concern
3 or identified contamination?

4 MR. EASTEP: For the most part, I
5 think the terms in this context are synonymous.

6 MS. SHARKEY: Despite the definition?

7 MR. EASTEP: Yes.

8 MS. SHARKEY: All right. You
9 wouldn't have an objection, then, in using the
10 term contaminants of concern instead of recognized
11 environmental conditions?

12 MR. EASTEP: Yes. I would have an
13 objection.

14 MS. SHARKEY: Could you explain what
15 the problem would be?

16 MR. EASTEP: It would just entail a
17 change that I don't think is necessary.

18 MS. SHARKEY: All right. But you
19 agree that in your mind what you are looking for
20 at this point is the narrowed and identified
21 contamination rather than the broader and more
22 speculative notion that one starts out with, as I
23 understand it?

24 MR. EASTEP: At this point where you

1 have gone through the program, for all intents and
2 purposes, they become synonymous. It's about the
3 same thing.

4 MS. SHARKEY: I guess I have trouble
5 when I've got a definition that defines two terms
6 differently to say at some point in here, they become
7 the same thing, but continuing to use the definition,
8 that doesn't match that same thing. You don't
9 consider that to be a problem?

10 MR. EASTEP: No. I didn't understand
11 that was your question, but, no.

12 MS. SHARKEY: Okay. My second
13 question goes to (b)(1), which has to do with the
14 development of remediation compliance objectives
15 and it says as follows and under (b)(1), we are
16 looking at groundwater remediation objectives.

17 I just wanted to clarify is it
18 possible that one would not be pursuing groundwater
19 objectives and, therefore, could simply get a letter,
20 let's say, in the first instance a focused NFR
21 letter for soil and avoid (b)(1) here completely?

22 MR. EASTEP: I think for (b)(1),
23 it's possible to not -- you don't have to develop
24 groundwater remediation objectives in all cases.

1 It may be appropriate that you don't have to in some
2 cases.

3 MS. SHARKEY: Would that be in a
4 focused --

5 MR. EASTEP: There can be circumstances
6 where you conduct your investigation and you do your
7 remediation and you end up only remediating or
8 addressing soil as part of your -- that's the only
9 media that you address and you could get an NFR and
10 that's all you would have to do.

11 MS. SHARKEY: Okay. And is that --
12 are there circumstances in which one could actually
13 get a comprehensive NFR letter without looking at
14 groundwater?

15 MR. EASTEP: You would have to address
16 groundwater, but you may not have to sample it or
17 you may not have to develop objectives for it. You
18 would have to address it in some fashion.

19 MS. SHARKEY: How would you address it
20 in that kind of instance?

21 MR. EASTEP: Well, you could go back
22 to the example we brought up that maybe you've
23 eliminated a groundwater pathway for the reasons
24 that we talked about yesterday and earlier this

1 morning. That might be one example.

2 I mean, you could have other
3 examples. There is the example I gave where
4 your site is on 50-foot of clay and the extent
5 of contamination is very shallow and you remove
6 all of the contamination and there is no need
7 to address groundwater in that instance.

8 MS. SHARKEY: So you basically made
9 a demonstration that the soil contamination doesn't
10 threaten the groundwater?

11 MR. EASTEP: You have addressed the
12 groundwater, yes. You've --

13 MS. SHARKEY: And that's how you've
14 addressed --

15 MR. EASTEP: -- addressed that exposure
16 pathway.

17 MS. SHARKEY: You've addressed it that
18 way rather than sampling?

19 MR. EASTEP: In that example, yes.

20 MS. McFAWN: In that example, (b) would
21 not be applicable right, (b)(1)?

22 MR. EASTEP: That's correct.

23 MR. RAO: I have a follow-up.

24 Subsection (b)(1)(B) states that

1 if an institutional control prohibiting the use of
2 groundwater as a potable water supply is obtained
3 under 35 Ill. App Code 742, Subpart J, the sample
4 points shall be located at the boundary of the
5 remediation site. That means that you should have
6 an ordinance in place to sample groundwater?

7 MR. EASTEP: If an institutional
8 control prohibiting that use is on the remediation
9 site, then, you would sample at the boundary of
10 your site and demonstrate the quality of groundwater
11 going off-site.

12 MR. RAO: It doesn't say if the
13 institutional control applies to the site, does it?

14 MR. EASTEP: I think that's --

15 MR. RAO: What I'm getting at is
16 that institutional control -- can it be used
17 to exclude a pathway?

18 MR. EASTEP: Institutional control --
19 I think under Section B, that's where you -- where
20 exposure routes have not been excluded or where
21 there is no reliance.

22 MR. RAO: You made the distinction
23 between an engineering barrier and an institutional
24 control. So I would like for you to clarify how

1 you view this institutional control to work.

2 MR. EASTEP: Well, I think we have
3 indicated that the -- if an institutional control
4 prohibiting groundwater is there, then, the sampling
5 point -- that's what it says -- the sampling point
6 is located at the boundary of the remediation site.
7 Okay. That's where you would want to ensure that
8 the appropriate quality of groundwater is met going
9 off-site where there might not be an institution.

10 MS. McFAWN: Does 742, Subpart J --
11 I don't have that before me. Does that help?

12 MR. EASTEP: No.

13 MS. McFAWN: I mean, was that put
14 in there to identify the scenario that you are
15 describing?

16 MR. RAO: That is, whether the
17 institutional control applies to site or off-site?

18 MR. EASTEP: In this instance, it was
19 meant for the site.

20 MR. RAO: So then 742, Subpart J,
21 applies to on-site institutional control, is that
22 correct?

23 MR. EASTEP: Without -- I haven't found
24 it yet. I would think Subpart J actually could apply

1 to on-site as well as off-site.

2 MS. McFAWN: So then it doesn't
3 provide the definition we are talking about?

4 MR. EASTEP: Again, I haven't found
5 it, but I don't believe so.

6 MR. RAO: That leads to another
7 question. Under 720.440, Subsection B, where you
8 talk about exclusion of exposure of pathways, you
9 refer to reliance on engineered barriers. I would
10 like to know why institutional controls are also
11 not included for exclusion of exposure of pathways?

12 MR. EASTEP: I think you lost me.

13 MR. LUCAS: What section?

14 MR. RAO: Subsection B.

15 MR. EASTEP: I'm not -- we need to
16 go back and probably look at this. I'm not sure
17 I'm understanding your question.

18 MR. RAO: Let me clarify what
19 I'm asking you. You deal with exclusion of
20 exposure pathways under Subsection B. I wanted
21 to know if institutional control could be used
22 to exclude pathways. If so, why isn't that
23 listed here?

24 MR. EASTEP: Institutional --

1 MR. RAO: You specifically identify
2 in here an engineered barrier.

3 MR. EASTEP: Well, institutional
4 controls are a part of excluding pathways under
5 742. Regarding why they haven't been addressed
6 there, I think we would prefer to defer that
7 and see if we can address that later.

8 MR. RAO: We will address that at
9 the next hearing.

10 MR. WIGHT: The question again is
11 why can't institutional controls be used to --

12 MR. RAO: To exclude exposure of
13 pathways. I thought the intent was --

14 MR. EASTEP: The intent is, and I
15 think we do it there, but I'm at a loss to explain
16 it now. The use of institutional controls is
17 integral in the exclusion of exposure pathways.

18 MR. WIGHT: I think what we need
19 to do is go back and look at it and explain the
20 context of this language.

21 MR. RAO: Yes. I would like that.

22 MR. WIGHT: That shouldn't be an
23 indication of what 742 provides one way or another.

24 MS. McFAWN: Could you also or

1 discuss further the question Mr. Rao brought
2 up about (b)(1)(B)?

3 MR. EASTEP: (b)(1)(B)?

4 MS. McFAWN: Yes. If you don't qualify
5 that as being an on-site institutional control for
6 groundwater being used on-site, it doesn't look like
7 it's raised right or maybe we are misplacing
8 something.

9 MR. EASTEP: It is a little confusing.

10 MS. McFAWN: We will discuss that at
11 a later date and time.

12 THE HEARING OFFICER: Ms. Sharkey, I
13 believe you had one more question.

14 MS. SHARKEY: Actually, that question
15 is misplaced. That should go to 740.445. I'll save
16 it until then.

17 THE HEARING OFFICER: Why don't we
18 turn to, then, the eleventh question filed by
19 Gardner, Carton & Douglas pertaining to 740.440.

20 MR. WATSON: I'm afraid this question
21 is treading into the area where we have just been.
22 I'm happy to defer the issue, if you would like,
23 until the next hearing.

24 THE HEARING OFFICER: That's fine.

1 It's something that you expect the agency to come
2 back with after further conferencing?

3 MR. WATSON: Mark, would you agree
4 that this is --

5 MR. WIGHT: Number eleven?

6 THE HEARING OFFICER: Yes.

7 MR. WATSON: Right.

8 MR. WIGHT: Yes. I think we can roll
9 that into our discussion on Mr. Rao's question and
10 try to wrap up the whole thing at once.

11 MR. WATSON: I mean, as a practical
12 matter, I think we will be getting into this as
13 well next week because it is related to 742.

14 THE HEARING OFFICER: Then, we
15 have one question from the site remediation
16 advisory committee that pertains to the sufficiency
17 of the engineered barrier. I believe there is a
18 correction to your cite at 740.440(c) rather
19 than (d). I don't know if that has been sufficiently
20 answered.

21 You may proceed with your
22 question.

23 MS. ROSEN: What factors will the
24 agency consider to determine the sufficiency of

1 the engineered barrier pursuant to Section
2 740.440(c)?

3 MR. EASTEP: There are several factors
4 that could be considered. The basis of design,
5 durability, design life, et cetera, those are things
6 that we might look at.

7 MS. ROSEN: Thank you.

8 THE HEARING OFFICER: Are there any
9 follow-up questions to this section?

10 Seeing none, let's proceed, then,
11 to Section 740.455.

12 MS. SHARKEY: Excuse me.

13 THE HEARING OFFICER: Oh, I'm sorry.
14 740.445. Go ahead.

15 MS. SHARKEY: I'm sorry. I know mine
16 was mismarked.

17 The question that I have written
18 down here is -- pertains to 740, under ten. It's
19 the third bullet. It pertains to Subsection F of
20 this section.

21 Subsection F looks like it's
22 largely taken from the act. It states in the
23 event that the agency has determined in writing
24 that the background level for a regulated substance

1 or pesticide poses an acute threat to human health
2 or the environment at the site when considering the
3 post-remedial action land use, the remediation
4 applicant shall develop appropriate risk-based
5 remediation objectives in accordance with Subsections
6 (a), (b), and/or (c) above.

7 Does Subsection F mean that
8 the remediation applicant could be required to
9 remediate contamination which is unrelated to
10 the specific subject of a focused site investigation
11 in remediation?

12 MR. EASTEP: It's not intended to do
13 that.

14 MS. SHARKEY: Okay. Thank you. I
15 actually have one other question, if I might, under
16 this section that somehow got left out of my notes.

17 THE HEARING OFFICER: Proceed, please.

18 MS. SHARKEY: I noticed under
19 Subsection A of 740.445, there is discussion of the
20 appropriateness or there is basically a standard
21 using the term appropriate.

22 It says if an exposure route
23 has been excluded under 742(c), the remediation
24 applicant may prepare a remediation objective

1 report showing the appropriateness of the exclusion.

2 I'm wondering whether or not the
3 term appropriate -- what the term appropriate means
4 under this context.

5 MR. EASTEP: That's an additional
6 question.

7 MR. WIGHT: She asked to ask an
8 additional question.

9 MR. EASTEP: Generally speaking, I
10 think that means compliance with Subpart C.

11 MS. SHARKEY: So it --

12 MR. EASTEP: Excuse me. In 742.

13 MS. SHARKEY: Basically, it would
14 be prepare a remediation objective report showing
15 that the exclusion applies, the applicability of
16 the exclusion?

17 MR. EASTEP: That it satisfies the
18 criteria.

19 MS. SHARKEY: That it satisfied the
20 criteria of the exclusion?

21 MR. EASTEP: Yes.

22 MS. SHARKEY: The term appropriateness
23 is also used in E, Subsection E. It says if the
24 recognized environmental condition requires

1 remediation measures other than, or in addition to,
2 remediation objectives under 742, the remediation
3 objectives report shall describe those measures and
4 demonstrate their appropriateness for remediating
5 the recognized environmental condition.

6 What does appropriateness mean in
7 that context?

8 MR. EASTEP: This really would --
9 some demonstration of the fact that whatever measure
10 we come upon, your ability to satisfy -- whether
11 you're proposal has the ability to satisfy that.
12 If in the example here, you are going to remove
13 the drums by just throwing them on a truck and
14 there is evidence that they are partially corroded
15 and you don't have a plan to, like, overpack them
16 and be extra careful, maybe it wouldn't be
17 appropriate to handle them in quite that way.

18 So this is just the general way
19 that you're going to be able to do what you claim
20 is -- what you propose is your goal. You're going
21 to be able to meet that goal.

22 MS. SHARKEY: That your measure is
23 effective in meeting the goal?

24 MR. EASTEP: I would say effective

1 would be feasible.

2 MS. SHARKEY: Thank you.

3 THE HEARING OFFICER: Mr. Rieser?

4 MR. RIESER: I have just a real quick
5 follow-up on 445(a). You talk about if an exposure
6 route has been excluded under 35 Ill. Adm. Code 742,
7 Subpart C, would that, by its own terms, include
8 excluding of the pathway by virtue of Subpart I of
9 742 as well or should that be added since a pathway
10 can also be excluded under Subpart I of 742?

11 MR. EASTEP: Subpart C cross-references
12 to Subpart I.

13 MR. RIESER: I believe 742 does
14 cross-reference Subpart I, but I wanted to clarify
15 it's the agency's intent even though it specifically
16 says Subpart C, you could also exclude a pathway
17 under this section of Subpart I of 742?

18 MR. EASTEP: I think it still comes
19 through Subpart C but it would be Tier 3.

20 MR. RIESER: Okay. Thank you.

21 DR. GIRARD: Can I ask a question?

22 THE HEARING OFFICER: Dr. Girard?

23 DR. GIRARD: Going back to Subpart E,
24 did I hear you say that appropriate means -- that

1 the measures are in compliance with the Environmental
2 Protection Act and all applicable board regulations?

3 MR. EASTEP: I don't think I said that,
4 but that would certainly be implied. We wouldn't --
5 the agency wouldn't approve anything that would cause
6 a violation to the act certainly, but I don't know
7 if -- I didn't really mention that, but it should be
8 understood.

9 MS. SHARKEY: I guess the one thought
10 that I have is that this is a showing that needs to
11 be made by the remediation applicant. I'm wondering
12 what they would need to do to show this negative that
13 you are not in violation of anything else.

14 It's one thing to say -- to
15 show that you have met the criteria laid out in
16 the specific exclusion provision if that remediation
17 applicant now has the burden also, in this instance,
18 to show that they have not violated the act in any
19 other way, what do they have to show? I guess that
20 would be a question to the agency if that were
21 added.

22 MR. EASTEP: We wouldn't knowingly
23 approve anything that was a violation. If that
24 issue came up, and frankly I wasn't thinking of

1 that issue, but it should be understood that we
2 wouldn't agree with you to do or conduct some
3 activity that would violate the act.

4 If your measure required a
5 permit, but they are waste, but let's say your
6 measure did require a permit, then, it wouldn't
7 be appropriate for you to act without a permit,
8 I guess. It might be appropriate for you to
9 conduct that activity if you did have a permit.
10 I'm just saying I didn't make that --

11 DR. GIRARD: When you are using
12 the word appropriate, you mean in compliance
13 with the board's regulations?

14 The example you gave of a
15 permit or the example earlier about removing
16 some drums and conducting yourself appropriately
17 with containment packs, all of these are board
18 regulations or agency regulations, for that
19 matter, for how to deal with environmental
20 situations.

21 So the appropriateness is
22 tested by seeing that the actions are in
23 compliance with the act or board or agency
24 regulations. We are getting back to how you test

1 for appropriateness.

2 MR. EASTEP: This whole section was
3 put in to enable us to be flexible with people and
4 to be able to deal with situations that are beyond
5 the norm, so to speak, and to be able to conduct
6 cleanup sufficiently as well.

7 I just had not thought of it in
8 terms of that. I don't know if overpacking drums
9 of non-hazardous waste would be subjected to any
10 regulatory requirements just sitting here. I can't
11 think of one.

12 Certainly, if they did something
13 that required a permit, we wouldn't authorize them
14 to do that activity. That would be in violation.
15 If we knew of a board rule that they had to follow,
16 we would certainly make sure they were aware of that,
17 and when they conducted the activity, that they
18 followed or complied with the rule.

19 Appropriateness, by itself
20 here in this context has to do more with the
21 demonstration that they can meet their remediation
22 goal or measure or whatever it is in this instance
23 as opposed to complying with some particular rule
24 or regulation.

1 MS. McFAWN: Can I ask a clarification?

2 I just want to make
3 sure that I understand this. You are saying that
4 this demonstration of appropriateness is really a
5 description of how to meet those other measures?
6 For example, they need to remove the drums. So they
7 will describe to you we need to remove the drums in
8 order to meet our goal. Given the condition of the
9 drums, they are going to describe to you how they
10 are going to do that?

11 MR. EASTEP: Uh-huh.

12 MS. McFAWN: So the appropriateness
13 is just the explanation needed to meet their goals?

14 MR. EASTEP: In this instance, the
15 explanation of how they are going to do it so as
16 to get the drums off-site without removing --
17 without releasing contaminants would be the
18 key.

19 MS. McFAWN: Thank you.

20 MS. SHARKEY: I guess I'll put this
21 in terms of a question. We have here a case of
22 using the term appropriate in two different ways,
23 don't we, in this 740.445?

24 MR. WIGHT: Describe the two ways.

1 MS. SHARKEY: Well, what I see is
2 showing that the exclusion is applicable, the
3 remediation applicant bears the burden of showing
4 it met the criteria of an exclusion in 742.

5 In (e), the term appropriateness
6 is demonstrating that the method you have used is
7 capable or effective at achieving the goal, that is,
8 that the measure will remediate the recognized
9 environmental condition there.

10 MR. EASTEP: The context is different
11 for those.

12 MS. SHARKEY: I would agree with you
13 it's different and I think we have come up with
14 terms that are useful in understanding what is meant
15 in the individual situation. Board Member Girard
16 came up with another interpretation.

17 My only point is I think we are
18 using a single term in lots of different ways that
19 can cause confusion.

20 DR. GIRARD: Right. I just wanted to
21 ask could you take this discussion under advisement
22 and possibly look at that wording to see if you could
23 be a little more specific in some language and offer
24 it to us at the second hearing?

1 Would that be possible?

2 MR. EASTEP: I think my answer is yes.
3 I better check with him.

4 MR. RAO: You may also come up with
5 questions for the board regarding what does
6 appropriateness mean. That will help to clarify
7 this.

8 MR. WIGHT: I think, if I might, again,
9 not intending to testify, but from the point of view
10 of one of the drafters, I will emphasize again that
11 given the large variety of sites that come through
12 here, if anybody thinks they can come up with a
13 specific standard of criteria that would address
14 each and every site, they are certainly welcome to
15 attempt it, but we had used some words that are
16 admittedly general because we can't necessarily
17 anticipate in advance every situation that may
18 arise and provide one express set of criteria
19 that that meets all of those situations.

20 I know Ms. Sharkey has a
21 continuing line of questioning in some of the
22 review areas that addresses the same issue and I
23 think our response will be the same. It's just
24 very difficult to come up with specific criteria.

1 I understand the vagueness, but this program has
2 to meet a lot of needs.

3 If we are going to nail down
4 a very specific point on that basis, I think
5 we're going to be so abstract on this thing that
6 it's going to be extremely difficult to administer
7 in all situations.

8 We are open to suggestions if
9 people think they have better language and better
10 criteria, but there was a reason why we chose
11 these terms. We will look at anything anyone
12 else has. Again, I think there is a reason why
13 these words were put in here.

14 MS. TIPSORD: What you are saying
15 is that you're not willing to look at the term
16 appropriateness in this context and come back
17 with some suggestions at this point?

18 MR. EASTEP: I think we are asking
19 if there is something that can offer assistance.
20 With some of these terms, we have spent a lot of
21 time internally as well as with the advisory
22 committee discussing some of these and I don't
23 want to say necessarily vague, but if you want
24 to offer the flexibility to serve the needs of

1 people trying to conduct voluntary cleanups,
2 then, you have to figure a way to make the system
3 workable within the needs of how business is
4 being conducted on a day-to-day basis. If there
5 are people that could help us, we would accept
6 their help.

7 MR. WIGHT: I think it's not an issue
8 of not being willing, but it's more of an issue we
9 have looked at it and thought about it in the past
10 and have been unsuccessful at this point and there
11 is no reason to assume that in the next two weeks,
12 we will suddenly find a key.

13 MS. TIPSORD: I guess my concern arises
14 out of the fact that we have, as Ms. Sharkey pointed
15 out, had already had several different definitions of
16 what appropriateness means that have been addressed
17 to you.

18 So my preference would be to
19 let you have the first chance in suggesting some
20 change.

21 MR. WIGHT: Sure. That's fair. I
22 think even though it may mean different things in
23 different contexts, if it's clear from context what
24 it means, even though it may be general, to us,

1 that would be sufficient.

2 It may have different meanings
3 in different contexts. In fact, I think the
4 introductory language to the definitions section
5 says that words shall have their meaning as
6 prescribed in the act of these regulations unless
7 a different meaning is cleared from context. So
8 that's not a foreign concept.

9 THE HEARING OFFICER: Ms. Sharkey?

10 MS. SHARKEY: I appreciate the
11 concern for flexibility. I think the point that
12 I have been trying to make here is that -- and
13 I think we successfully went through these two
14 and Mr. Eastep was able to provide other words
15 that were more tailored to what was meant in a
16 specific situation.

17 I think we have succeeded
18 possibly with 445. Perhaps others have a -- more
19 need for flexibility exists. My hope would be
20 that the agency would look at them on a case-by-case
21 basis and take a look and see if the word could be
22 tailored some more.

23 This is a concern, if I could
24 just put it on the record so it doesn't sound like

1 it's a picky concern, but I think there is a
2 right to appeal this report. If the agency has
3 denied a report because their measure was
4 inappropriate, then it becomes a very difficult
5 issue on appeal.

6 It becomes difficult for the
7 remediation applicant to understand the basis for
8 the denial of the report as well as difficult to
9 appeal it. I think we recognize the need for
10 flexibility, but underneath it, there has to
11 be a real standard that could be used in that
12 context.

13 MR. WIGHT: I would add this. Where
14 we do deny a report, we are required to state the
15 specific reasons for the denial and the provisions
16 of the act or regulations, if any, that would be
17 violated.

18 I don't think that we would
19 be sending out denials because a proposal was
20 inappropriate. I don't think that would be our
21 reason for the denial. I think the reasons would
22 be more specific.

23 Again, they would be determined
24 on a site-specific basis, what were you proposing

1 and what did we view as the problem. I think the
2 rule does provide that pretty clearly when we do
3 deny a plan or report.

4 MS. SHARKEY: Part of the problem,
5 of course, is that the remediation applicant
6 doesn't have a clear standard other than appropriate
7 up front to determine -- maybe perhaps they may
8 find out later.

9 A question might be whether the
10 agency specification at that point falls within this
11 standard of appropriate and that's a very tough one,
12 I think, for any decisionmaker to have to grapple
13 with.

14 MR. WIGHT: Sure. Without knowing
15 what's going on at a specific site, I don't think
16 we have standard rule either. It's the choice of
17 the word appropriate at this point.

18 MS. SHARKEY: I guess I hear you saying
19 that you have looked at this. It seems to me we just
20 went through 445 and were able to find some
21 alternative words to the word appropriate that were
22 more tailored to what was meant.

23 MS. McFAWN: I would like to make
24 an interjection.

1 While I have been listening,
2 I kind of summarized what I have heard the
3 different interpretations of appropriateness
4 to be through the course of the questions and
5 answers.

6 I came up with three. If
7 you wouldn't mind, I might just put them on
8 record. These are the three things you could
9 tell us which you mean, if all three, or any
10 subset.

11 It seems to me that you were
12 saying if remediation methods other than or in
13 addition to those obviously necessary to reach
14 the remediation objectives or the remediation
15 objectives determined under 35 Illinois
16 Administrative Code 742, if those other methods
17 are required to remediate the recognized
18 environmental conditions, remediation objectives
19 report shall describe those measures.

20 Now, here's the three
21 alternatives; demonstrate that they will be
22 conducted in such a manner as to not pose a
23 threat to the environment or you might want
24 to maintain -- I don't know if you recall this,

1 but they have to demonstrate that those measures
2 will be conducted in accordance with the act
3 and applicable regulations or is it that you
4 want the applicant to demonstrate that those --
5 why those measures are necessary to remediate
6 the recognized environmental condition? You
7 probably will want to see the transcript on
8 that.

9 MR. WIGHT: I'm sorry. I got
10 two of those; no threat to the environment,
11 or why measures are necessary to remediate
12 the environmental condition, and you said there
13 was a third?

14 MS. McFAWN: The third would be
15 Dr. Girard's suggestion that does it mean that
16 the applicant has to demonstrate those measures
17 were conducted in accordance with the act and
18 applicable regulations.

19 Maybe someone else has even
20 yet another interpretation that they heard us
21 discussing. You don't have to do anything with
22 those now. I just thought it might help if I
23 tried to articulate those so we can go back and
24 have something to think about.

1 ready to go back on the record.

2 We are deferring further questions
3 on the appropriateness issue until December 17th. So
4 let's proceed with 740.455.

5 The remediation advisory
6 committee has three questions on that starting
7 with question forty-two.

8 MS. ROSEN: I might suggest these
9 questions might be somewhat tied to the issue
10 of sampling being required for groundwater
11 monitoring purposes.

12 I believe that we deferred
13 further discussion on that issue and I don't
14 know if the agency might want to defer on these
15 questions as well until a later time or if they
16 feel comfortable answering them now.

17 MR. EASTEP: Which ones?

18 MS. ROSEN: Question forty-two,
19 forty-three and forty-four.

20 MR. EASTEP: All right.

21 MS. ROSEN: Let's go ahead. Is
22 post-remediation monitoring required in all
23 cases under the site remediation program?

24 MR. EASTEP: No.

1 MS. ROSEN: Okay. What types of
2 situations does the agency envision will require
3 post-remediation monitoring?

4 MR. EASTEP: For example, you might
5 have a site -- groundwater monitoring at a site
6 with engineering control specifying the use of
7 draw-down wells as a means of grading and control.
8 In that case, groundwater monitoring would be used
9 to ensure that draw-down system is working.

10 MS. ROSEN: Okay. Do you envision
11 time limitations on how long you are going to
12 require post-remediation monitoring and perhaps
13 an ability to revisit the necessity of
14 post-remediation monitoring, and where will
15 that be specified?

16 MR. EASTEP: I think that would --
17 time would be a factor on these. I don't know
18 how it would be used to limit it. In the example
19 that I gave, it might be required until such time
20 as the remedial applicant elected to do something
21 else.

22 In other instances, it could
23 be -- it certainly could be more limited than
24 that. That would probably show up in the remedial

1 action plan and I believe the NFR is required to
2 specify its monitoring requirements.

3 MS. ROSEN: Okay.

4 THE HEARING OFFICER: Could we just
5 stop for one minute? The court reporter needs to put
6 in additional paper.

7 (Brief pause.)

8 THE HEARING OFFICER: Thank you for
9 pausing for one minute. Let's proceed.

10 MS. ROSEN: Could you provide examples
11 of scenarios where the agency might not envision
12 needing post-remediation monitoring?

13 MR. EASTEP: One scenario might be a
14 site that meets Tier 1 objectives through the use of
15 dig and haul.

16 MS. ROSEN: Could you perhaps give us
17 an example of a scenario where you have utilized
18 Tier 2 or Tier 3 to establish your remediation
19 objective?

20 MR. EASTEP: I would think in most
21 instances where you have met your Tier 2 objectives,
22 you might not have to do groundwater monitoring or
23 post-remediation monitoring. If you had a situation
24 where you have an institutional control or

1 engineering control, then, your monitoring might
2 be related to the maintenance of those controls.

3 MS. ROSEN: That's fine for now.
4 Thank you.

5 THE HEARING OFFICER: Are there any
6 follow-up questions?

7 MR. WATSON: Yes.

8 THE HEARING OFFICER: Mr. Watson?

9 MR. WATSON: Are there any
10 circumstances where you would have institutional
11 controls in place for groundwater and not have
12 to do post-remediation monitoring?

13 MR. EASTEP: You might.

14 MR. WATSON: Under what circumstances?

15 MR. EASTEP: In the one circumstance
16 where you have excluded the groundwater pathway
17 and the likelihood of contaminated groundwater,
18 which is very minimal anyway, but then you might
19 not have groundwater monitoring and particularly
20 post-remediation monitoring.

21 MR. WATSON: All right. What kind
22 of post-remediation monitoring would you have to
23 do when there is an ordinance in place as the
24 institutional control?

1 MR. EASTEP: The condition of your
2 NFR letter -- your NFR letter would be conditioned
3 upon that institutional control remaining in place.
4 Particularly, if it were an ordinance, I can
5 envision a situation where your requirement is
6 basically monitoring to make sure that ordinance
7 doesn't change.

8 THE HEARING OFFICER: Ms. Sharkey?

9 MS. SHARKEY: As a follow-up on that,
10 I'm wondering if -- I'm not sure this is the first
11 time that the word post-remedial monitoring appears
12 in here. I know it appears later.

13 Is there anywhere where an
14 applicant would have at the outset an idea of
15 how long they may have to monitor for any way
16 to determine whether a monitoring program is
17 going to be acceptable before this where we
18 are at the final report?

19 MR. EASTEP: Well, if you had a
20 circumstance dealing with groundwater and you
21 had modeled the groundwater and you could
22 demonstrate through modeling that you only needed
23 to do post-remediation modeling for three years,
24 then, you could set up some sort of schedule to

1 work within that time frame to verify that.

2 MS. SHARKEY: Would you anticipate
3 that this is a -- that post-remedial modeling is
4 something that the remediation applicant would
5 propose or is it something that's going to appear
6 in a draft approval?

7 At what point would the
8 remediation applicant become aware of the
9 monitoring requirement?

10 MR. EASTEP: I would suspect that
11 in most cases, the remediation applicant would
12 propose the post-remediation monitoring to help
13 support their argument on whatever remedial
14 objectives are coming up.

15 MS. SHARKEY: Okay. And the standard
16 for approval for the agency, in that case, would
17 be -- I don't know if it's in here anywhere. I'm
18 sorry. I don't recall seeing it earlier, but what
19 standard would the agency use in determining whether
20 or not post-remedial monitoring is appropriate and
21 how long it ought to go on for?

22 MR. EASTEP: That might be a Part 742
23 issue.

24 MR. RIESER: I'm sorry. I didn't hear.

1 What issue?

2 Could you read that back?

3 (Whereupon, the requested
4 portion of the record was
5 read accordingly.)

6 MS. SHARKEY: By that, do you mean
7 in the course of developing one's objectives under
8 742, one would also develop a -- part of that would
9 be the monitoring program?

10 MR. EASTEP: I would think in a
11 lot of cases, yes. That's where your original
12 question went to initially. Where does this
13 start at? I would think it would start with
14 the development of your remedial objectives.

15 MS. SHARKEY: It might be developed
16 by the remediation applicant in that process,
17 presented to the agency, and approved at the
18 point that the objectives are approved? I guess
19 what I'm trying to figure out what is standard
20 for those -- for that monitoring is, the need
21 for it and the duration.

22 Would it be -- are we saying
23 that's something that we could address in 742
24 or are we saying that it's something we know is

1 addressed in 742? I guess I'm not clear on that.

2 MR. EASTEP: Part of the answer is
3 going to show up in 742 and I think part of your
4 answer would show up under the general standard
5 for how the agency approves various plans and
6 reports.

7 The general standards --
8 without having the language in front of me, our
9 general standard would go towards the demonstration
10 that whatever you are proposing is going to meet
11 your remediation objectives.

12 MS. SHARKEY: Maybe we can address
13 that after we get to that section.

14 THE HEARING OFFICER: That is the next
15 section.

16 MR. WATSON: Let me just ask one more
17 follow-up question just to be clear.

18 With respect to an ordinance
19 as an institutional control, there are certain
20 sampling of groundwater that is required. You
21 have to make certain showings. Once you make
22 those showings, the only post-remediation monitoring
23 you have to do is to ensure that that ordinance stays
24 in place, is that correct?

1 MR. EASTEP: I used that as one
2 example. You could have other examples where --
3 I think I mentioned this earlier this morning.
4 You could have a site where you have eliminated --
5 your proof that you have eliminated the groundwater
6 pathway depending on the model and you are proposing
7 to do some sampling to verify the model.

8 MR. WATSON: But my question is do
9 you have to do any post-remediation sampling to
10 verify a model. In post-remediation -- after you
11 have established it and you are done, are you
12 required to do anything else post-remediation?

13 MR. EASTEP: In some cases, you
14 might and in some cases, you might not.

15 MR. WATSON: Let me try it this way.
16 We are getting into Part 742.

17 MS. McFAWN: We are going to address
18 that next week at hearings.

19 MR. WATSON: Okay. I think we can do
20 it then.

21 THE HEARING OFFICER: Does anyone else
22 have anything further?

23 MS. McFAWN: I had a question about
24 these ordinances. I don't know if I'm reading

1 between the lines or not.

2 Has the agency ever encountered
3 one of these ordinances?

4 MR. WIGHT: I can speak to that because
5 I have reviewed two or three of them. Yes, we have.
6 We have approved some of these institutional
7 controls. Specifically, I can say that was in
8 LaGrange, Orland Park, and Tazwell County.

9 MS. McFAWN: Thank you.

10 THE HEARING OFFICER: Is there anything
11 further at this time.

12 Let's proceed, then, to Section
13 740.505. The advisory committee has questions
14 forty-five through fifty on that section.

15 Please, proceed.

16 MR. RIESER: Will the agency expedite
17 the review of a plan or report, if requested, for
18 good cause by a remediation applicant?

19 MR. EASTEP: Plans may be expedited
20 depending on the availability of resources, the
21 reasonableness of the request, and the number of
22 requests that we get at any particular time.

23 MR. RIESER: So those are the factors
24 that you would use in considering that?

1 MR. EASTEP: Yes.

2 MR. RIESER: Would good cause include
3 the pendency of a transaction, a real estate
4 transaction?

5 MR. EASTEP: That could be good cause
6 in some instances, yes.

7 MR. RIESER: Will the agency have any
8 priorities in considering when to review plans and
9 reports other than the chronological order in which
10 they are received?

11 MR. EASTEP: The priorities may include
12 sites that pose a high risk or sites where there is a
13 lot of community concern about the remediation.

14 MR. RIESER: Will the agency log
15 in the reports the day they are received by the
16 agency mail room or on some other date? If the
17 report is logged on some other date, how will
18 that be communicated to the remediation applicant?

19 MR. EASTEP: It's our intention that
20 they be logged the date they are actually received
21 by the agency.

22 MR. RIESER: Does that actually
23 happen?

24 MR. EASTEP: To the best of my

1 knowledge, it does. If it doesn't happen, then,
2 my intention is to set the system up so that if
3 something doesn't get logged in the date it comes
4 in, our clerks have a procedure to ensure that
5 a log is put in that it was received -- the date
6 it was actually received.

7 MR. RIESER: In the case where
8 the agency has reviewed and approved a document
9 submittal under the site remediation program,
10 will it be acceptable for the remediation applicant
11 reference rather than to remit the document as
12 need arises throughout the completion of the site
13 remediation program process?

14 MR. EASTEP: Yes. If the document
15 is appropriate, yes.

16 MR. RIESER: Appropriate to what you
17 are resubmitting it for?

18 MR. EASTEP: Correct.

19 MR. RIESER: Okay. Thank you.

20 THE HEARING OFFICER: Would you like
21 to proceed with the question pertaining to 740.505(f)
22 then?

23 MR. RIESER: Will the agency allow the
24 revision or resubmission of plans or reports without

1 restarting the time frame?

2 MR. EASTEP: Generally, we will
3 restart the time frame. We are going to -- in
4 order to efficiently manage our workload, though,
5 it will depend on how the report came in and when
6 it came in. If it's a very minor revision and
7 the project manager is working on it as it comes
8 in, whether or not we restart the time frame may
9 not matter. It may get done when it was supposed
10 to anyway.

11 Frequently, though, where we
12 have to stop work and wait for a report that comes
13 in, we may have to wait. We don't know the amount
14 of time that we are going to have to wait. So we
15 may restart it.

16 MR. RIESER: So it would depend on
17 circumstances particular to when the extent of
18 the resubmission, the time frame in which the
19 resubmission was reviewed, and things of that
20 nature?

21 MR. EASTEP: Circumstances would
22 govern the time frame in which the report gets
23 reviewed. My general intention is to restart
24 the time frame with new or revised submissions

1 or reports.

2 MR. RIESER: Thank you.

3 THE HEARING OFFICER: Okay. Why
4 don't you finish up with your last question on
5 Section H?

6 MR. RIESER: Will the agency
7 confirm that even though the date that the agency's
8 determination is mailed is described as the date
9 of the agency's determination -- actually, the
10 agency's final decision in some instances -- the
11 deadline for appealing this determination is
12 thirty-five days from the date the remediation
13 applicant actually receives the determination in
14 writing?

15 MR. EASTEP: Yes.

16 MR. RIESER: So even though at some
17 point, this document -- the agency's determination
18 is described as its final decision and it's described
19 as the final decision whenever it's issued, the
20 appeal date does not run until the date that the
21 remediation applicant receives it?

22 MR. EASTEP: Yes.

23 THE HEARING OFFICER: Is there any
24 follow-up to this?

1 MR. WATSON: I have my question
2 fifteen, which relates to Section 505.

3 THE HEARING OFFICER: Which question
4 is that?

5 MR. WATSON: It's fifteen. I have (a),
6 (b), and (c).

7 THE HEARING OFFICER: We can take that
8 at this time.

9 MR. WATSON: Again, I think it goes to
10 a real practical problem that some of our clients are
11 concerned about in terms of the flexibility to handle
12 site-specific issues as they come out without being
13 bound to a particular rigid time frame in terms of
14 the agency won't review partial reports or the agency
15 won't review reports submitted out of sequence.

16 The question is (a), will
17 the agency review and comment on proposed site
18 investigation and remediation plans prior to
19 formal completion as required under Subpart E?

20 MR. EASTEP: Are you referring to a
21 particular section?

22 MR. WATSON: The general requirement
23 that plans to be complete before they are reviewed.

24 MR. EASTEP: As a the matter of

1 course, I think we tend to work with remedial
2 applicants. We don't want to be put in the position
3 of several iterations or helping applicants do the
4 work that their consultant should be doing for them,
5 perhaps.

6 I think on a day-to-day basis,
7 our experience has been that we do work with people
8 and we do try and help them where possible to the
9 point where they can get a good submission in.
10 So that constitutes the limited reviews, but they
11 wouldn't be the formal final reviews.

12 MR. WATSON: So the agency certainly
13 would be willing to conduct limited reviews where
14 warranted and discuss issues with the remediation
15 applicant prior to the submission of a formal
16 report?

17 MR. EASTEP: I think that's been our
18 practice for the last several years.

19 MR. WATSON: My second question
20 goes to a concern that once you go out and do
21 your investigation that there may be additional
22 investigation that then becomes warranted at more
23 complex sites.

24 The question is will the agency

1 review reports where additional investigation
2 or remediation may nonetheless be necessary?

3 MR. EASTEP: Again, my comment would
4 be is we might sit down and talk with someone and
5 work with them on figuring out where they need to
6 go next. That might be a lot of questions if
7 somebody has a site investigation and say, well,
8 I really think I want to do a Tier 3. What else
9 do I need to do here? I'm talking about that type
10 of thing, if that's what you are talking about.

11 There wouldn't be a need for or
12 reason to do a formal review of that report, but
13 you might want to sit down and work with them to
14 help them figure out what they need to do next.

15 MR. WATSON: I guess my question
16 goes more to the situation where you have
17 Phase 2 sampling, Phase 3, Phase 4, and Phase 5
18 sampling as a site based on what you are finding
19 in each sampling event.

20 The question is what is the
21 agency going to review? Will they review the
22 interim sampling reports as being the -- as site
23 investigation reports under this program or is
24 a remediation applicant required to do all

1 sampling that would be necessary to fully define
2 and characterize its site before they can submit
3 these site investigation reports to you?

4 MR. EASTEP: Before they can submit
5 it for a final review, they have to do it all.

6 MR. WATSON: Question (c) says, for
7 complex remediation sites, will the agency review
8 interim plans or reports submitted out of sequence?

9 MR. EASTEP: It would depend on the
10 relationship. If one of them is dependent on another
11 one, then, you would not want to take it out of
12 sequence.

13 MR. WATSON: Right, obviously.

14 MR. EASTEP: Again, we talk to
15 the consultants frequently about this.

16 MR. WATSON: Okay.

17 THE HEARING OFFICER: Is there anything
18 further on 505?

19 Seeing nothing, let's proceed to
20 Section 740.510. Ms. Sharkey, you may proceed with
21 your question number eleven.

22 MS. SHARKEY: This section is
23 the standards for the agency's review of site
24 investigation reports and related activities.

1 The first standard seems to be
2 simply a determination of completeness. Then, the
3 second is determination whether a site investigation
4 has been conducted in accordance with the procedures
5 in Title 17 and Subpart E of this part. Then, it
6 states including, but not limited to, and lists
7 items one, two, three.

8 I recognize that those criteria
9 appear to come directly out of the act or come
10 primarily out of the act. The terms here that
11 are used include the term adequacy for describing
12 the description, adequacy of the investigation of
13 potential pathways and risks to receptors identified
14 at the site, and then appropriateness of the sampling
15 and analysis used.

16 My question really goes to
17 the same issue we were talking about earlier today
18 when looked at the question of appropriateness.
19 I feel we could ask the same questions or go through
20 it. Perhaps that's not necessary.

21 This is the point that -- I guess
22 I would just like to say if we are going to take
23 that same approach that obviously, this is the point
24 of the agency's actual decision making and criteria

1 for their decisions and it seems to me this is the
2 place where particularly if you consider adequacy
3 of the investigation of potential pathways, if this
4 is really an elaboration on the procedures that went
5 before, in other words, it says shall comply with
6 the procedures set forth in Subpart E, but if this
7 is adding something in terms of standard, it's not
8 clear to me what it's adding.

9 I guess I could go through and ask
10 that question or we could save this and revisit this
11 when this whole issue is revisited.

12 MR. WIGHT: I think it's pointless to
13 carry on with the type of discussion that we had
14 fifteen minutes ago or whatever that was. I'm not
15 sure if -- I guess the only thing that I can comment
16 is we can go back and take another look at it and see
17 whether or not we can be more specific.

18 As you did point out, these happen
19 to be statutory criteria. I think we can reconsider
20 the language. I'm not sure I can promise the results
21 will be totally satisfactory to you, but we will make
22 attempts to go back and see if we can come up with
23 something more specific and clarify it to some
24 extent.

1 MS. SHARKEY: I guess I would like
2 to ask the question whether the agency, in drafting
3 this, felt constrained to use the exact language
4 that was in the statute?

5 MR. WIGHT: Again, I don't think we
6 felt constrained. I think that we always feel that
7 we are safe when we were using statutory language.
8 The closer to that you stay, the less difficulty you
9 can get into.

10 Certainly, we recognize the
11 statutory language can be expanded upon. The board
12 has been frequently willing to do that in the context
13 of almost every rulemaking. In that sense, it's not
14 really a restriction.

15 MS. SHARKEY: In fact, doesn't the
16 procedures that go -- that are actually contained
17 in Subpart E, don't they actually define to a
18 certain extent what is adequate in terms of a site
19 investigation for potential pathways -- the exclusion
20 of potential pathways, for example?

21 MR. WIGHT: I'm sorry. Excuse me. In
22 Subpart E?

23 MS. SHARKEY: Yes. What I'm saying
24 is we have a general standard, which is conducted

1 in accordance with the procedures in Subpart E.
2 That is what (b) says. Then, we have including,
3 but not limited to.

4 In other words, these seem
5 to be examples almost of criteria and it's not
6 clear if these criteria are kind of on top of the
7 procedures or if, in fact, one walks through those
8 procedures and is able to provide the agency with
9 information for each category of information
10 requested, whether that's all that's required to
11 achieve adequacy.

12 My point is, I think to the
13 certain extent the agency has elaborated these
14 general criteria in the statute in the regulations
15 themselves.

16 MR. WIGHT: In answer to your question
17 of whether or not these are in addition to what's
18 provided in the introductory language in (b), I
19 think the answer to that is that they are not.

20 They are the criteria themselves
21 that would allow us to evaluate what is in the
22 introductory language in Subpart E. So they are
23 not in addition to that. They are things that
24 we would look at to see if things have been done

1 in accordance with Subpart E.

2 MS. SHARKEY: So these standards,
3 then, do come down to the terms adequacy and
4 appropriate, isn't that the case?

5 MR. WIGHT: Well, yes, but in the
6 context of looking specifically at what Subpart E
7 requires.

8 MS. SHARKEY: We will certainly address
9 it in our comments further, but again, I would hope
10 that this is an area that the agency will reconsider
11 due to the vagueness of those terms.

12 MR. WIGHT: We will take another
13 look at it. Certainly, once again, if anyone has
14 any suggestions to offer in the course of testimony,
15 we would be happy to look at those and consider
16 those as well.

17 THE HEARING OFFICER: Is there any
18 follow-up at this point? I believe Ms. Tipsord
19 has one point she would like to make.

20 MS. TIPSORD: Yes. I would like to
21 follow-up with what Ms. Sharkey was saying. I
22 think I'm confused at this time.

23 If I am a remediation applicant
24 and I provide everything in Subpart E to the agency,

1 then, that would be an adequate description of the
2 site, and I would have an adequate investigation,
3 correct, and my sampling would be appropriate.
4 Is that statement correct if I provide everything
5 asked for in Subpart E?

6 MR. WIGHT: Actually, the contents
7 of the site investigation reports are set forth
8 in Subpart D, but, yes, if you follow those steps.

9 MS. TIPSORD: Then, I could have an
10 adequate appropriate --

11 MR. WIGHT: Yes, yes, you might.

12 MS. TIPSORD: Thank you.

13 MR. RAO: I have a quick follow-up
14 question.

15 You just now mentioned that the
16 procedures are all specified in Subpart D and not
17 in Subpart E. The proposed language under Section
18 740.510(b) cites Subpart E instead of Subpart D.

19 MR. WIGHT: You are right. That
20 is a cross-reference that did not get changed.

21 MS. SHARKEY: So that should read B?

22 MR. WIGHT: B. Sorry.

23 THE HEARING OFFICER: As agreed, the
24 agency will address further issues pertaining to

1 the 510 at the beginning on December 17th in addition
2 to the other previous issues that we have discussed.

3 Are there any other questions
4 relating to 510 at this point? Let's proceed, then,
5 with 515.

6 Ms. Sharkey, I believe question
7 twelve refers to that.

8 MS. SHARKEY: Yes. I guess I am
9 looking at satisfying requirements for Part 742
10 for the exclusion of exposure routes and wondering
11 if a remediation applicant performing a focused
12 site remediation requested a focused NFR letter
13 be required to sample for hazardous characteristics
14 and pH in the soil in order to exclude an exposure
15 route if neither of these would be associated with
16 the release?

17 MR. WIGHT: I think we would request
18 the opportunity to defer. It's in a 740 context,
19 but it's related as much to T.A.C.O. procedures.

20 Given Mr. King's unavoidable
21 absence today, I would defer to the response of
22 this question until the next set of hearings.

23 MS. SHARKEY: That's fine.

24 THE HEARING OFFICER: Does anyone have

1 any objection to that?

2 MS. HENNESSEY: As a point of
3 clarification, are you going to address this in the
4 742 hearing or the 740 hearing?

5 MR. WIGHT: Well, we'll have to
6 address it in these hearings. It may get addressed
7 at the next set of hearings. We will go back and
8 make some assessment of it and respond at the site
9 remediation hearings on the 17th.

10 MS. HENNESSEY: Thank you.

11 THE HEARING OFFICER: Does anyone have
12 any objection to that?

13 MS. SHARKEY: No. That's fine with me.

14 THE HEARING OFFICER: Thank you.
15 Please, proceed.

16 MS. SHARKEY: My second question
17 is with regard to the area of background in
18 515(b)(2)(1). Actually that's (b)(2)(A). Excuse
19 me a second. I have to figure out my reference
20 here.

21 MR. WIGHT: Maybe I can save you
22 the trouble. We planned also to request deferral
23 of this. If you want to clarify the question,
24 though, that might be helpful.

1 MS. SHARKEY: Okay. The question is
2 whether or not if we are looking to area background
3 levels for establishing the remediation objective,
4 whether or not in a focused site remediation, one
5 is required to remediate to levels below area
6 background levels. I suppose the alternative would
7 be to simply achieve area background levels.

8 Then, the second question is that
9 only for contaminants of concern if we are going to
10 be focused assessment?

11 MR. WIGHT: Okay. We will request
12 deferral on this. I think I understand where you
13 are headed.

14 MS. SHARKEY: My third question
15 here may strike one as not too smart. Many of
16 my questions may strike you that way. This one
17 in particular possibly.

18 I'm asking what is the standard
19 the agency would use to determine whether an acute
20 threat to human health or environment exists? I
21 would be the first to agree that that may in and
22 of itself be a standard.

23 The problem in this context
24 is again, we are under area backgrounds, whether

1 an area background level for a regulated substance
2 poses an acute threat to human health or the
3 environment at the remediation site in considering
4 post-remediation property uses.

5 I guess what I'm trying to
6 get at is are we going to be using some sort
7 of standard like exceeds Tier 1, exceeds Tier 2,
8 Tier 3.

9 Is there some sort of numerical
10 notion of what -- when area background may, in
11 fact, rise to what I think everybody considers
12 to be kind of a blatant type of standard, acute
13 threat, and yet we are talking about it in the
14 context of area background.

15 In other words, it's sitting
16 out there. Do you have -- could you give us
17 anymore help on the kinds of context in which
18 the agency might find an area background
19 situation actually prevents an acute threat?

20 MR. EASTEP: First of all Tiers 1,
21 2 and 3, they are usually based more on chronic
22 effects. We would probably use the most recently
23 available or the best scientific or technical
24 literature.

1 Our Sources might include
2 USEPA and some of the various toxicological
3 data bases. They would go in there and look
4 for constituents and levels that identify as
5 representing acute threats.

6 MS. SHARKEY: Okay. The basic
7 scenario here is if I have gone down the route
8 of investigating my area background and found
9 there are high levels of contaminants and
10 possibly even such that would trigger this type
11 of standard, is the applicant at that point free
12 to, say, I guess I can't use area background,
13 I'm going to use a different objective.

14 Does the applicant end up
15 in a situation of having to remediate this
16 area background condition?

17 MR. EASTEP: I don't think that
18 that's required under the statute. Excuse me.

19 Can you repeat the question,
20 please?

21 MR. REISER: I'm sorry.

22 MR. EASTEP: I was asking her to
23 repeat the question. We may want to --

24 MS. SHARKEY: The concern that I

1 have is that if this language appears -- if the
2 remediation objectives are based on the determination
3 of area background levels and the criteria then --
4 there are a number of criteria for approving or
5 reviewing the site in terms of those area background
6 levels and it appears to be whether it presents
7 an acute threat to health or the environment with
8 the area background levels, my assumption is the
9 agency is saying that you can't use that as a
10 cleanup level if we found that it presents an
11 acute threat.

12 The question becomes do I --
13 if I have encountered that level of background
14 out there, may I then say all right, this is a
15 background level, I didn't have anything to do
16 with it, I'm going to clean up to other background
17 levels or to other standards for the remediation
18 I'm undertaking, but I'm not going to clean up the
19 area background level if it can be demonstrated
20 and indeed that is the area background level and
21 indeed this is an acute threat, or is the
22 remediation applicant once they have discovered
23 this forced to deal with it and remediate it?

24 MR. EASTEP: If you opt to go in

1 and use another procedure to develop your cleanup
2 objectives, I can't think of an instance where
3 Tier 1 or Tier 2 would be more conservative than
4 some acute threat.

5 So you would, in fact, end
6 up having to remediate to lower levels anyway.
7 This is within the context of the site remediation
8 program. In situations where there is an acute
9 threat or imminent to health to the environment,
10 the agency still has abilities under the act to
11 go in and take action independent of what a
12 remediation applicant might do.

13 MS. SHARKEY: I'm not sure that's
14 answering the question whether the remediation
15 applicant would be required to do something.

16 MR. EASTEP: This is still a
17 voluntary program.

18 MS. SHARKEY: Right.

19 MR. EASTEP: If you want an NFR letter,
20 though, you would be required to address the
21 situation. If you are wanting --

22 MS. SHARKEY: A comprehensive.

23 MR. EASTEP: -- a comprehensive, you
24 would be required to address the situation.

1 MS. SHARKEY: And if I wanted a
2 comprehensive NFR letter with area backgrounds
3 that exceed this acute level, the remediation
4 applicant would be required to reduce those
5 within the remediation site?

6 MR. EASTEP: Yes.

7 MS. SHARKEY: Even though it was
8 background?

9 MR. EASTEP: Yes.

10 MS. SHARKEY: Okay. My question under
11 515(b)(4)(C), and it appears under 5(C) as well, is
12 how would the agency determine whether site-specific
13 data reflects actual remediation site conditions? If
14 properly obtained, doesn't site specific data by
15 definition reflect actual conditions?

16 MR. EASTEP: Properly attained would be
17 the key words there.

18 MS. SHARKEY: So the real criteria is
19 whether site-specific data is properly obtained or
20 has been properly obtained?

21 MR. EASTEP: Properly obtained would
22 be -- that would probably satisfy -- generally, I
23 thought that would deal mostly with the completeness
24 and comprehensiveness of the data. If you properly

1 obtained it, it would be complete and comprehensive.

2 MS. SHARKEY: Properly obtained meaning
3 pursuant to the methods and procedures described in
4 these regulations?

5 MR. EASTEP: I think those were your
6 words.

7 MS. SHARKEY: Yes. I recognized it was
8 probably vague with the term properly.

9 MR. EASTEP: Yes.

10 MS. SHARKEY: Okay. The answer was was
11 yes?

12 MR. EASTEP: Yes.

13 MS. SHARKEY: In 6(a), we have again
14 the use of the term appropriate describing the
15 remedial measure being appropriate for addressing
16 the recognized environmental condition. This is
17 the same issue that we dealt with before. I'm
18 happy to wait to hear what the agency has to say
19 at the next hearing on that.

20 MR. WIGHT: That's fine. We would have
21 the same response.

22 MS. SHARKEY: Thank you.

23 THE HEARING OFFICER: Are there any
24 follow-up questions to 515.

1 Why don't we proceed, then, with
2 Section 740.520. Ms. Sharkey, that will begin with
3 your question number thirteen, please.

4 MS. SHARKEY: Under 520(b)(1),
5 standards for review of the remedial action plans,
6 is compliance with Title 17 and this part, including,
7 but not limited to, a number of points, and I guess
8 I have concerns about the standard of review with
9 the likelihood or non-likelihood, and I guess I'm
10 curious, how would the agency determine that a plan
11 is likely or unlikely to result in attainment of an
12 applicable remediation objective and what type of
13 evidence would be persuasive of likelihood one way
14 or the other?

15 MR. EASTEP: Whether it's likely
16 is generally technical judgment, but the applicant
17 should show that the plan meets the remedial
18 objectives. They should not propose something
19 and not indicate that it doesn't meet remedial
20 objectives.

21 MS. SHARKEY: I'm thinking of
22 actually some situations I have been in in
23 the existing program and the types of evidence
24 that have been submitted and I guess is it enough

1 to submit an evidence showing that this technology
2 has been used in another case, in a similar case?

3 MR. EASTEP: Probably.

4 MS. SHARKEY: In a similar situation?

5 MR. EASTEP: Probably.

6 MS. SHARKEY: You are looking at
7 the likelihood of success of a remedial measure.
8 I guess I'm trying to elicit from you more of
9 what you are looking for in determining what a
10 remedial measure is worth in a given instance.

11 MR. EASTEP: I think I have answered
12 if you have shown that the technology has worked
13 before in a similar case, we would probably accept
14 it in another case.

15 MS. SHARKEY: Okay.

16 MR. WATSON: My question twelve
17 is directly related to this section if I could
18 just follow-up with this.

19 Who would be making this
20 determination regarding the technical sufficiency
21 of the plan? Who at the agency would be making
22 that determination regarding the technical
23 sufficiency of the plan?

24 MR. EASTEP: That would occur in

1 remedial project management section.

2 MR. WATSON: So each project manager
3 is responsible for making that decision?

4 MR. EASTEP: Generally, the agency
5 utilizes a number of resources to aid the project
6 manager.

7 THE HEARING OFFICER: Do you have
8 anything further on that, Mr. Watson?

9 MR. WATSON: Yes. Do you have anything
10 else to add in response to my last question?

11 MR. WIGHT: No, not at this point.

12 MR. WATSON: You said that one of
13 the things that you look at is whether or not the
14 technology has been shown to be effective in
15 similar circumstances. Is that a requirement
16 that a party makes that kind of technical showing?

17 MR. EASTEP: I thought I was
18 responding to Ms. Sharkey's question.

19 MR. WATSON: So --

20 MR. EASTEP: She asked if that would
21 be acceptable and I said probably it would be.

22 MR. WATSON: Okay. But that's not a
23 requirement?

24 MR. EASTEP: I don't believe so.

1 MR. WATSON: I mean, there are going
2 to be a lot of situations where parties will be
3 coming to you and proposing new and innovative
4 technologies.

5 The question is you will
6 certainly evaluate those and consider those
7 as being appropriate for a site?

8 MR. EASTEP: We certainly encourage
9 alternative and innovative technology, but there
10 probably wouldn't be a lot of instances and probably
11 there probably will be very few instances.

12 MR. WATSON: Very few instances
13 where you will approve new and innovative
14 technologies?

15 MR. EASTEP: No. Very few
16 instances where people will propose new and
17 innovative technologies.

18 MR. WATSON: Okay. Are there any
19 technologies that the agency has might a decision
20 be made today that they will not accept as being --
21 as part of a remedial action?

22 MR. EASTEP: No.

23 MR. WATSON: That's all I have.

24 THE HEARING OFFICER: Ms. Sharkey?

1 MS. SHARKEY: I wanted to follow-up
2 on one more point, if I might, on this section
3 before we leave it.

4 THE HEARING OFFICER: That's fine.

5 MS. SHARKEY: Now, (b)(3) -- again,
6 these are standards for review of remedial action
7 plans by the agency. B is whether the plan result
8 in compliance of Title 17 of the act of the part
9 including, but not limited to, and it has these
10 three sections.

11 We talked about the first.
12 The third section seems to raise this issue we
13 talked about a little bit ago and this may be
14 where this standard for review of this comes in
15 for the -- I'm wondering if this is where the
16 long-term monitoring or the post-remediation
17 monitoring would be approved.

18 This is the section that
19 says the management of risk relative to any
20 remaining contamination including, but not
21 limited to, the provision for long-term
22 enforcement, operation, and maintenance of
23 institutional controls and engineering roles
24 relied on.

1 Is this the standard for
2 review of the post-remediation monitoring?

3 MR. EASTEP: I think this is a
4 standard. I thought there was something else
5 in the act, but it doesn't come to mind right
6 now.

7 MS. SHARKEY: The concept here
8 is that there will be a review of compliance
9 with Title 17 and this part and will include
10 a review of the management of risk on these
11 long-term and maintenance type of issues.

12 I'm wondering at what point
13 would a remediation applicant again learn what
14 their post-remediation obligations might be.

15 Will there be an opportunity
16 for that remediation applicant to propose those
17 to see them in draft or otherwise become aware
18 of them for the standards that they are going
19 to be expected to achieve for this post-remediation
20 work before the points of review or final phase
21 of the action at least?

22 MR. EASTEP: Again, this would be
23 very site-specific. We would hope that the
24 applicant in many instances would recognize

1 the need for post-remediation monitoring early
2 in the process. They would have that in mind
3 when they are developing even remedial objectives.

4 MS. SHARKEY: Where an institutional
5 control or engineered barrier is involved, would
6 you anticipate an agency form would actually
7 reference post-remedial monitoring or other
8 work?

9 MR. EASTEP: I don't think we
10 have contemplated any forms for that right
11 now.

12 THE HEARING OFFICER: Mr. Rieser?

13 MR. RIESER: In the first instance,
14 isn't it the remediation applicant's responsibility
15 to propose whatever it is they are going to do to
16 the site and the agency reacts to their proposal?

17 MR. EASTEP: That is typically
18 correct, yes.

19 MR. RIESER: So the remediation
20 applicant would propose a certain remedial
21 objective and based on modeling to a certain
22 extent would either say this current modeling
23 is sufficient or that additional information
24 is needed to support the sufficiency of this

1 on the barrier and specific conditions in each
2 case?

3 MR. EASTEP: Yes.

4 MS. SHARKEY: And that's true with
5 institutional control as well?

6 MR. EASTEP: Yes.

7 MS. SHARKEY: There are no numbers
8 out there in your experience in the past in using
9 any of these that you found not to say that they
10 are going to apply in every case, but to give us
11 some sort of idea about the kind of time frame
12 that we might be looking at?

13 MR. EASTEP: That's correct.

14 MS. SHARKEY: There are none?

15 MR. EASTEP: That's correct.

16 MS. SHARKEY: Does this section --
17 by the way, to the extent that it involves
18 monitoring an ordinance -- imply that one may
19 have management responsibilities in perpetuity
20 with regard to that ordinance?

21 MR. EASTEP: It might imply that.

22 MS. SHARKEY: In other words, one
23 might in some situations is what you are saying?

24 MR. EASTEP: Yes

1 MS. SHARKEY: Okay. That's all I
2 have. Thank you.

3 THE HEARING OFFICER: Ms. Sharkey,
4 has your second question been answered, then,
5 under 520? I know you referred to (b)(2), but
6 I think it's actually referring to (b)(3).

7 MS. SHARKEY: Yes. Thank you
8 for reminding me on that.

9 It was something I noticed,
10 I think, a couple places in these rules, the
11 notion that there was a remaining risk. I guess
12 I wondered to myself if by definition, once one
13 has achieved an objective or goal, has not the
14 risk been eliminated?

15 MR. EASTEP: The risk has been reduced
16 to an acceptable level.

17 MS. SHARKEY: That would, is that
18 true, in a scenario where you have limited it to
19 industrial use, for example, and used a -- where
20 the limitations -- scratch that. I'll let it go.
21 Thank you.

22 MS. McFAWN: Just as a clarification
23 point, you used the term relative risk remaining,
24 but I think this section talked about risk relative

1 to remain contamination.

2 MS. SHARKEY: Thank you, yes.
3 That's right. I have been contemplating the
4 distinction there.

5 In other words, there is a
6 remaining contamination and the question is
7 whether or not there is -- there would appear
8 to be risk remaining with that contamination,
9 then, the management of risk remaining with
10 that contamination. You are saying there may
11 be an acceptable level of risk under these
12 rules?

13 MR. EASTEP: That's correct.

14 THE HEARING OFFICER: Is there any
15 further follow-up to Section 520?

16 Seeing none, let's go off the
17 record for a minute, please.

18 (Whereupon, after a short
19 lunch break was had, the
20 following proceedings
21 were held accordingly.)

22 THE HEARING OFFICER: Why don't we go
23 ahead and get started? We're back on the record.
24 Let's start with Section 740.525.

1 MR. WIGHT: Excuse me a minute. We are
2 short one very important individual.

3 THE HEARING OFFICER: Just one
4 minute. We'll go off the record.

5 (Whereupon, after a short
6 break was had, the
7 following proceedings
8 were held accordingly.)

9 THE HEARING OFFICER: Okay. Let's
10 proceed.

11 Is the agency ready?

12 MR. WIGHT: We're ready.

13 THE HEARING OFFICER: We are at
14 Section 740.525. I believe there is one question
15 on that filed by Mayer, Brown & Platt.

16 MS. SHARKEY: This question is
17 actually tied up to a certain extent with the
18 next section, which is on groundwater management
19 zones.

20 The question is whether or
21 not a site is, in fact, finished and complete
22 and done at the point that one gets the NFR letter
23 if there is still post-remediation monitoring going
24 on.

1 Part of my concern is tied up
2 in the availability of the groundwater management
3 zone for that period of time while that monitoring
4 is still going on. If we are going to defer the
5 discussion of the groundwater management zone until
6 Mr. King is available, it may be appropriate to defer
7 that question until that time as well.

8 MR. WIGHT: We'll answer that now,
9 although we do wish to defer the GMZ. Maybe the
10 follow-up question we would prefer to wait on.

11 MS. SHARKEY: That's fine.

12 MR. WIGHT: We may not take the
13 follow-up of the initial question.

14 MR. EASTEP: Yes.

15 MS. SHARKEY: So it is considered to
16 be complete?

17 MR. EASTEP: It can.

18 MS. SHARKEY: Thank you.

19 THE HEARING OFFICER: Is there anything
20 further on that particular section?

21 MS. ROSEN: I have something further.
22 It's related to this issue.

23 Can remedial activities at a site
24 be considered complete if you have implemented your

1 engineered barrier, which is going to remain there
2 you know long-term.

3 Would you be getting your
4 no further remediation letter at the time the
5 implementation of the engineered barrier, like,
6 is your remedial activity deemed complete at
7 that time even though you are going to have an
8 engineered barrier remaining?

9 MR. EASTEP: Yes

10 MS. ROSEN: Okay. Thank you.

11 THE HEARING OFFICER: Is there
12 anything further? Let's proceed, then, to Section
13 740.530.

14 Why don't we start with
15 Mr. Watson's question.

16 MR. WIGHT: At this point, I would
17 like to request that we defer all of the questions
18 on Section 530 with regard to the groundwater
19 management zones until the 17th. Again, due to
20 Mr. King's unavoidable absence, we would prefer
21 to have him respond to those questions. That's
22 our request, that we defer all of the 530 questions.

23 THE HEARING OFFICER: Does anyone
24 have an objection to that at this time?

1 THE HEARING OFFICER: All right.
2 All of the questions regarding groundwater management
3 zones will be deferred to December 17th. We will
4 address those also at the beginning of the hearing.
5 That concludes the advisory committee's questions
6 fifty-one through fifty-seven, Ms. Sharkey's question
7 fifteen, as well as Gardner, Carton & Douglas'
8 question fifteen. I believe that concludes that
9 entire section regarding Subpart E.

10 Does anyone have any further
11 follow-up regarding that subpart.

12 All right. Let's proceed, then,
13 to Subpart F regarding no further remediation letters
14 and recording requirements. We have a couple of
15 prefiled questions by the Water Reclamation District.

16 Mr. Dunham, would you like to
17 proceed with those?

18 MR. DUNHAM: Questions number three,
19 since the no further remediation letter can severely
20 limit the future use of property, and to the extent
21 that it can impact the rights of the owner, and
22 affect the value of the property? Should the
23 regulations clearly state that the owner should
24 be noticed as well as the remediation applicant if

1 they are not the same?

2 MR. WIGHT: If I can just respond
3 to that in terms of the overall proposal, the
4 statute certainly doesn't address that and we
5 wouldn't necessarily be opposed to it if you
6 wanted to submit some language that you think
7 would take care of that, we certainly would
8 review it and comment on it at the appropriate
9 time. I guess it wasn't our intention to propose
10 that language.

11 THE HEARING OFFICER: Let me just
12 interject one thing. We'll go off the record.

13 (Whereupon, a discussion
14 was had off the record.)

15 THE HEARING OFFICER: Let's proceed on
16 the record, please.

17 DR. GIRARD: Could I ask a clarifying
18 question?

19 THE HEARING OFFICER: Certainly.

20 DR. GIRARD: We had a discussion
21 along these lines many hours ago yesterday sometime,
22 and it seemed to be that the agency's position was
23 that the remedial applicant was the contact person
24 for the project and that the relationship between

1 the remediation applicant and the owner had to be
2 worked out privately between those two parties.

3 So given that that is your
4 position, are you now today changing your position
5 and considering that maybe the owner should be
6 brought into the process for the rules?

7 MR. EASTEP: No. I don't think we
8 are doing that at all. The way we have proposed
9 it, we would notify the owner -- excuse me -- we
10 would notify the remediation applicant.

11 I think our comment on this
12 particular question was if somebody else wants
13 to propose it, they could, but the agency is not
14 in a position to propose that the owner be
15 involved.

16 As a practical matter, if the
17 owner indicated that he wanted a copy, we would
18 probably just make him a copy of the NFR letter.

19 DR. GIRARD: But the owner would have
20 to contact you directly?

21 MR. EASTEP: Either the owner or
22 remediation applicant could ask that we copy
23 the owner. Somebody would have to contact us,
24 yes.

1 MR. GIRARD: As the regulations are
2 then put forth, you would not automatically contact
3 the owner?

4 MR. EASTEP: Correct.

5 MR. GIRARD: Thank you.

6 MS. McFAWN: So you are just basically
7 saying that -- I think what Dr. Girard is proposing
8 is that the owner get a copy of the letter, which
9 would be recorded, is that right?

10 MR. DUNHAM: I moved. There is noise
11 in the back. So I moved forward.

12 MS. McFAWN: Is that what you were
13 saying by your question to get a copy of the letter
14 to be recorded?

15 MR. DUNHAM: Yes. Whether it's the
16 copy that is recorded or not, the substantive rights
17 of the owner could be affected by the no further
18 remediation letter. To the extent that
19 the owner's rights are impacted by the content of
20 this letter, the owner should be on notice long
21 before the potential appeal term.

22 MS. McFAWN: Thank you.

23 MR. DUNHAM: That basically brings
24 me to the next question. The wording of Section

1 740.600(b) (sic.) states that the no further
2 remediation letter shall be issued only to the
3 remediation applicants who have completed all
4 requirements and received final approval of the
5 remediation action completion report by the agency
6 or on appeal.

7 The wording is such that it
8 can be construed to mean that of all the remediation
9 applicants, only those who complete all requirements
10 would get the NFR letter, which I believe is the
11 intent, or it can be read to mean that no one who
12 is not a remediation applicant can obtain an NFR
13 letter that could include a site owner.

14 I want to know which is your
15 intended meaning.

16 THE HEARING OFFICER: Before you
17 answer the question, I just want to make one
18 correction. You are referencing actually 740.605(b)
19 and not 600(b).

20 MR. DUNHAM: I'm sorry.

21 MR. EASTEP: The intention is that
22 the only remediation applicant's who complete all
23 requirements get an NFR letter.

24 MR. DUNHAM: That is the wording.

1 Which is the intent? Only remediation applicants
2 or only those who complete their requirements?

3 MR. EASTEP: Only remedial applicants
4 who complete the requirements.

5 MR. DUNHAM: So no copy of the letter
6 will be given out?

7 MR. EASTEP: Copies would probably
8 be issued or given to practically anybody that
9 asks. It's a public document. It goes under
10 the subject of Freedom of Information Act.

11 I think as I indicated before,
12 if the owner wanted a copy and they notified us
13 early on or at any time, if they just asked for
14 a copy, we would probably give them a copy, but
15 it wouldn't be issued to them.

16 MR. DUNHAM: Why not?

17 MR. EASTEP: I think because the
18 statute requires that the remedial applicant be
19 the one that obtained the NFR letter.

20 MR. DUNHAM: So you are back to
21 the statement from yesterday that the remediation
22 applicant and the the owner have to have a private
23 agreement between them regarding the scope and the
24 outcome?

1 MR. EASTEP: I think my statement
2 was we don't intend on getting involved in the
3 relationship between the remediation applicant
4 and the owner except to the extent that the owner
5 signs off on the application if that person is
6 different than the remediation applicant.

7 MR. DUNHAM: Thank you. The last
8 question is moot.

9 THE HEARING OFFICER: Let's proceed
10 then to Ms. Sharkey's question sixteen. This is
11 pertaining to the same section.

12 MR. RIESER: Ms. Sharkey was just
13 saying that there are questions the site remediation
14 advisory committee as on 600.

15 THE HEARING OFFICER: Do you want to
16 proceed with that first?

17 MR. RIESER: Yes, if that would be
18 okay.

19 MS. SHARKEY: That's fine.

20 THE HEARING OFFICER: Go ahead.

21 MR. RIESER: This is question number
22 fifty-eight. Will the agency state that NFR
23 letters which the remediation objectives are based
24 on different tiers or pathway exclusions will be

1 identical, except for the identification of site
2 requirements which support those remediation
3 objectives such as institutional controls.

4 MR. EASTEP: Yes.

5 MR. RIESER: Will the agency state
6 that it will not require contaminants of concern
7 remaining on the site to be specifically identified
8 in the NFR letter?

9 MR. EASTEP: In some cases, it might
10 be appropriate to identify the remaining contaminants
11 in the NFR letter. It could assist the current owner
12 in identifying any potential hazards should they need
13 to conduct any activities on the property, but our
14 general procedure would be to specify, as is required
15 under Title 17, a level of remediation objectives.

16 MR. RIESER: I'm sorry. When you
17 say specify the level of remediation objectives,
18 what remediation objectives do you mean?

19 MR. EASTEP: One of the requirements
20 for the contents of NFR letters, I want to say
21 610(a)(3), would identify the level of remediation
22 objectives.

23 MR. RIESER: I see. I see the language
24 that you are referring to.

1 MR. EASTEP: So we would specify
2 the level of remediation objectives. We wouldn't
3 necessarily make any distinction, though, of
4 what remains on-site or how much remains on the
5 site unless it were appropriate for that particular
6 situation and we discussed it with the remedial
7 applicant.

8 MR. RIESER: How would you intend
9 to fulfill the requirement of 610(a)(3)? Would
10 you do something as being a Tier 1 or Tier 3 --

11 MR. EASTEP: No. That is not
12 intended.

13 MR. RIESER: How would you, then,
14 fulfill that requirement?

15 MR. EASTEP: If the remediation
16 objective -- one way would be if the level of
17 remediation objective was, say, for PCB's and
18 it was 25 parts, that might be what is specified --

19 MR. RIESER: I see.

20 MR. EASTEP: -- on the letter. I
21 believe that requires us to specify the land use
22 limitation as well if there were one.

23 MR. RIESER: Certainly. And if there
24 were a engineered barrier, you would specify that

1 as being the remedial objective, is that correct?

2 MR. EASTEP: That's correct.

3 MR. RIESER: I'll move on to my next
4 question.

5 MR. WATSON: I have a follow-up on
6 that.

7 MR. RIESER: Okay. I'm sorry. Go
8 ahead.

9 MR. WATSON: Are you saying for each
10 of the contaminants of concern, you will specify
11 a numerical remediation objective on the no further
12 remediation letter?

13 MR. EASTEP: Potentially, yes.

14 MR. WATSON: And that would be the
15 case notwithstanding the fact that you were getting
16 a comprehensive no further remediation letter?

17 MR. EASTEP: Yes.

18 MR. WATSON: It's my understanding
19 that comprehensive no further remediation letter
20 addresses all site conditions and all contaminants
21 of concern, correct?

22 MR. EASTEP: Yes.

23 MR. WATSON: Go ahead.

24 MR. RIESER: In a situation where

1 there was not a numeric objective such as an
2 engineered barrier, you wouldn't specify --

3 MR. EASTEP: That's correct.

4 MR. RIESER: -- a number even if
5 there were contaminants of concern remaining on
6 the site?

7 MR. EASTEP: That's correct.

8 MR. RIESER: Excuse me for just a
9 second.

10 MS. ROSEN: Could we request a brief
11 recess off the record just for a moment, please?

12 THE HEARING OFFICER: Is just a couple
13 minutes fine?

14 MS. ROSEN: That would be fine. Thank
15 you.

16 THE HEARING OFFICER: All right. Let's
17 go off the record.

18 (Whereupon, a discussion
19 was had off the record.)

20 MR. RIESER: If I may, and I would
21 like to -- we have had a discussion with the agency.
22 What we would like to do is to strike any discussion
23 of the interpretation of 605 -- I'm sorry --
24 610(a)(3) from the record.

1 Some of this was based on
2 Mr. King not being present and I think we need to --
3 this is an area where the agency has agreed to
4 go back and look at this issue a little further
5 and present some further clarification on this
6 issue at the next hearing.

7 I'm asking -- this is something
8 counsel has discussed here with the agency and the
9 agency has no objection to that.

10 THE HEARING OFFICER: That's
11 specifically Section 610(a)(3)?

12 MR. RIESER: Yes, ma'am.

13 THE COURT: Regarding your questions,
14 Mr. Rieser, did you want to proceed with anything
15 that's not specific to that area?

16 MS. ROSEN: Yes.

17 THE HEARING OFFICER: Just for the
18 record, I just want you to know that I am granting
19 your motion.

20 MR. RIESER: Thank you very much.

21 MS. ROSEN: We will continue with
22 the site remediation advisory committee next
23 question, which is sixty-one.

24 MS. ROSEN: If a remediation applicant

1 establishes a remediation site consisting of several
2 separate parcels of land, may the remediation
3 applicant obtain no further remediation letter for
4 each separate parcel?

5 MR. EASTEP: Yes, if there are no
6 interdependencies between the sites.

7 MS. ROSEN: What do you mean by that?

8 MR. EASTEP: In some instances,
9 there could be engineering or institutional controls
10 at the sites that are related to one another. The
11 conditions of the NFR letter for one site may be
12 dependent on something happening at the other site
13 and vice versa. We think it would be clearer to
14 have one NFR letter.

15 MS. ROSEN: And in such an instance,
16 would the NFR letter be recorded on each of the
17 separate titles for each of the separate parcels?

18 MR. EASTEP: Yes.

19 MS. ROSEN: Question sixty-two, if
20 the remediation applicant remediates an off-site
21 parcel of land first and submits a remediation
22 action completion report as to that parcel and
23 then proposes to evaluate its own parcel of property
24 differently, may the remediation applicant obtain no

1 further remediation letters for those parcels where
2 the remediation objectives have
3 been achieved?

4 MR. EASTEP: A general answer is
5 yes, but I guess that also depends on any
6 interdependent relationships between the two
7 parcels.

8 MS. ROSEN: Okay. But in the event
9 that one of the parcel of properties is not, as
10 you stated, interdependent upon an activity that's
11 going on in the first parcel, it could have its
12 own NFR letter, which would just address that
13 separate parcel?

14 MR. EASTEP: That's correct.

15 MS. ROSEN: Okay. Sixty-three,
16 if the identified remediation site extends beyond
17 the boundaries of the Property A to include Property
18 B, is a no further remediation letter recorded for
19 both Property A and Property B? You stated yes,
20 that's correct?

21 MR. EASTEP: Yes.

22 MS. ROSEN: Okay. Again, you
23 probably answered A, in such a case, may the
24 terms of the no further remediation letter

1 recorded for each property reflect achievement
2 of differing remediation objectives, specifically,
3 land use limitations, et cetera?

4 MR. EASTEP: Yes.

5 MS. ROSEN: Okay. Question B,
6 assume that after participation in a site remediation
7 program, a no further remediation letter recorded
8 for Property A and Property B limits both properties
9 to industrial/commercial use. If the conditions on
10 either property are subsequently improved so that
11 residential remediation objectives may be achieved,
12 may a new no further remediation letter be issued
13 for that property?

14 MR. EASTEP: Yes, but it may be
15 necessary -- again, it depends on the relationship
16 between the two properties, whether or not any
17 changes would be necessary for the NFR on the
18 adjacent property.

19 MS. ROSEN: By that, if the property
20 that can achieve the residential levels, if it's
21 achievement of those residential levels is somehow
22 dependent on something that the other property --

23 MR. EASTEP: If by doing that, they
24 remove an engineering control that might be necessary

1 to achieve the levels on the other property, then,
2 that might impact the NFR for the other property.

3 MS. ROSEN: In such a case, what
4 would be the consequences to the NFR letter for the
5 other property?

6 MR. EASTEP: That would be fairly
7 site-specific.

8 MS. ROSEN: By saying site-specific,
9 what do you mean?

10 MR. EASTEP: I mean that it potentially
11 would subject the NFR letter to avoidance on the
12 adjacent property if property that's cleaned up had
13 engineering controls that the other property relied
14 upon in getting the NFR letter and those engineering
15 controls are removed, then, that would potentially,
16 since that was another condition of the NFR, that
17 might be cause for avoidance?

18 MS. ROSEN: It might be cause for
19 avoidance, but not necessarily so?

20 MR. EASTEP: Well, I couldn't tell
21 without knowing -- we would have to look at this
22 on a fairly site-specific basis.

23 MS. ROSEN: You answered C under
24 sixty-three.

1 Question sixty-four, what happens
2 to an existing no further remediation letter which
3 limits the use of the property once the no further
4 remediation letter, which does not restrict the
5 property's use, is recorded?

6 MR. EASTEP: The existing one stays on
7 the record and it would be superseded.

8 MS. ROSEN: How would that be
9 reflected? Would the new no further remediation
10 letter -- would there be language included within
11 that letter to reflect that it is superseding an
12 earlier no further remediation letter?

13 MR. EASTEP: We haven't done one,
14 but probably. We would want to put something in
15 there indicated what happened to the first one.

16 MS. ROSEN: Okay. Is there a
17 mechanism for removing a voided or superceded no
18 further remediation letter from the title of the
19 property subsequent to its recording?

20 MR. EASTEP: Not that we are aware
21 of.

22 MS. ROSEN: I think our question
23 specifically is what actions does the agency
24 intend to take to remove from property titles,

1 if any?

2 MR. EASTEP: I think we intend the
3 superceding document to govern.

4 MS. ROSEN: So the voided no further
5 remediation letter would remain voided on the title?

6 MR. EASTEP: That's correct.

7 MS. McFAWN: You mean that would be
8 recorded over the superceding document?

9 MR. EASTEP: Yes.

10 MS. McFAWN: Thank you.

11 MS. ROSEN: Whose responsibility is
12 it to maintain an institutional control or engineered
13 barrier, which is required by a recorded no further
14 remediation letter, should the property be sold
15 following the recording of the no further remediation
16 letter?

17 MR. EASTEP: We would think the new
18 owner.

19 MS. ROSEN: Okay. What impact will
20 a release of a contaminant of concern subsequent
21 to issuance of a no further remediation letter
22 have upon the existing NFR letter?

23 MR. WIGHT: Could we defer the
24 response on this question to the next set of

1 hearings?

2 This is another one that we
3 have allocated to Mr. King. He had a perspective
4 on this question based on some of the aspects of
5 the T.A.C.O. proposals. I think we would prefer
6 to have him respond to it.

7 THE HEARING OFFICER: Is there any
8 objection to that?

9 MS. ROSEN: That's fine.

10 Okay. Question sixty-nine, may
11 the agency revoke a no further remediation letter
12 on the grounds that the RELPE's recommendation upon
13 which the agency relied in issuance of the letter
14 was improper?

15 MR. EASTEP: We would look to the
16 rules of the statute regarding reasons for voidance
17 or termination -- I guess, voidance -- of an NFR
18 letter and if the information was considered
19 misrepresentative or fraudulent, then, that would
20 certainly be cause.

21 I don't know if we are in a
22 position right now to address any other circumstances
23 where that might happen. Certainly, it's the
24 agency's intent to carefully monitor the activities

1 of RELPE's to ensure that they are acting in a
2 professional capacity in following all of the
3 appropriate requirements.

4 MS. ROSEN: Okay. Thank you.

5 THE HEARING OFFICER: Ms. Sharkey,
6 you still have the one question. I don't know
7 if that has been adequately answered, your
8 question sixteen.

9 MS. SHARKEY: Question sixteen, I
10 think, is based on question fourteen. In looking
11 at it again, I thought it was slightly different.

12 Subsection B of 605 states that
13 no further remediation letter shall be issued only
14 to remediation applicants who have completed all
15 requirements, received final approval of the remedial
16 action completion report by the agency on appeal.

17 We have talked around this section
18 a little bit. The focus that I had again was on
19 completing all requirements. I'm assuming the answer
20 is the same that one need not have completed
21 post-remedial monitoring in order to have satisfied
22 that.

23 MR. EASTEP: Yes.

24 MS. SHARKEY: Thank you. The next

1 question that I have is 610. Is that the next one?

2 THE HEARING OFFICER: Right.

3 MS. SHARKEY: This one goes to the
4 same question that I think we were looking at. I
5 think it was decided that it would to be deferred
6 until Mr. King was here. It's regarding that
7 section under 610(a) and the terminology used
8 there regarding the level for remediation of land
9 use limitation.

10 It may open it up. It's not
11 exactly the same question, but it may open it up.
12 So I would be happy to defer that if you would
13 like.

14 MR. WIGHT: We did have an answer
15 prepared. I think we would be amenable to going
16 ahead and giving that now. It may depend on
17 how far you want to go with the follow-up and
18 how long we can hang with you. We will try at
19 this point.

20 MS. SHARKEY: Okay. I think the
21 real focus I had is understanding what the land
22 use limitations are that are being placed in the
23 no further remediation letter and that one
24 subsequently has to live with.

1 The reference here is to level --
2 that no further remediation letter would include
3 the level of remediation objectives specified as
4 appropriate any land use limitation imposes a
5 result of such remediation efforts.

6 I guess I went back and did
7 not find a definition of land use or land use
8 limitation in the rule itself. I was looking
9 for a definition of that and found my way over
10 to Part 742.

11 I wondered if that is what
12 was intended or if you had some other idea earlier
13 in discussion of this rule. We talked about zoning
14 and whether or not one would look to zoning to
15 describe land use in the surrounding area.

16 So with all of those sort of
17 options out there, I'm wondering what is really
18 meant by land use limitations?

19 MR. EASTEP: It's generally those
20 classes that I think you referenced under 742, the
21 industrial, commercial, residential, conservation,
22 agricultural.

23 MS. SHARKEY: Okay. So it would
24 be specified in terms of 742 definitions then?

1 MR. EASTEP: I'm sorry?

2 MS. SHARKEY: It was intended, then,
3 to be specifying it in terms of 742 definitions?

4 MR. EASTEP: Yes, it was. It was
5 tied to this. It's supposed to directly relate
6 because your remediation objectives, of course,
7 are developed under 742. They are developed using
8 various land uses or for considering various land
9 uses.

10 MS. SHARKEY: And this would be
11 referring to both your current land use and
12 any anticipated most remediation land use?

13 MR. EASTEP: That's correct.

14 MS. SHARKEY: That's all I have on
15 that. Thank you.

16 THE HEARING OFFICER: Are there any
17 other further questions on the Subpart F?

18 MR. WATSON: I have one question.

19 THE HEARING OFFICER: Mr. Watson?

20 MR. WATSON: This question relates
21 to Section 740.625(a)(6). It involves voidance
22 of the no further remediation letters. One of
23 the basis for voiding a no further remediation
24 letter is subsequent of discovery of contaminants

1 not originally identified that would pose a threat
2 to human health or the environment.

3 Well, let me ask the question.
4 Maybe it's already been deferred. If so,
5 then, I'm happy to address it at a later time.

6 The question is I'm
7 looking for some amplification from the agency
8 regarding the circumstances or what they would
9 view to be the discovery of contaminants that
10 would pose a threat to human health or the
11 environment.

12 MR. EASTEP: What's the question?

13 MR. WATSON: The question is what
14 would the agency determine to be appropriate
15 circumstances that would pose a threat to human
16 health or the environment that would support
17 avoidance of a no further remediation letter?

18 MR. EASTEP: Well, if a contaminant
19 was newly identified and that contaminant was such
20 a level that posed a risk, then, the basis on which
21 the issue of the NFR letter, which was that it
22 doesn't represent a threat to human health or the
23 environment, would no longer be valid.

24 MR. WATSON: So the agency would

1 look, then, at the risk analysis set forth in
2 Part 740 and Part 742 to determine the existence
3 of a risk?

4 MR. EASTEP: That would help us
5 formulate more specifically what an appropriate
6 level might be in terms of risk. Acute risk might
7 also come into play.

8 MR. WATSON: With respect to --

9 MR. WIGHT: Could you excuse me a
10 minute?

11 MR. WATSON: Do you have anything
12 further to add?

13 MR. WIGHT: Do you want to continue
14 with your questioning? I don't think we have
15 anything to add to the questions that you have
16 asked so far, but if you want to, you may continue
17 with your line of questioning. There was just
18 something we had to get straight between us.

19 MR. WATSON: Could you read that
20 back, please, the question and answer?

21 (Whereupon, the requested
22 portion of the record was
23 read accordingly.)

24 MR. WATSON: Okay. I don't think

1 I have anything further.

2 MR. RAO: May I ask a follow-up
3 question?

4 THE HEARING OFFICER: Go ahead.

5 MR. RAO: Is the agency saying
6 that they are going to go through the exercise
7 of determining the risk by using -- by going
8 through all of the three tiers to see if the
9 risk posed by the newly discovered contaminants
10 are a threat to human health and the environment
11 and are you to look at the Tier 1 tables and
12 say it's higher than Tier 1 and it may impose
13 a risk to human health and environment?

14 MR. EASTEP: The determination of
15 whether something causes a risk would have to
16 take into context the character of the site and
17 it might be appropriate under Tier 1.

18 If you utilized engineering
19 or institutional controls, those would be
20 important in determining what the risk might
21 be given the concentration of the contaminants
22 being found.

23 See, I would think that we
24 have to use probably more than Tier 1. Under 742,

1 we would have to at least consider engineering or
2 institutional controls or other characteristics
3 of the site.

4 MR. RAO: Okay. Thank you.

5 THE HEARING OFFICER: Ms. Sharkey?

6 MS. SHARKEY: Yes. This was not one
7 of my written questions. I'm just sort of following
8 up on this section.

9 The voidance of the no further
10 remediation letter, there are a number of avenues
11 under which the letter may be voided. Given the
12 time and money that both the agency and the applicant
13 would have put in to creating to remediating a site
14 and getting to the point of a no further remediation
15 letter, is it fair to say that the agency would not
16 intend to exercise any of these except in a situation
17 where they have provided an opportunity for an
18 applicant to have remedied the situation first?

19 MR. EASTEP: Whether we provided
20 any opportunity to remedy, I would think that would
21 depend upon circumstances.

22 In most cases, I think we try
23 and -- if there are problems, we try to identify
24 them to people and allow them to take them before

1 we take any action. I don't know that I could say
2 that 100 percent, though.

3 MS. SHARKEY: Am I correct that the --
4 it appears that there was a -- once a avoidance letter
5 is issued, not is given, and there is an opportunity
6 for appeal, but there is no avenue for discussion
7 with the agency or a draft notice or any notification
8 before the avoidance actually occurs in the rule?

9 MR. EASTEP: I think that's correct.

10 MS. SHARKEY: Given the fact that
11 the -- again, given that the applicant and the
12 agency will put quite a bit of effort into achieving
13 the remediation that is in place, would you agree
14 that there should be some burden on the agency for
15 a letter of this sort that may be voided that is
16 at least a equivalent to the efforts that has gone
17 into creating the remediation site?

18 MR. EASTEP: The agency would not want
19 to limit itself.

20 MS. SHARKEY: Okay. For example,
21 under number three, apparently the letter could
22 be voided if any -- is it true that any disturbance
23 or removal of contamination that was left in place
24 could result in voiding of the letter?

1 MR. EASTEP: Yes.

2 MS. SHARKEY: Would you expect that
3 that would be a scenario where inadvertent -- for
4 example, unknowing inadvertent disturbance of that
5 soil would not warrant the voidance whereas knowing
6 or intentional disturbance might?

7 MR. EASTEP: Yes. I think I had
8 indicated in my previous comment that we try and
9 work with people to get things resolved. If it is
10 unintentional or unavoidable and they want to
11 correct it, I think that would satisfy the agency.

12 Similarly, if they don't
13 pay their no further remediation assessment fee, if
14 they didn't pay that, we probably would send them
15 another bill or something before we moved to take any
16 objection.

17 MS. SHARKEY: Would the agency have any
18 problem with including some sort of mechanism of that
19 sort allowing for notification, but prior to voidance
20 due to this rule?

21 MR. EASTEP: I don't think so. I think
22 we would prefer not to limit our flexibility and keep
23 the rule like it is.

24 MS. SHARKEY: Would that be for only

1 some of these instances or is it a particular concern
2 for the agency with regard to some of these criteria
3 for voidance and maybe less of an interest or concern
4 with others as we were just talking about the
5 disturbance of dirt and the failure to pay a fine?
6 I can see it may create a different level for you
7 than discovering some significant threat or a blatant
8 failure to comply.

9 MR. EASTEP: I believe my comments
10 were made in general. Any references to examples
11 were in general. In general, we would prefer to
12 have the flexibility to be able to work with the
13 applicant to get problems resolved --

14 MS. SHARKEY: And why do you prefer
15 that?

16 MR. EASTEP: -- or voided.

17 Excuse me. Or voided.

18 MS. SHARKEY: Why do you prefer to
19 have that situation where it would get voided
20 without that required?

21 MR. EASTEP: Well, what if I had
22 a remediation applicant or an owner who was no
23 longer present and the NFR still existed and
24 nobody was paying taxes on the property and perhaps

1 they weren't maintaining engineering or institutional
2 controls and nobody was there, why should I spend
3 the state's money chasing some absentee landowner
4 or a bankrupt landowner or deceased landowner
5 around when I could just go ahead and void the
6 letter?

7 MS. SHARKEY: So what you are saying
8 is there may be instances in which it would possibly
9 cost you, say, a 30-day waiting period or something
10 in order to --

11 MR. EASTEP: I didn't say that.

12 MS. SHARKEY: I'm sorry to sort of
13 put it that way, but is what you are saying that
14 there may be some delay in being able to move on
15 something you may otherwise be able to move on
16 quickly?

17 MR. EASTEP: Well, I guess I would
18 reiterate my previous answers that we think it's
19 important for the agency to have the flexibility
20 to either work with them or to seek relatively
21 immediate voidance of the NFR letter. Besides
22 that, there is the appeal period. You do have
23 that opportunity.

24 MS. McFAWN: When you are working

1 with them, as you speak of this, are you doing
2 that before you formally send the notice?

3 MR. EASTEP: I would suspect, yes.

4 MS. McFAWN: Once you formally send
5 the notice, a 35-day time clock kicks in?

6 MR. EASTEP: That's correct. You
7 have to understand we haven't gone through this.

8 MS. McFAWN: I understand. I should
9 have said are you --

10 MR. EASTEP: Yes.

11 MS. McFAWN: -- anticipating, in
12 other words, just informally notifying them that
13 you have some concerns? Is that what you are
14 talking about when you say you will work with
15 them?

16 MR. EASTEP: That's correct. We would
17 somehow communicate our concerns with the remediation
18 applicant or the owner.

19 MS. SHARKEY: Mr. Eastep, what would
20 you say --

21 MR. WIGHT: Excuse me, please.

22 Go ahead.

23 MS. SHARKEY: Mr. Eastep, what
24 would you say to a remediation applicant who said

1 I'm concerned that the agency may find a technical
2 violation of some sort such as perhaps payment of
3 my fee has been lost in the mail and all the work
4 that I have done in achieving this site remediation
5 will be voided and I will be forced into appeal
6 posture because the agency didn't let me know this
7 problem is coming up?

8 MS. McFAWN: For the record, it's not
9 voided until the appeal process is over.

10 MS. SHARKEY: But we will have issued
11 the notice, then, and the appeal process would be
12 triggered.

13 MR. EASTEP: I guess my first answer
14 would be with what Board Member McFawn has just
15 indicated, which is that if somebody is late paying
16 their fees, they probably still have an opportunity
17 during that appeal period to pay the fee. I would
18 suspect that would have no further reason to
19 proceed.

20 MS. SHARKEY: So you're saying that
21 the matter could be settled with the agency and
22 the Court while the appeal is pending?

23 MR. EASTEP: I think that happens
24 in other parts of the agency for appeals. So I

1 don't see why it wouldn't happen here.

2 MS. SHARKEY: Just so I'm understanding
3 you, you're saying that the party in that posture
4 may have a remedy after the issuance of that notice
5 letter, but before the deadlines or activity before
6 the board begins? In other words, there is 35 days
7 to appeal. So perhaps during that 35-day appeal
8 period or after the appeal period is run and an
9 appeal has been filed, it would be an ongoing
10 opportunity to resolve it before the board decided
11 the appeal?

12 MR. EASTEP: That's correct.

13 MS. SHARKEY: Okay. I think I
14 understand your position. Thank you.

15 THE HEARING OFFICER: Mr. Watson?

16 MR. WATSON: I have another question on
17 another part of Section 740.625(a)(6) and that
18 relates to the first clause of that provision where
19 is says subsequent discovery of contaminants, could
20 you provide me with some clarification on what the
21 agency would view to be appropriate subsequent
22 discovery of contaminants that would lead them down
23 the road to potentially voiding a no further
24 remediation letter?

1 I mean, would it have to be
2 more than a single sample that there's something
3 in the ground? I guess I'm not concerned about
4 the agency in this instance so much as I'm concerned
5 about lenders and purchasers of property where they
6 are out doing due diligence and they poke a hole in
7 the ground and it comes up with something that is an
8 anomaly, but would perhaps fall on the list of
9 regulated substances.

10 I guess I'm just looking for
11 some clarification from you in terms of whether
12 or not you think that kind of situation would
13 be enough for the agency to say, oops, there is
14 a basis for avoiding the no further remediation
15 letter or whether the agency believes it has a
16 duty to do some further injury inquiry in that
17 regard.

18 MR. EASTEP: What exactly was the
19 question?

20 MR. WATSON: Would one sample be
21 enough?

22 MR. EASTEP: Maybe.

23 MR. WATSON: Under what circumstances
24 would that be enough?

1 MR. EASTEP: If in the one sample,
2 they had identified -- somebody had identified
3 free product, some substance that wasn't supposed
4 to be there.

5 MR. WATSON: Would you envision in the
6 normal course of things, though, that there would be
7 some greater level of inquiry perhaps that the agency
8 would go through?

9 MR. EASTEP: Yes.

10 MR. WATSON: Okay.

11 MS. McFAWN: Can I ask a question?
12 In subsequent discovery, does this mean -- how
13 are you going to handle it if they have an NFR
14 letter and there is a subsequent spill, does that
15 necessitate voiding the first?

16 MR. WIGHT: I think that goes back
17 to a question that we deferred on. It might have
18 been number sixty-eight.

19 MS. McFAWN: I apologize.

20 MR. WIGHT: That's all right. I think
21 that was, in essence, the issue in sixty-eight. We
22 will get to that in the next hearing.

23 THE HEARING OFFICER: I believe
24 Ms. Tipsord had a comment.

1 MS. TIPSORD: Yes. I would just
2 like to go back to what Ms. Sharkey was talking
3 about with the 35-day voidance notification where
4 you notify them and they have 35 days to appeal
5 that to the board.

6 That appeal is pursuant to
7 Section 40 of the act. The provisions of Section
8 40 also have a 90-day extension provision in there
9 upon agreement with the agency. So in effect, would
10 the agency agree that if this were a situation and
11 if it was a good faith effort on the part of a
12 remediation applicant, there is potentially another
13 90 days in there in which the agency and the
14 remediation applicant can negotiate?

15 MR. EASTEP: Yes, I would agree to
16 that.

17 MS. TIPSORD: Thank you.

18 THE HEARING OFFICER: Is there anything
19 further at this time? I believe we have come to the
20 end of our prefiled questions that can be answered
21 today. So noting that, I just have a couple quick
22 follow-up points.

23 First, I just want to remind
24 the agency that any issues that you have agreed

1 to address after further discussion or deferral
2 to Mr. King will be addressed at the forefront
3 of the next hearing on December 17th.

4 I just want everyone to note
5 that the second hearing is actually scheduled
6 on December 17th and 18th in Springfield. The
7 first date on the 17th, it's scheduled to be at
8 the Illinois State Library. On the 18th, it's
9 at a different place. It's at Counsel Chambers.

10 At the request of some of the
11 parties, we have decided to change the dates
12 when prefiled testimony is due and when the
13 questions are due.

14 Originally, the dates that
15 were scheduled for prefiled testimony was actually
16 December 3rd. We are able to give three further
17 days. That will now be December 6th.

18 Anyone who desires to present
19 testimony in support of or in opposition to the
20 proposed regulation should file their prefiled
21 testimony on December 6th.

22 All questions concerning that
23 prefiled testimony for the second hearing must be
24 filed with the board by December 12th. The board

1 needs to have that filed on those days so that we
2 can see them on those days.

3 At this time, is there any
4 discussion regarding those dates.

5 Hearing none, I just want to
6 note also that all the prefiled testimony and
7 prefiled questions must be filed with everyone
8 on the service list. The most recent service
9 list is at the back table. Just make sure you
10 grab a copy of that on the way out.

11 Also, I wanted to ask the
12 agency one quick question. Given the relationship
13 between the R97-12, which is known as T.A.C.O.,
14 which is Part 742, and this rulemaking, do you
15 agree that this rule should be adopted, this
16 Part 740 should be adopted either subsequent
17 or at the same time as Part 742, just to make
18 sure we have a coinciding date line?

19 MR. WIGHT: I certainly think that
20 would be the best approach.

21 THE HEARING OFFICER: I just want
22 to make sure we have that on the record.

23 MR. WIGHT: We have discussed that and
24 that's how we feel about it.

1 THE HEARING OFFICER: Mr. Rieser?

2 MR. RIESER: I have one suggestion,
3 if I may, Ms. Hearing Officer. If individuals
4 have questions -- prefiled questions that they
5 intend to file with respect to certain testimony,
6 that they at least fax those questions at least
7 to the witness, if not to everybody else, on the
8 list so we have time to do this.

9 We certainly commit -- that
10 site remediation advisory committee is committed
11 to at least delivering our testimony to the agency
12 and to parties who are actively participating
13 by fax. That wouldn't be a problem.

14 THE HEARING OFFICER: The board will
15 have that testimony and questions in our offices
16 as well. In the event someone needs to get a copy
17 right away, you can notify the board as well.

18 A further reminder is that the
19 R97-12 hearings are scheduled for next week, which is
20 December 2nd and 3rd. I believe it is in this room,
21 which is obviously here in Chicago.

22 Does anyone else have anything
23 that they want to discuss at this time?

24 Hearing nothing, I just want

1 to thank everyone for being prepared and having
2 very good questions and answers at this hearing.

3 This matter is hereby adjourned.

4 We will see you on December 17th in Springfield.

5 Thank you.

6

7 (Whereupon, the proceedings
8 in the above-entitled
9 cause were adjourned until
10 December 17, 1996.)

11

12

* * * * *

13

14

15

16

17

18

19

20

21

22

23

24

