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BEFORE THE POLLUTION CONTROL BOARD

STATE OF ILLINOIS

IN THE MATTER OF:
TIERED APPROACH TO CORRECTIVE ACTION
OBJECTIVES (T.A.C.O.) NO. R97-012
35 ILL. ADM. CODE 740

Hearing held, pursuant to Notice, on the 10th day
of December, 1996, at the hour of 10:00 a.m., at Room
A-1 Stratton Office Building, Springfield, Illinois,
before Kevin Desharnais, duly appointed Hearing
Officer.

TRANSCRIPT OF PROCEEDINGS

1 PRESENT:

2	MS. MARILI McFAWN		Board Member
	MR. JOSEPH YI		Board Member
3	MR. CHARLES FEINEN		Board Attorney
	MR. KEVIN DESHARNAIS		Hearing Officer
4	MS. KIMBERLY ROBINSON		Attorney, IEPA
	MR. H. MARK WIGHT		Attorney, IEPA
5	MR. GARY P. KING	IEPA	
	MR. JOHN SHERRILL		IEPA
6	MR. JAMES PATRICK O'BRIEN	IEPA	
	MR. DOUGLAS CLAY	IEPA	
7	MR. THOMAS C. HORNSHAW	IEPA	
	MS. TRACEY E. VIRGIN		IEPA
8	MR. KENNETH L. PAGE		IEPA
	MR. CHRISTOPHER NICKELL	IEPA	
9	MR. KENNETH LISS	IEPA	
	MS. VICKY L. VonLANKEN	IEPA	
10	MR. LAWRENCE EASTEP		IEPA
	MR. DAVID RIESER		Attorney
11	MS. WHITNEY WAGNER ROSEN		Attorney
	MR. JOHN W. WATSON, III		Attorney
12	MS. KAREN L. PRENA		Attorney
	MR. RAYMOND T. REOTT		Attorney
13	MR. HARRY R. WALTON		Illinois Power
	MS. ELIZABETH A. STEINHOOR	IERG	
14	MS. KAREN A. LYONS		Shell Oil Products
	MR. DEREK D. INGRAM		Black & Veatch
15	MR. MARK ELMER		Chemical Industry Council
	MR. RANDY SCHICK		IDOT

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1 HEARING OFFICER DESHARNAIS: Good morning.
2 My name is Kevin Desharnais, I'm the hearing officer
3 for this proceeding, which is entitled: In the Matter
4 of Tiered Approach to Corrective Action Objectives, 35
5 Illinois Administrative Code Part 742.

6 This is the third day of hearing for the first set
7 of scheduled hearings, which is the Agency's
8 presentation of its proposals, and questions for the
9 Agency's witnesses.

10 Because the Agency has finished its presentation
11 of its proposal, we'll be continuing with the
12 questions that have been prefiled. And there are
13 several sets of prefiled questions that were made to
14 be addressed.

15 We're going to actually begin with the questions
16 that the Agency agreed to respond to at the last set
17 of hearings -- at the last two hearings, and then
18 we'll move on to the remaining prefiled questions that
19 proceed by section number.

20 Then we'll address the remaining questions that
21 were prefiled by Ray Reott, and then the additional
22 prefiled questions that were filed by Mr. Rieser.

23 Is there anyone present today on behalf of Mayer,
24 Brown & Platt?

1 MS. PRENA: I am, Karen Prena.

2 HEARING OFFICER DESHARNAIS: Are you going to
3 be asking the prefiled questions?

4 MS. PRENA: Yes, I am.

5 HEARING OFFICER DESHARNAIS: Great, thank
6 you. We'll start by introducing the other members
7 here from the Pollution Control Board.

8 To my right is Marili McFawn, Board member.

9 MS. McFAWN: Good morning.

10 HEARING OFFICER DESHARNAIS: To my left is
11 Joseph Yi.

12 MR. YI: Good morning.

13 HEARING OFFICER DESHARNAIS: To his left is
14 Chuck Feinen, Board Assistant. And Anand Rao from the
15 Technical Unit is here on the very right.

16 MS. McFAWN: I just want to welcome you all
17 back from last week's hearing. We're glad to have
18 Kevin with us, too. Thank you for coming on such
19 short notice, and I'm sure we can wrap up the prefiled
20 questions today.

21 HEARING OFFICER DESHARNAIS: Does the Agency
22 have any opening remarks at this time?

23 MS. ROBINSON: Would you like me to introduce
24 everybody again?

1 HEARING OFFICER DESHARNAIS: That would be
2 great.

3 MS. ROBINSON: Way over to my far left is
4 Mark Wight, then Gary King, Tom Hornshaw, Tracey
5 Virgin, I'm Kim Robinson, to my right is John
6 Sherrill, Jim O'Brien, Ken Liss and Doug Clay.

7 And I think the way that we think that probably we
8 should proceed this morning is go ahead and answer
9 first the follow-up issues that we committed to bring
10 back today, and then if you'd like to proceed from
11 there.

12 HEARING OFFICER DESHARNAIS: Okay. Since
13 there's not that many people here in the audience, why
14 don't we also have people introduce themselves and
15 state who they represent if anyone on the record.
16 We'll begin with those seated at the table in front.

17 MS. PRENA: I'm Karen Prena from Mayer, Brown
18 & Platt.

19 MS. ROSEN: I'm Whitney Rosen with Illinois
20 Environmental Regulatory Group.

21 MR. RIESER: I'm David Rieser with the law
22 firm of Ross & Hardies. I'm here representing the
23 Illinois Steel Group, the Illinois Petroleum Council,
24 and I'm also a member of the Site Remediation Council

1 on behalf of the Chemical Industrial Council of
2 Illinois.

3 MR. WATSON: My name is John Watson. I'm
4 from the law firm of Gardner, Carton & Douglas, and I
5 am here on behalf of a number of corporations
6 representing them today.

7 MR. REOTT: Raymond Reott from Jenner &
8 Block.

9 MS. LYONS: Karen Lyons, Shell Oil Company.

10 MR. WALTON: Harry Walton, Illinois Power,
11 Illinois Environmental Regulatory Group, Correctional
12 Action Board Group, and I'm also chairman of the Site
13 Remediation Advisory Committee.

14 MS. STEINHOOR: Beth Steinhour, Illinois
15 Environmental Regulatory Group.

16 MR. EASTEP: I'm Larry Eastep with the
17 Illinois EPA Bureau of Land.

18 MR. INGRAM: Derek Ingram, Black & Veatch.

19 MR. PAGE: Ken Page, Illinois EPA Bureau of
20 Land.

21 MR. NICKELL: Chris Nickell, Illinois EPA
22 Bureau of Land.

23 MR. ELMER: Mark Elmer, Chemical Industry
24 Council of Illinois.

1 HEARING OFFICER DESHARNAIS: Thank you.

2 MR. SCHICK: I'm Randy Schick from the
3 Illinois Department of Transportation.

4 MS. VonLanken: And I'm Vicky VonLanken with
5 the Illinois EPA.

6 HEARING OFFICER DESHARNAIS: Thank you. I'd
7 also say that the acoustics in here are really bad, so
8 when you're speaking please try to keep your voice up.
9 These blowers on the side are making a lot of noise.

10 Kim, do you want to continue?

11 MS. ROBINSON: From the Agency's perspective
12 I believe that there were six issues that we committed
13 to answer at today's hearings, and the first one I
14 think we're going to let Gary King address regarding
15 the risk factor.

16 We've got for purposes of illustration, there may
17 be some extra copies over on the bench area over there
18 by Vicky and Randy, it says errata changes on risk
19 issue.

20 And this is not an actual errata sheet, this will
21 being gone through, an errata sheet number two, but
22 for purposes of illustration and following along
23 today, if you'd like to grab a copy of that. I
24 believe the Board members should all have one of

1 those.

2 Mr. King, would you like to proceed?

3 MR. KING: Before I start talking about that
4 issue, one of the things I guess I was kind of excited
5 to see a copy of a set of technical comments from
6 USEPA on the proposed T.A.C.O. rules, and we're going
7 to -- we'll be conferring with USEPA as to whether the
8 -- whether it's okay to introduce these into the
9 record. But I wanted to go ahead and read the last
10 comment that USEPA had with regards to the proposed
11 T.A.C.O. rules, and this is coming from their
12 technical staff.

13 It says, and I'll quote it. "Overall the proposed
14 T.A.C.O. rules represent an excellent risk based
15 approach. The equations and technical parameters are
16 scientifically sound and widely recognized by industry
17 experts as appropriate.

18 Individual IEPA staff members who worked on these
19 rules are to be commended for their efforts. Thank
20 you for the opportunity to review this document."

21 I guess we're pretty excited about this, because
22 the role that USEPA could play in this process
23 obviously was still kind of up in the air, and I think
24 this kind of tends to kind of solidify what their

1 views are relative to the technical issues.

2 They do have a number of questions that they also
3 raise, but I think we will probably be responding to
4 those points as part of the January set of hearings
5 since we got there so late.

6 We've already taken, started taking steps to
7 distribute copies of these comments to appropriate
8 people that we've been involved with.

9 Getting back to the issue on the risk issue --

10 MR. RIESER: I'm sorry, Gary, of course we're
11 going to get questions on everything, so I'll start
12 off. What part of the USEPA did the letter come from?

13 MR. KING: The letter was transmitted from
14 Ann Wentz, who is our liaison person with the
15 Underground Storage Tank Section. She was forwarding
16 what's described as Region V's technical comments.
17 The person who was actually doing the comments is part
18 of the UST Section, but he is really their -- their
19 central technical person as far as understanding the
20 RBCA concepts and looking at risk based approaches for
21 regional offices.

22 MR. RIESER: Thanks very much.

23 MR. KING: Okay, the --

24 MS. McFAWN: Wait, Gary, before you go on,

1 have these comments been submitted to the Board?

2 MR. KING: I don't think so, I think they
3 were just transmitted to us and we were just going to
4 -- we just saw this late yesterday, I just saw it for
5 the first time this morning. We'll check back with
6 USEPA to see whether they intended for us to file
7 these of record. I assume it's okay with them since
8 it's a public document.

9 If it's not we probably should put it on the
10 record anyway, but I think it would be -- from a
11 courtesy standpoint we should at least make that
12 communication before taking the formal step.

13 MS. McFAWN: Okay, thank you.

14 MR. KING: Okay, talking about the issue of
15 how you vary the -- either the target hazard quotient
16 or the target cancer risk, when we were having our
17 discussions at the first two set of hearings, the
18 point was -- I think the point was being made and I
19 think it was correct, that there seemed to be some
20 inconsistency with the way that the Agency was
21 approaching this issue as far as how it was
22 procedurally handled.

23 And I think that that is kind of just a -- that
24 inconsistency is more of a leftover from trying to put

1 together a complicated proposal. Our key notion is
2 still that we're looking at applying the risks at the
3 point of human exposure, and we've got a definition
4 which sets out what that point of human exposure is.

5 Where I think the confusion was occurring was
6 relative to how that was handled within Tier 2. What
7 we've tried to do with this two page document is set
8 forth a strategy in which the issues about varying
9 target cancer risk or the target hazard quotient would
10 be dealt with exclusively under Tier 3. You'd have to
11 have a specific approval from the Agency before you
12 would vary that.

13 There was some -- I think there was some concern
14 on our part that the way we had it set up, somebody
15 using Tier 2 could simply go in and change the target
16 risk goals without really doing much other than saying
17 they wanted to change those risk goals.

18 So we thought it was more appropriate to raise
19 that kind of consideration to Tier 3 where we really
20 could look at things in a much more site-specific
21 basis.

22 That's not to say that you couldn't -- once you
23 had a Tier 3 approval, you couldn't go back and use
24 the Tier 2 equations. You could, and we're

1 recognizing that. But you'd have to go through a Tier
2 3 process to get approval of that different risk goal.

3 Now, what we've suggested here is that the
4 appropriate mechanism under Tier 3 to do that kind of
5 risk assessment is the formal risk assessment process
6 that's envisioned in Section 742.915. There it's
7 really talking about our concept of a formal risk
8 assessment in which you're using nationally accepted
9 methodologies for when you would vary risk -- vary
10 risk goals.

11 We have in fact over the years approved risk
12 ranges between -- greater than one in a million. We
13 think one in a million is the appropriate starting
14 point and should be the -- could be the risk goal if
15 you're under Tier 1 or Tier 2.

16 But under Tier 3, a Tier 3 approach we have
17 approved risk ranges greater than one in a million,
18 and a target hazard quotient of greater than 1.0 at
19 NPL type sites, sites that are on the Super Fund
20 National Priority List, and at those types of sites
21 there is a requirement that there be a formal risk
22 assessment, and methodology is well understood in
23 those contexts and that is the approach that if risk
24 is -- if the risk goals are going to be varied we

1 think it needs to have that kind of close scrutiny.

2 And so you'll see what we have laid out here in
3 these various changes is really kind of -- is an
4 implementation of that approach. That's the extent of
5 my comments relative to those.

6 HEARING OFFICER DESHARNAIS: Follow-up
7 questions, Mr. Rieser?

8 MR. RIESER: Yeah, what would be the factors
9 for approving the changes in the target risk, what
10 issues would the Agency consider?

11 MR. HORNSHAW: Up front if somebody just came
12 in in Tier 3 and said I want a ten to the minus four
13 risk instead of ten to the minus six, and now do a
14 risk assessment based on that assumption, I can't
15 imagine how the Agency would ever approve that kind of
16 an approach.

17 I don't think we should be the ones that would be
18 okaying a greater cancer risk for somebody with no
19 justifying reason basically.

20 What I can envision is that people will go through
21 standard type of risk assessment that's done for Super
22 Fund sites or equivalent, and also whatever controls
23 are on the site, an estimation of short term risks, of
24 doing any kind of remedial action, that kind of a risk

1 balancing effort that's done at large sites like Super
2 Fund sites, and in cases where the estimated risk
3 either to current or future receptors is greater than
4 one in a million but less than one in ten thousand, we
5 would approve some of those things based on a very
6 site-specific development of facts pertaining to that
7 site.

8 In that case we could approve that and we have
9 done that for sites both in and out of the Super Fund
10 site program.

11 MR. RIESER: And I'm trying to listen back
12 for that answer where there were specific factors that
13 you're looking for.

14 MR. HORNSHAW: Things like what kind of
15 controls are on the site, what would be the short term
16 risk to people as a result of doing remediation
17 efforts versus not doing them, and balancing those out
18 versus the risk, the long term risk versus the short
19 term risk, evaluations of the incremental cost to
20 achieve a lesser risk level, all the things that are
21 routinely done in feasibility studies for Super Fund
22 sites for instance.

23 MR. RIESER: And one could reference USEPA
24 guidance for this type of thing?

1 MR. HORNSHAW: USEPA's many guidance
2 documents, correct.

3 MR. RIESER: Thank you.

4 HEARING OFFICER DESHARNAIS: Any additional
5 follow-up questions?

6 (No response.)

7 HEARING OFFICER DESHARNAIS: Thank you.

8 MS. ROBINSON: The second one that I think I
9 had on my list, and I believe this question came up by
10 Hiten Soni with the Board, was regarding why we didn't
11 use the left-hand side in all the equations but rather
12 used them in some, and John Sherrill's going to
13 address this issue.

14 MR. SHERRILL: Yeah, the question was raised
15 regarding the not putting an equal sign in the
16 equations, and we've gone through different iterations
17 of how we were going to present this material, and we
18 went through several iterations of how to present the
19 equations in the material.

20 And in one of our iterations we did have an
21 equation sign, and when you put an equation sign, the
22 equal sign on the -- you had to put a corresponding
23 left-hand side of the equation, and which meant we had
24 to come up with another symbol.

1 As you've gone through these T.A.C.O. rules you'll
2 see all kinds of abbreviations and symbols and what
3 they all mean. And so for three reasons which I'm
4 going to discuss here we did not put an equal sign in
5 these -- the way we presented the equations.

6 HEARING OFFICER DESHARNAIS: Excuse me, Mr.
7 Sherrill, could you address for the record what
8 specific equations you're talking about or if it's
9 general?

10 MS. ROBINSON: I think it's just a general
11 comment that was made by Hiten Soni, and there were
12 some where we did have them in and there were many
13 that where we didn't have them in, and he's going to
14 sort of address that generally in his answer. So we
15 didn't really pick out which ones didn't have them.

16 HEARING OFFICER DESHARNAIS: Okay.

17 MR. SHERRILL: The primary equations that
18 these were addressed to were Appendix C, Table A, SSL
19 equations, and Appendix C, Table C. As discussed in
20 previous testimony, a person must select the
21 applicable remediation objective equation which is
22 dependent upon the exposure route medium population
23 preceptor and whether the contaminant of concern is a
24 carcinogen and a noncarcinogen.

1 For all these different equations that we've
2 presented, this written explanation, we did not want
3 to have to put this on the left-hand side of the
4 equation.

5 To include this written description of the
6 remediation objective and when it was applicable would
7 be redundant of all the work already provided in the
8 testimony and the work in the body of the rules
9 themselves.

10 So that's one issue.

11 The second issue is to differentiate between the
12 different remediation objective equations using
13 distinct symbols we think would confuse the user even
14 more, since these are not really parameters
15 themselves, they're just the answers to the equations.

16 And if these new symbols were to be added to the
17 tables, then the rule would have to be revised to
18 address these new symbols in the text.

19 And the third reason is building upon the second
20 one. If we were to add new symbols or acronyms, we do
21 not think that it would really help the regulated
22 community or the Board in differentiating between what
23 we're talking about.

24 In other words, we'd have to have a description of

1 the remediation objective in the column to the left of
2 the equation, corresponding to the right, and then
3 we'd we just think it would add more confusion. And
4 like I said, we presented this over a year ago, and
5 the approach that we have now just from an operational
6 viewpoint, people have not been confused by it. And
7 when we did have it before there was confusion because
8 when we were -- I'll give you example.

9 When we had migration to groundwater, people would
10 say are you talking about the migration to groundwater
11 under a RBCA approach or migration of groundwater
12 under an SSL approach. And then we would have to have
13 two distinct symbols saying okay, that is migration to
14 groundwater value for SSL versus migration to
15 groundwater for RBCA.

16 And so we would have to end up having off the top
17 of my head upwards of 50 new symbols that we would
18 need to come up with.

19 And if you would turn to let's say Appendix C,
20 Table C, Appendix C, Table C, this equation that's
21 entitled R1, on R1 in this, do you see where it says
22 remediation objectives for carcinogenic contaminants,
23 milligrams per kilogram, and then in a sense on the
24 right-hand side we have the actual equation.

1 And so what this issue is being raised is why
2 don't we have a symbol for that left-hand side there,
3 and in the short answer, after what I've just given,
4 it added more confusion when we added a symbol for
5 that instead of a short word description.

6 MR. RAO: So what you are saying is that the
7 description on the left-hand side in the second column
8 in Table C where it says remediation objectives for
9 carcinogenic contaminants, that's the left-hand side?

10 MR. SHERRILL: Yes.

11 MR. RAO: Okay, I don't think we have any
12 problems if you think this works. But the only thing
13 I think Hiten Soni was concerned about was for some of
14 them you have and some you don't. If you go down the
15 equations R9 and R10, which is basically screening
16 levels for air, for carcinogenic contaminants and
17 noncarcinogenic contaminants.

18 MR. O'BRIEN: If you'll notice that the only
19 ones that aren't set up as an equation with both sides
20 are the remediation objective equations. Everything
21 else that goes into the remediation objective
22 equations are set up in the normal equation format.

23 MR. RAO: Yeah, that's the reason, and I
24 think he raised this question because he thought maybe

1 you missed something, or now that Mr. Sherrill has
2 explained --

3 MR. O'BRIEN: No, the answer is we did it on
4 purpose in order to reduce confusion.

5 MR. RAO: Okay.

6 MS. ROBINSON: Is the Board comfortable now
7 with our answer on that?

8 MS. McFAWN: Can you just give us a minute?

9 MS. ROBINSON: Sure.

10 HEARING OFFICER DESHARNAIS: Are there any
11 additional follow-up questions?

12 (No response.)

13 HEARING OFFICER DESHARNAIS: Thank you.

14 MS. ROBINSON: The third issue I believe we
15 had committed to provide physical chemical constant
16 changes that we've made from the ASTM models, and Dr.
17 Hornshaw's going to address that issue.

18 MR. HORNSHAW: I've prepared a table which
19 lists the value for Henry's Law constant, diffusivity
20 in air, diffusivity in water, and organic carbon
21 partition coefficients, which was used by ASTM for
22 their six model chemicals and the corresponding values
23 which is proposed in the 742 rule, which came from
24 USEPA's database, and that's available I think on the

1 front table and at the side as well, to answer that
2 question.

3 HEARING OFFICER DESHARNAIS: Does the Agency
4 wish to introduce this as an exhibit?

5 MS. ROBINSON: Yes, we can do that. I don't
6 know what Exhibit Number we're on. 9, okay.

7 HEARING OFFICER DESHARNAIS: Is there any
8 objection to this being admitted as an exhibit?

9 (No response.)

10 HEARING OFFICER DESHARNAIS: Okay, the
11 Agency's table entitled Comparison of
12 Physical/Chemical Constants Used in ASTM's Risk Based
13 Corrective Action Example Look-Up Table (Table X2.1)
14 and Part 742 Tier 1 Tables (Appendix B, Tables A and
15 B) is admitted as Exhibit Number 9.

16 (Agency Exhibit 9 was admitted.)

17 HEARING OFFICER DESHARNAIS: Follow-up
18 questions, Mr. Rieser?

19 MR. RIESER: The source for the 742 values
20 was the USEPA's SSL guidance document, is that
21 correct?

22 MR. HORNSHAW: That's correct.

23 MR. RIESER: Do you know what accounts for
24 the differences between these values?

1 MR. HORNSHAW: I'm not sure how ASTM selected
2 the values that they used in their example table from
3 the many values which are available in the literature.

4 I know USEPA completed a fairly large review of
5 the database and compiled all that into the database
6 that is currently presented in the SALT screening
7 guidance document.

8 MR. RIESER: Would one be able to use the
9 ASTM values in a Tier 3 setting?

10 MR. HORNSHAW: Yes, they would have to - the
11 person would have to present some sort of
12 justification why the value they're proposing is
13 better than the values that appear last in their
14 document.

15 MR. RIESER: Would they need more
16 justification than just that that was the value that
17 ASTM used and found acceptable?

18 MR. HORNSHAW: Yes, we decided even prior to
19 this hearing that it's in everybody's best interest to
20 use a standardized set of physical chemical constants.
21 We selected USEPA's database partly because of the
22 large review of the data that USEPA did.

23 We were very concerned right from the beginning of
24 this entire procedure because there's -- for some of

1 the physical chemical constants there's up to two to
2 three orders of magnitude difference for the same
3 parameter in various literature citations, which
4 obviously carry the potential for pretty large
5 disputes when these physical chemical constants were
6 substituted into the Tier 2 equations. So we wanted
7 one standardized set of values to be used, and
8 somebody will have to make a case that the value
9 they're proposing is in some way better than the value
10 that USEPA decided on.

11 MR. RIESER: So then we have what USEPA
12 looked at and make a case for why that decision was
13 wrong, as well as why the value that they were
14 selecting was appropriate?

15 MR. HORNSHAW: That's correct.

16 MR. RIESER: Thank you.

17 HEARING OFFICER DESHARNAIS: Just to check,
18 are people in the back able to hear the conversation
19 that's taking place?

20 MR. WALLACE: Mr. Rieser's very hard to
21 understand.

22 MR. RIESER: Hard to hear or hard to
23 understand?

24 MR. WALLACE: Oh, I'm sorry, hard to hear.

1 MR. RIESER: I will speak up or use the
2 microphone.

3 HEARING OFFICER DESHARNAIS: Yeah, it might
4 be best if everyone used the microphones, they are
5 here to make it easier. Any additional follow-up
6 questions?

7 MR. RAO: I have just a minor clarification.
8 Dr. Hornshaw, you said that the parameter values from
9 the table were derived from the SSL document. Is that
10 the final guidance that came out in 1996 or the one
11 that's attached to your testimony? You had SSL
12 guidance attached to your testimony that is a graph
13 document.

14 MR. HORNSHAW: I thought I --

15 MR. SHERRILL: I can answer that. What Tom
16 Hornshaw had attached to his testimony was a user's
17 guide. The 1996 document had -- there's two different
18 publications, the technical background document and
19 the user's guide. Both of those are dated 1996. And
20 that is the final, quote, version and that's what
21 we've referenced, incorporated by reference.

22 MR. RAO: Yeah, I just wanted to make sure.
23 Thank you.

24 HEARING OFFICER DESHARNAIS: Mr. Watson?

1 MR. WATSON: For the record again my name is
2 John Watson from Gardner, Carton & Douglas. Mr.
3 Hornshaw, did you do a comparison of the ASTM physical
4 chemical constants and the USEPA physical chemical
5 constants and determine that the USEPA model is
6 superior?

7 MR. HORNSHAW: Model or constants?

8 MR. WATSON: I'm sorry, constants.

9 MR. HORNSHAW: We made a decision to use the
10 table that USEPA has in their final guidance as the
11 values to be used for the -- for all parameters, all
12 physical chemical parameters for both sets of
13 equations.

14 MR. WATSON: Have you done any in-depth
15 analysis of the ASTM constants?

16 MR. HORNSHAW: No, I haven't.

17 MR. KING: If I could just state, one thing
18 if I could just add something relative to that, one of
19 the reasons why we picked the SSL numbers is they're
20 covering the entire range of chemicals that we're
21 doing dealing with the ASTM is only what, six
22 chemicals, it's only six chemicals, and if we were to
23 pick the ASTM numbers we would have -- it's in essence
24 a bifurcated system relative to the physical chemical

1 constants.

2 HEARING OFFICER DESHARNAIS: Any additional
3 follow-up questions?

4 (No response.)

5 HEARING OFFICER DESHARNAIS: Thank you.

6 MS. ROBINSON: The next issue is regarding
7 SW-846 and Jim O'Brien's going to address this. I
8 believe the question came up from Mr. Reott regarding
9 if soils need to be left in their natural state during
10 testing.

11 MR. O'BRIEN: I looked at the applicable ASTM
12 methods, and the one for soil and waste pH is method
13 9045C, Revision 3 dated January, 1995. And the method
14 is very specific, and it states that the 20 grams of
15 the waste sample is to be added to 20 milliliters of
16 reagent water and stirred continuously for five
17 minutes and then the suspension is expected to settle.

18 So it doesn't specifically say you have to crush
19 the soil but it's -- you have to stir it in solution,
20 and they anticipate that the suspension will occur and
21 that that needs to settle before the electrodes are
22 introduced to measure the pH.

23 MR. REOTT: Just as a follow-up, so you
24 should be able to do anything to it except stir it,

1 stirred and not shaken in other words?

2 MR. O'BRIEN: Yes, that's correct. There's a
3 copy of the -- copies of the method I believe out
4 there for people to reference.

5 MR. REOTT: Thank you.

6 HEARING OFFICER DESHARNAIS: Any additional
7 follow-up questions?

8 (No response.)

9 HEARING OFFICER DESHARNAIS: Thank you.

10 MS. ROBINSON: Okay, the next issue John
11 Sherrill is going to provide some visual examples to
12 demonstrate how 742.600(e) through (g) work. I think
13 there was some confusion last time around as to how
14 these were all supposed to fit together. So John's
15 going to step over to the easel. If everybody can see
16 that, that's where he's going to be.

17 HEARING OFFICER DESHARNAIS: Before you
18 begin, is the Agency going to be introducing a copy of
19 this as an exhibit?

20 MS. ROBINSON: Yes, we are. This will be
21 Exhibit Number 10, and there are also extra copies
22 over there on that one, too.

23 MR. SHERRILL: There's a three-page handout
24 on the Title of Section 742.600(e) is what I'm

1 referencing right now. The question was asked last
2 week if we could explain and provide an example of
3 742.600(e), 742.600(f) and 742.600(g), so I'm going to
4 briefly go through.

5 MS. McFAWN: Mr. Sherrill, before you begin
6 can I interrupt you one more time. I don't believe we
7 have a copy of this three-page handout up here, do we?

8 MS. ROBINSON: I'm sorry about that, we'll
9 get you one.

10 MS. McFAWN: Thanks a lot.

11 HEARING OFFICER DESHARNAIS: Okay, are there
12 any objections to this being introduced as an exhibit?

13 (No response.)

14 HEARING OFFICER DESHARNAIS: Then the Agency
15 handout, three-page handout that begins with Section
16 742.600(e) Tier 2, Example 1, Benzene is the
17 contaminant of concern, will be introduced as Agency
18 exhibit and it's numbered 10.

19 (Agency Exhibit 10 was admitted.)

20 MR. SHERRILL: I'm going to read in
21 742.600(e) just as it's stated in the proposed rule.
22 "If the calculated Tier 2 soil remediation objective
23 for an applicable exposure route is more stringent
24 than the corresponding Tier 1 remediation objective,

1 then the Tier 1 remediation objective applies."

2 So getting back to our handout, in this example
3 the groundwater classification at a residential site
4 is Class I. The benzene soil remediation objectives
5 from Appendix B, Table A, are as follows: For benzene
6 the soil, the ingestion in milligrams per kilogram is
7 22 milligrams per kilogram. For inhalation 0.8, and
8 migration to groundwater milligrams per kilogram 0.03.

9 So let's suppose someone went and did a -- as
10 discussed in previous testimony, we look at all three
11 of these exposures routes and the most stringent or
12 health protective route applies.

13 So we're looking at this migration to groundwater
14 route of 0.03. We won't be talking in this particular
15 example about excluding a route.

16 Let's suppose someone were to calculate a Tier 2
17 soil remediation objective that is more stringent than
18 the corresponding remediation objective presented in
19 the Tier 1 tables.

20 In other words, these three tables, these three
21 values I pulled directly from our Tier 1 tables, these
22 are precalculated Tier 1 remediation objectives.

23 Let's suppose someone were to calculate a Tier 2
24 migration to groundwater objective of 0.024. In other

1 words, they went and did their calculations and they
2 came back under Tier 2 with a value, as you can see
3 this value is more stringent than the value of the
4 migration to groundwater number of 0.03.

5 So as the rule states, if the calculated Tier 2
6 value, which in this case is here, for an applicable
7 exposure route is more stringent than the Tier 1
8 value, these are all the Tier 1 values, then the Tier
9 1 remediation objective applies.

10 So in this example, this would be our soil
11 remediation objective. This would be our -- and in my
12 testimony I discuss this can happen in very few cases.

13 We believe that these as presented in Tom
14 Hornshaw's testimony and my own testimony we feel --
15 we have confidence in these Tier 1 objectives. And if
16 you were to calculate a Tier 2 objective that is more
17 stringent than the Tier 1, it would be of usually
18 insignificant difference.

19 Did you want to comment anything on that?

20 MR. HORNSHAW: No.

21 MR. SHERRILL: So that's 742.600(e). Are
22 there any questions on that?

23 (No response.)

24 MR. SHERRILL: 742.600(f) a new example, and

1 I'm going to read this as it's proposed in the rules.
2 742.600(f), "If the calculated Tier 2 soil remediation
3 objective for an exposure route is more stringent than
4 the Tier 1 soil remediation objectives for the other
5 exposure routes, than the Tier 2 calculated soil
6 remediation objective applies and Tier 2 soil
7 remediation objectives for the other exposure routes
8 are not required."

9 So in this example, new example, but I've left the
10 contaminant of concern is benzene, here again these
11 are our Tier 1 values, 22 milligrams per kilogram for
12 injection, 0.8 for inhalation, 0.03 for migration of
13 groundwater, these are our Tier 1 precalculated
14 values.

15 In this example assume that we have no routes
16 excluded from consideration pursuant to Subpart C. So
17 the first step of this what under Tier 1, let's say
18 what is the soil remediation objective? It's 0.03 is
19 our most restrictive, our most, quote, health
20 protective remediation objective.

21 Let's suppose someone then calculates a Tier 2 for
22 the migration to groundwater route and a calculated
23 value of 0.519 milligrams per kilograms is obtained.
24 So someone does a calculation using the equations that

1 we've provided and they come up with a Tier 2
2 migration to groundwater of 0.519 milligrams per
3 kilogram. And we approve of the number, this is a
4 site-specific number as we've discussed in our -- on
5 how to develop these remediation objectives.

6 In this particular -- we've said it's a Class I
7 groundwater site, so this is protective of Class I
8 groundwater based on the site-specific information
9 that was input into the equations.

10 The Tier 2 calculated value of 0.519 is more
11 stringent than the other Tier 1 objectives. Here's
12 the other objectives. 0.519 is more stringent than
13 0.8 and it's more stringent than 22.

14 And as the rule says then, the Tier 2 calculation
15 soil remediation objective applies and the Tier 2 soil
16 remediation objectives for the other exposure routes
17 are not required.

18 So what we're saying in this rule is there's no
19 need to go and calculate objectives for this because
20 we already know our Tier 2 calculated for migration to
21 groundwater is 0.519. So under this Tier 2 example
22 the soil remediation objective is 0.519 milligrams per
23 kilogram. There would be no reason to calculate
24 these objectives for these two, for the ingestion and

1 inhalation.

2 Any questions on this one?

3 (No response.)

4 MR. SHERRILL: And I'm focusing on soil in
5 this, in these equations, just for simplicity sake.

6 Okay, this is our page three of our handout,
7 742.600(g), and I'll read it as proposed in the rule.
8 "If the calculated Tier 2 soil remediation objective
9 is less stringent than one or more of the soil
10 remediation objectives for the remaining exposure
11 routes, then the Tier 2 values are calculated for the
12 remaining exposure routes and the most stringent Tier
13 2 calculated value applies."

14 For ease of presentation I've there again selected
15 benzene as our contaminant of concern, it's a
16 residential site, and we will assume that it's got
17 Class I groundwater.

18 In this example it kind of makes it add a little
19 twist to it, and it adds for clarification on this
20 site three feet of clean soil covers the site and the
21 injection route is excluded from consideration under
22 Subpart C.

23 So we're looking at inhalation and migration to
24 groundwater in this particular example.

1 The soil remediation objective from benzene from
2 Appendix B, Table A, for inhalation is 0.8, for
3 migration groundwater 0.03 milligrams per kilogram.
4 So it's those same values that we saw before from --
5 these are precalculated values that are in the
6 proposed 742 rule.

7 So the soil remediation objective for benzene, you
8 know, before we've done any Tier 2 calculations, would
9 be the most restrictive, so we've we're back to this
10 0.03 which is the most restrictive or health
11 protected.

12 So now someone wants to do a Tier 2 calculation
13 and they come up with a Tier 2 calculation of 1.2,
14 I'll put Tier 2. Let's suppose someone does a Tier 2
15 calculation and they come with a value of 1.2
16 milligrams per kilogram.

17 There again this would be a site-specific, you
18 know. Let's say we approve it. So out of the rule
19 the value of 1.2 is less stringent, this value is less
20 stringent than one or more of the soil remediation
21 objectives for the remaining exposure routes.

22 Then the Tier 2 values are calculated for the
23 remaining exposure routes and the most stringent Tier
24 2 calculated value applies.

1 So then someone says okay, I like this value, I'm
2 going to go ahead and calculate a Tier 2 for
3 inhalation. So let's say they calculate a Tier 2 for
4 inhalation and they come up with 11.0 milligrams per
5 kilogram.

6 So in this Tier 2 example the soil remediation
7 objective for benzene is 1.2 which is the most
8 restrictive Tier 2 value.

9 The purposes in one sense of (f) and (g) is one,
10 so people don't do unnecessary calculations, and then
11 also, you know, unless the calculations or the
12 development of the remediation objectives are
13 presented to us, we're going to assume the most
14 stringent remediation objective.

15 You know, so in this scenario, let's say somebody
16 was just looking at -- they had calculated in 1.2 and
17 they hadn't calculated the inhalation yet, we're going
18 to say okay, you can calculate it for migration to
19 groundwater of 1.2, but your most restrictive now is,
20 you know, if you did not calculate a Tier 2 for
21 inhalation, we're going to kick you back to this 0.8.

22 So then they'd say okay, well, I'm going to
23 calculate one for inhalation.

24 HEARING OFFICER DESHARNAIS: Any additional

1 follow-up questions?

2 MR. RAO: I just have a comment under let me
3 see, 742.600 Subsection (g). Could you clarify the
4 language that you have proposed by saying if the
5 calculated Tier 2 soil remediation objective is less
6 stringent than one or more of the soil remediation
7 objectives under Tier 1?

8 MR. SHERRILL: I believe the reason we did
9 not do that, why we didn't say that under Tier 1 is
10 because you make -- Tier 1 isn't the only way to
11 calculate objectives. You can go under Tier 3 and you
12 can also do the background approach.

13 MR. RAO: But you have said Tier 1 under
14 Subsection (f) about Subsection (g).

15 MR. SHERRILL: We'll look into that to see if
16 it's applicable that way.

17 MR. RAO: Because it is kind of confusing to
18 read it, you know. Of course with the example it's
19 very easy to understand what you are trying to say.

20 MR. SHERRILL: Okay. The only thing I'm
21 concerned about is to make sure that we would account
22 for being able to develop objectives under the
23 background approach and the Tier 3 that we -- I don't
24 want to exclude those processes. But we'll look into

1 it and see if it works.

2 MR. RAO: Okay.

3 MR. WATSON: I've got one more follow-up
4 question. On (g), the second half of that you say
5 that if -- you say then the Tier 2 values are
6 calculated for the remaining exposure routes, and the
7 most stringent Tier 2 calculated value applies. You
8 don't really mean that you have to go through and
9 calculate all of the Tier 2 values for the remaining
10 exposure routes, right? I mean you sort of take them
11 one by one, right, and if you want to live with
12 whatever the calculated number is, then you'll live
13 with that?

14 MR. SHERRILL: That's correct.

15 MR. RIESER: With regard to Anand Rao's
16 suggestion including Tier 1, if you had a calculated
17 Tier 3 or area background value, that would control,
18 because you would have arrived at that value through
19 an Agency approved process which would support that
20 value, so that would be the value for that route. And
21 so I don't think this would apply in that context
22 because you've already made an Agency decision that
23 that's the appropriate value for the route.

24 So I mean you should think about it some more, but

1 I would think that his recommendation is not
2 inconsistent with what is proposed.

3 MR. SHERRILL: Okay.

4 MR. HORNSHAW: Except if you're using area
5 background, in some cases that can only be used to
6 exclude a chemical from further consideration. If
7 you're using a statewide background approach you could
8 drop the chemical out, but if it doesn't drop out
9 using that approach then you have to go into one of
10 the tiers to address it.

11 MR. RIESER: Thank you.

12 HEARING OFFICER DESHARNAIS: Any additional
13 follow-up questions?

14 (No response.)

15 HEARING OFFICER DESHARNAIS: Thank you.

16 MS. ROBINSON: The last issue, and this was
17 also raised by Hiten Soni last time around, was the
18 question regarding safety factors and why we didn't
19 take those into account. So Dr. Hornshaw's going to
20 address this.

21 MR. HORNSHAW: As I started to say at the
22 hearing, there are safety factors inherent in both
23 ASTM's and USEPA's approach for Tier 1. We -- there
24 are safety factors in the toxicological data that's

1 used to calculate the various remediation objectives.
2 There are safety factors built into the models and
3 based on the -- I guess the similarity of the two
4 approaches, versus what we didn't have in the R94-2B
5 approach, we're comfortable that there isn't a
6 necessity for an additional safety factor at this time
7 where we thought there was a necessity for that in the
8 original LUST Docket B.

9 HEARING OFFICER DESHARNAIS: Any follow-up
10 questions?

11 MR. RIESER: Dr. Hornshaw, just to illustrate
12 the point you just made, there is a great deal of
13 conservatism built into the assumptions that support
14 the models, isn't that correct?

15 MR. HORNSHAW: That's correct.

16 MR. RIESER: And what would some examples be
17 of that conservatism?

18 MR. HORNSHAW: For example in the USEPA's SSL
19 approach, the derivation of the dilution factor that
20 was used -- well, the dilution factor of ten that was
21 in the original proposal for public comments from
22 USEPA and the final value of 20 that's incorporated in
23 this proposal, that was backed by -- I've talked with
24 the people at USEPA who have done the modeling to

1 derive that value, that was backed up by about 16,000
2 model runs of the computer model that they used to
3 predict migration to groundwater using data from real
4 soils from around the country to generate this Monte
5 Carlo type of analysis.

6 And then the dilution factor was chosen to be,
7 it's either 90th or 95th percentile dilution factor
8 that was derived from these many model runs, so we
9 have confidence that what they've said is an upper
10 limit on the dilution factor and it probably is truly
11 an upper limit.

12 MR. RIESER: And what you've said about the
13 dilution factor would be true of other variables and
14 points in the models as well, is that correct?

15 MR. HORNSHAW: That's correct.

16 MR. RIESER: Thank you.

17 HEARING OFFICER DESHARNAIS: Additional
18 follow-up questions?

19 (No response.)

20 HEARING OFFICER DESHARNAIS: Okay, does that
21 conclude the Agency's response to questions from the
22 hearing?

23 MS. ROBINSON: Yes, it does, and I would
24 request that we take maybe a five minute break before

1 we get into the line of questioning so that we can
2 regroup here for a moment.

3 HEARING OFFICER DESHARNAIS: Okay, we'll take
4 a five minute break.

5 (A recess was taken.)

6 HEARING OFFICER DESHARNAIS: The Agency's
7 ready to proceed with the remaining prefiled
8 questions. My understanding is that on the prefiled
9 questions, we're now up to Subpart I Tier 3 evaluation
10 questions beginning with 742.900. So we will turn to
11 the first three prefiled questions on that section
12 beginning with the Site Remediation Advisory
13 Committee.

14 MS. ROSEN: Number 1, will the Agency confirm
15 that Tier 3 evaluations can be performed for some
16 pathways while other pathways can be excluded by
17 comparison to Tier 1 values?

18 MS. VIRGIN: Yes, Tier 1 evaluations can be
19 performed for some pathways while other pathways can
20 be excluded by comparison to Tier 1 objectives.

21 MS. ROSEN: Number 2, will the Agency confirm
22 that Tier 3 represents a level of Agency review above
23 its project managers and is used to resolve complex
24 issues or situations beyond those provided for under

1 Tier 1 and 2.

2 MS. VIRGIN: Yes, Tier 3 represents a level
3 of Agency review above its project managers.

4 MS. ROSEN: Will the Agency also confirm that
5 Tier 3 may be used for any reason, even if not
6 expressed in Section 742.900(c) listed situations
7 considered for a Tier 3 evaluation.

8 MS. VIRGIN: Yes, Tier 3 can be used for any
9 reasonable purposes.

10 MR. WATSON: I've got a follow-up question
11 and it goes to the second question, and that is is
12 there a specific program that's been developed in
13 terms of a committee that will review Tier 3
14 submittals?

15 MS. VIRGIN: There's not a specific committee
16 or specific program.

17 MR. KING: We don't have -- it's not a
18 specific programmatic function like we have some of
19 our other line functions. But what we have done, and
20 we've been doing this for the last several years, is
21 we -- where there is a Tier 3 type issue we make sure
22 that we have a consistent determination across our
23 remediation programs.

24 The manager who is head of that remediation

1 program is still responsible for making the final
2 decision relative to that project, but we make sure
3 that there's a cross program review with the senior
4 managers within the Bureau of Land and in the Office
5 of Chemical Safety to make sure that there's -- that
6 some issue is not being missed that should be
7 otherwise included as far as valuation.

8 MR. RIESER: Is that the same or -- same as
9 the CORE?

10 MR. KING: Right, that's our description of
11 it, we call it the Cleanup Objectives Review and
12 Evaluation Group or the CORE Group.

13 MR. RIESER: Are the decisions of the CORE
14 Group recorded in any fashion?

15 MR. KING: There's not a decision of CORE
16 Group. There ends up being a decision by the senior
17 manager who is responsible for that program. But
18 there will be -- they will have gone through and he
19 will have consulted with the other people.

20 MR. RIESER: Is there any way that a --
21 someone from outside the Agency can be aware of how
22 the Agency has consistently made the determination in
23 a specific area through its CORE Group?

24 MR. KING: I don't think so, because unless

1 somebody wanted to look at all the remedial decisions
2 that the Agency has made, it would be kind of a
3 fishing expedition to do that. We really -- I don't
4 know how somebody would know that actually.

5 MR. RIESER: You yourselves don't keep a
6 record of like section by section for example of if
7 742 is adopted and it was being implemented, you
8 wouldn't keep a record section by section of how
9 different issues were handled?

10 MR. KING: We may end up taking some more of
11 a generic kind of data to look at the types of -- the
12 types of sites, just more of a management kind of
13 function so that we can see the kinds of decisions
14 that are being made. I don't think we've really
15 thought that through totally at this point, how to
16 handle that.

17 MR. RIESER: Thank you.

18 HEARING OFFICER DESHARNAIS: Additional
19 follow-up?

20 (No response.)

21 HEARING OFFICER DESHARNAIS: Next question.

22 MS. ROSEN: Question number 4, will the
23 Agency confirm that remedial objectives developed
24 pursuant to Tier 3 offer equivalent protection as

1 values derived under Tiers 1 and 2.

2 MS. VIRGIN: Remedial objectives that have
3 been developed pursuant to Tier 3 offer equivalent
4 protection as values derived under Tiers 1 and 2,
5 provided that the applicable controls and conditions
6 under which the decision was made do not change.

7 MS. ROSEN: Thank you.

8 HEARING OFFICER DESHARNAIS: Just a point I'd
9 just ask the Site Remediation Advisory Committee when
10 you're asking a question when it's -- we're up to your
11 prefiled question, please read the question into the
12 record so that it will appear in the record -- and
13 then if there's follow-up questions after the Agency
14 response, please raise your hand, wait for me to
15 acknowledge you, and then we'll have follow-up
16 questions.

17 The next prefiled questions on 742.900 were filed
18 by Gardner, Carton & Douglas. Mr. Watson, I believe
19 you're question 15.

20 MR. WATSON: Subpart I of proposed Part 742
21 sets forth the framework for conducting a Tier 3
22 evaluation. Question number (a), how will the Agency
23 evaluate the appropriateness of proposed Tier 3
24 methodologies?

1 MR. KING: When we're looking at Tier 3
2 that's going to be a site-specific determination, it's
3 going to depend upon the nature of the proposal.

4 MR. SHERRILL: We had gone through kind of a
5 litany of things we do look at. I can repeat those if
6 you want. It was under the last -- it was kind of the
7 general things we look at.

8 MR. WATSON: Why don't you do that for the
9 record.

10 MR. SHERRILL: We look at the concentration
11 of contaminants, the toxicity of the contaminants, the
12 amount of contaminants, the estimated migratory routes
13 and pathways, whether any free phase contaminant is
14 present, whether the soil attenuation capacity is
15 exceeded, whether the soil saturation capacity is
16 exceeded, whether a sheen is visible either in the
17 soil, groundwater or surface water, whether remaining
18 contamination will be disturbed by construction
19 workers or other human activities, whether remaining
20 contamination will be disturbed by natural or animal
21 forces, high infiltration rates, highly permeable
22 geological units, sand seams, burrowing animals,
23 whether the release point or release points of the
24 contamination have been located, the intended post

1 remedial use of the property, in other words, whether
2 it's going to be residential or industrial/commercial,
3 whether the contamination is going to be covered by
4 some structure such as a building. That's not all
5 inclusive, but that's what we look at.

6 MR. O'BRIEN: And over all those
7 particularities we look to see if the methodology used
8 is consistent with national consensus methodologies
9 and also whether it represents conditions and factors
10 relative to the site.

11 MR. WATSON: In looking at methodologies for
12 example, the Agency would, however, be open to new and
13 innovative models for instance that are being
14 developed as the program is being implemented, is that
15 right?

16 MR. O'BRIEN: It's the intention of the Tier
17 3 flexibility is to be open to innovation.

18 MR. WATSON: I think my question on sub (b),
19 who will conduct this valuation, has been answered.
20 It's the CORE Group, is that correct?

21 MR. KING: Well, I see that as being a little
22 bit different here, the nature of the question. Who
23 is going to review the proposal is going to depend on
24 specifically what's -- what the type of -- what the

1 nature of the proposal is.

2 In the past we've really had a broad
3 interdisciplinary approach to evaluating these kind of
4 issues, and in any specific case we'd have a
5 toxicologist or an attorney or an engineer or a
6 geologist in addition to the project manager. And a
7 chemist as well, we'll include Jim O'Brien.

8 MR. WATSON: My question (c) is what factors
9 will be considered in determining whether further
10 remediation is not practical as referenced at Section
11 742.900(c)(5) when addressing constituents identified
12 in the vicinity of and under permanent structures at a
13 site?

14 MR. KING: This really is very much of a
15 site-specific decision, and where we've looked at the
16 permanence issue, I don't know that we've normally --
17 I'm trying to recall instances where we disputed
18 somebody who said it was a permanent structure.
19 Normally it's pretty obvious that it's a permanent
20 structure, and in any case if the building's going to
21 get torn down, it's a contamination issue, somebody's
22 going to have to deal with it at that point.

23 So we've been -- we've reacted pretty favorably
24 when people have said things were permanent.

1 HEARING OFFICER DESHARNAIS: Follow-up
2 questions. Miss Prena?

3 MR. WATSON: Let me ask one question if I
4 may. What is the -- when you use the term assessment
5 indicates further remediation is not practical, in the
6 context of an existing structure, contamination in the
7 vicinity of a structure, what would be the
8 circumstances under which remediation would not be
9 practical.

10 I mean this is -- what I'm looking for is a little
11 more guidance on this issue as it relates to
12 contamination in and around structures. This is an
13 issue that many of our clients are interested in
14 determining, in developing some certainty as to what
15 circumstances would allow them to -- or not allow
16 them, but under which they could rely on problems
17 associated with remediation to argue for a -- leaving
18 that in place.

19 MR. KING: I don't know how much real
20 certainty we can provide on that, but I'll give you a
21 couple of examples.

22 One that we encounter, we've seen this frequently
23 under the tank program where a person obviously has to
24 do underground remediation, and contamination may have

1 moved under a structure, and we've gotten to the point
2 where further remediation is going to start
3 undermining the foundation and the footings of the
4 structure, and when it gets to that point, you know,
5 unless there's -- if you continue to monitor the
6 situation and it doesn't look like things are moving
7 anywhere, then that would be the kind of situation
8 that we'd say hey, well, remediation further is
9 impractical.

10 MR. WATSON: Would you consider cost as being
11 a basis for impracticality?

12 MR. KING: I mean I think that comes into it
13 in terms of, you know, if you've got a 50 story
14 structure sitting on top of some contamination, the
15 notion of tearing that down to get to the
16 contamination is certainly a cost issue. I don't
17 think we -- we don't do a cost balancing in that kind
18 of context.

19 MR. WATSON: Would you consider for instance
20 incremental costs associated with the technology which
21 would allow you to drill vertically for instance to
22 remediate soil but would cost, you know, significantly
23 more?

24 MR. SHERRILL: We've seen examples in the

1 site remediation program just through under their --
2 under the umbrella of corporate responsibility where
3 people -- I mean where this is not a -- would not be
4 -- where this is not an enforcement issue where people
5 have gone to pretty exorbitant means to get
6 contamination out from under a building that we told
7 them that, you know, that we weren't requiring them to
8 do it, but I mean this is like operational concerns
9 and they would remove six, nine inches of concrete in
10 an operating building to get at it.

11 So it gets -- you know, it's a site-specific call
12 and that when we do this issue with permanence, when
13 we know a lot of buildings trade hands in the Chicago
14 area, other industrial areas, when we know that a
15 building is going to be torn down, that provides a
16 good opportunity to get at that contamination.

17 MR. RAO: I have a follow-up question. In
18 the situation where you were talking about
19 contamination under a structure, if the Agency allows
20 that to be as a condition where it's not practical to
21 remediate the contamination, would the structure be
22 considered as an engineered barrier or, you know, like
23 if somebody tears it down maybe ten years from now?

24 MR. KING: Right, that will be considered an

1 engineered barrier and there would need to be an
2 institutional control accompanying that. If at some
3 point a future property owner decided to tear the
4 building down, well then they would in essence be
5 violating the conditions of the No Further Remediation
6 Letter, and that would necessitate them coming back in
7 and addressing the contamination that had previously
8 involved the building.

9 HEARING OFFICER DESHARNAIS: Additional
10 follow-up, Mr. Watson?

11 MR. WATSON: No, thank you.

12 HEARING OFFICER DESHARNAIS: Miss Prena.

13 MS. PRENA: Can you provide us with another
14 example of what might be considered a common sense
15 assessment that no further -- that further remediation
16 is not practical, other than the building situation?

17 MR. HORNSHAW: One other situation that's
18 come up in the past is where contamination is already
19 in the saturated zone and the engineered to extract
20 that is pretty novel or nonexistent, in those cases
21 that contamination is allowed to be managed, or if
22 it's real minor it's just said enough is enough.

23 MS. PRENA: Are there any other examples?

24 MR. CLAY: There's one where we've had

1 fiber-optic cables, so instead of disturbing those,
2 we've allowed a Tier 3 valuation there.

3 MR. O'BRIEN: We've allowed support under
4 other underground utilities like sewer lines and so on
5 that would be -- where the amount of contamination,
6 you know, has been removed on both sides, but actually
7 supporting the line under it has been allowed to be
8 left in place because essentially the mass of
9 contamination is so small that it wouldn't really
10 contribute to additional risk.

11 And we've also done the same thing with especially
12 in gas station situations where you have canopies over
13 the pump islands and where they -- those rest on
14 footings, it may just be a foot or two square, and
15 rather than have to tear down the entire canopy or
16 something like that or put restrictions on them
17 removing the footing later, that contamination in a
18 small area is allowed to be left at existing levels.

19 MS. PRENA: Okay.

20 HEARING OFFICER DESHARNAIS: Any additional
21 follow-up, Mr. Watson?

22 MR. WATSON: Would that include also
23 underground structures that perhaps have been taken
24 out of service but not removed from the ground? I

1 mean I guess one of the examples that I -- that we're
2 involved in is that at old gas plant sites where
3 you've got all kinds of underground piping that has
4 been left in place because there's a lot of it, and
5 the question is what would be obligations for
6 remediation based on the existence of those no longer
7 used piping, and I guess we're wondering whether or
8 not those would be circumstances under which
9 practicality or common sense assessments would allow
10 you to leave that kind of material in the ground.

11 MR. O'BRIEN: I don't remember that we've ever
12 addressed that particular situation. The references
13 to piping were things that were still in use and
14 therefore that the disruption would cause a -- you
15 know, other effects. I don't believe that we've ever
16 had the argument brought to us that things that were
17 abandoned, that that was a justifiable reason.

18 MR. WATSON: Are you saying that that's not
19 appropriate in your view?

20 MR. O'BRIEN: I don't think we've ever made
21 the decision on that.

22 MR. WATSON: So you certainly would allow
23 people to argue impracticality based on the existence
24 of abandoned underground structures?

1 MR. O'BRIEN: Well, that's what the reason
2 for is to allow us to consider all the factors
3 relevant at a particular site.

4 HEARING OFFICER DESHARNAIS: Additional
5 follow-up on 742.900?

6 MR. RAO: Mr. King, you and Jim O'Brien were
7 giving examples of where this common sense assessment
8 -- examples of this common sense approach may apply.

9 Could roads and highways be an example if there's
10 any contamination under them? Okay, Gary.

11 MR. KING: I think the issue with roads and
12 highways is kind of a complex one. As Mr. Schick and
13 I have had many discussions about for the last several
14 months, and the fact that contamination is on property
15 that's owned by for instance Department of
16 Transportation, that shouldn't automatically mean that
17 you've got an impractical remediation, okay? I mean
18 because they've got lots of median areas and lots of
19 buffer zones around the actual highway itself.

20 So there may be -- it may be that it's not
21 impractical in those situations. And that really
22 again comes down to the nature of a case by case
23 situation looking at it. If it is actually under the
24 highway structure and it's an operating highway, you

1 know, it would seem like that's the kind of -- from a
2 common sense standpoint to say well, let's not tear
3 that highway up, you know, if there's some other way
4 to deal with the situation and preserve the integrity
5 of the highway, preserve the integrity relative to any
6 future remediation efforts that might go forward.

7 MR. SCHICK: Could I follow up with that?
8 I'm Randy Schick from DOT. And we've also got a
9 specific section under institutional controls to deal
10 with highways.

11 MS. McFAWN: Yes, you have a -- excuse me,
12 you have a specific section?

13 MR. SCHICK: There's a specific section in
14 the proposed rules on highway authorities dealing with
15 contamination in the right-of-way.

16 MS. McFAWN: Where is that?

17 MR. SCHICK: 1020.

18 MS. McFAWN: The Agency's pointed out to us
19 that's it's Section 742.1020, is that the one you're
20 referring to?

21 MR. SCHICK: That's correct. And so I would
22 think that we'd like to enter into an agreement to
23 leave it under the highway under this section if a
24 highway authority didn't -- if you couldn't negotiate

1 that kind of agreement, then that's going to -- when
2 it becomes impractical, I mean in that sense.

3 So that could be an example when it might become
4 impractical. That leaves open the question then if
5 the highway authority later comes back to that area,
6 and that party's gotten no a further remediation
7 letter, how they would be foreclosed from recovering
8 that cost in that situation. But those are -- you
9 know, that's just an open issue I think.

10 But the highway authority, we should have the
11 opportunity first of all to negotiate leaving it under
12 the road and protecting the environment if the road is
13 later excavated at some point in the future. And that
14 could be addressed in the agreement.

15 MS. McFAWN: So you're basically saying that
16 you would see this as an example of it not being
17 practical and you'd have the institutional control?

18 MR. SCHICK: Yes, similar to what Gary is
19 talking about the building. As long as the building
20 is in place, I mean we'd be willing, we would be
21 willing to leave it under the road. But if the road
22 -- you know, if the building's removed or say the
23 highway's later reopened for utility work or highway
24 improvement, it's not impractical at that point.

1 And so we'd like to have an understanding with
2 those parties in that situation that it's okay to
3 leave it there except we -- except in the situation
4 where we excavate it, you know, we would like to have
5 an agreement that that cost would be covered by that
6 party that we've agreed to leave it there, to cover.

7 MS. McFAWN: Well, now you're into another
8 issue. The Board's question was just is that an
9 example of being it being practical or not practical.
10 I think you've helped us.

11 MR. SCHICK: Okay.

12 HEARING OFFICER DESHARNAIS: Miss Prena?

13 MS. PRENA: Would an example include
14 disturbing natural resources such as unique plant
15 species or important plants or animals?

16 MR. KING: It's never come up, so I don't
17 know what to think about that one. It might be
18 something worth considering.

19 HEARING OFFICER DESHARNAIS: Additional
20 follow-up, Mr. Watson?

21 MR. WATSON: Yes. With respect to leaving
22 contamination under permanent structures, you may have
23 answered this question previously, but I'd like to
24 just confirm it.

1 With respect to the existence of free product
2 underneath the building, is it true that a party would
3 be allowed to argue under Tier 3 that leaving free
4 product under a building based on practicality and
5 common sense approaches would be appropriate?

6 MR. O'BRIEN: I believe that they'd also have
7 to make a showing that it wasn't mobile.

8 MR. SHERRILL: But yes is your answer. I
9 mean they could propose it.

10 MR. WATSON: And the Agency would --

11 MR. SHERRILL: We'll review it, yes.

12 MR. WATSON: Review it and potentially accept
13 that proposal, and what you're saying there is the
14 primary issue is whether the free product is mobile
15 and migrating off site?

16 MR. SHERRILL: That is one of the primary
17 issues, and then the other issues is what I've listed
18 before. The migratory, you know, you have off-site
19 and on-site concerns, and that's just one of the
20 issues.

21 MS. ROBINSON: Could I ask a follow-up?

22 HEARING OFFICER DESHARNAIS: Miss Robinson.

23 MS. ROBINSON: Would it necessarily have to
24 migrate off-site for it to be a concern to us? If it

1 migrated to a preceptor that's on-site would it then
2 be a concern to us?

3 MR. SHERRILL: Yes, that's correct.

4 HEARING OFFICER DESHARNAIS: Additional
5 follow-up?

6 MR. RAO: I have another question. Is this
7 common sense approach a very simple assessment?

8 MR. KING: Yeah, it has been. I mean
9 normally what we see as we're talking about this CORE
10 Group process in the past is the -- normally there's a
11 memo from the project manager that kind of outlines
12 the circumstances and it really is a fairly simple
13 submittal in most every case. It's one of the kind of
14 situations that we look at as being fairly easy to
15 make a decision about.

16 MR. RAO: But when reviewing the information
17 will the Agency consider all the other factors, you
18 know, the exposure of routes and pathways and things
19 like that, if somebody comes to you and says say we
20 have this contamination under a structure so we want
21 to leave it there, but they have to justify their
22 remediation approach with all the other things that
23 are required under the rule?

24 MR. KING: Yeah, I think that's true. I mean

1 it's like we were saying before, there's a series of
2 -- you know, you have to make a site-specific
3 evaluation. I mean one of the -- we were just talking
4 about the free product situation, you know. If you
5 had, you know, pure, a pure gasoline spill and it was
6 flowing underneath a building and it was going into
7 sewers and it was threatening to blow up the whole
8 building, well, you know, it wouldn't be very
9 practical to say let's leave that there.

10 I mean you have to look at that site-specific
11 situation and make sure that it was addressed.

12 MR. RAO: Yes, and the reason I ask is that
13 current common sense that it would turn around a lot
14 of different programs and some very loosely, so I just
15 wanted to make sure that.

16 MR. KING: Well, we've always used that term,
17 particularly when we've talked to people about making
18 decisions so that they can understand we're on Tier 3,
19 because the normal reaction was we said well, this was
20 a Tier 3 determination, the immediate reaction is that
21 people think oh, well, this means formalized risk
22 assessment, you've got to do a risk assessment that's
23 going to cost tens of thousands of dollars. And well,
24 we don't ever want to get into that situation.

1 Well, that is a potential -- that is a potential
2 way of doing things under Tier 3, but we wanted to
3 kind of indicate that there's a different way of
4 looking at those kind of issues that's not to that far
5 of an extreme.

6 MR. RAO: Thank you.

7 HEARING OFFICER DESHARNAIS: Additional
8 follow-up?

9 (No response.)

10 HEARING OFFICER DESHARNAIS: Okay, the next
11 prefiled questions are on Section 742.905 from the
12 Site Remediation Advisory Committee.

13 MR. RIESER: This is number one, on page two
14 of Tracey Virgin's testimony she states that "Section
15 742.900 begins by stating that Tier 3 has been
16 developed to be flexible and to address sites that are
17 not suitable for Tier 1 or Tier 2 analyses."

18 Is it correct that "suitability" is not a
19 requirement for utilizing Tier 3?

20 MS. VIRGIN: That is correct, suitability is
21 not a requirement.

22 MR. RIESER: It is also correct -- is it also
23 correct that it is the owner's decision as to the
24 mechanism (for example exposure route exclusion, use

1 of background concentrations, Tier 1, 2 or 3) to be
2 used when developing a remedial action plan?

3 MS. VIRGIN: Yes, it is the owner's decision
4 as to the mechanisms to be used, exposure route
5 evaluation under Subpart C use of background or Tiers
6 1 or 2 or 3 when developing a remedial action plan.

7 MR. RIESER: May an owner go directly to Tier
8 3 when addressing a recognized environmental condition
9 and bypass Tier 1 or Tier 2 assessments?

10 MS. VIRGIN: Yes, an owner may bypass Tiers 1
11 or 2 and go directly to Tier 3.

12 MR. RIESER: Will the Agency confirm that
13 under Tier 3 a persons could vary any Tier 2 variable
14 for any valid site-specific reason?

15 MS. VIRGIN: Yes, the Agency will consider
16 that Tier 2 variables can be proposed for change under
17 Tier 3 for a valid site-specific reason.

18 MR. RIESER: Thank you.

19 HEARING OFFICER DESHARNAIS: Any follow-up
20 questions on 742.905?

21 (No response.)

22 HEARING OFFICER DESHARNAIS: Okay, the next
23 section is 742.910 from the Site Remediation Advisory
24 Committee again.

1 MS. ROSEN: Question number one, are the
2 elements as to what the Agency will consider when
3 reviewing alternative model requests, as described in
4 Tracey Virgin's testimony, reflected in the proposal?

5 MS. VIRGIN: The elements that the Agency
6 will consider in reviewing alternative model requests
7 as discussed in my testimony are intended to give
8 additional information to justification. The elements
9 are not intended to be requirements but rather are
10 illustrations, and these elements are based on Agency
11 experience between 35 IAC and 811.

12 MS. ROSEN: I'm sorry, could you repeat the
13 end of your answer?

14 MS. VIRGIN: These elements are based on
15 Agency experience including 35 IAC 811.

16 MS. ROSEN: Okay. Do you believe that the
17 elements that you've reflected in your testimony are
18 appropriate given what is contained within the actual
19 proposal?

20 MS. VIRGIN: Yes, they are appropriate.

21 MS. ROSEN: Thank you.

22 HEARING OFFICER DESHARNAIS: Any follow-up
23 questions on 742.910?

24 (No response.)

1 HEARING OFFICER DESHARNAIS: The next
2 questions concern 742.915, formal risk assessments,
3 from the Site Remediation Advisory Committee.

4 MR. RIESER: Are the elements as to what the
5 Agency will evaluate when reviewing formal risk
6 assessments, as described in Tracey Virgin's
7 testimony, reflected in the proposal?

8 MS. VIRGIN: The elements when reviewing risk
9 assessments that I described in my testimony are
10 informational and are not descriptive, and again they
11 were rather to serve as illustrations. And again
12 these elements are based on Agency experience and also
13 including the USEPA's risk assessment guidance for
14 Super Fund document.

15 MR. RIESER: So they're examples of how
16 people would do what's required under 915.

17 MS. VIRGIN: Right, they're to serve as
18 illustrations and examples.

19 MR. RIESER: And it's your testimony that
20 they're appropriate to -- these are appropriate steps
21 in performing the steps under 915.

22 MS. VIRGIN: Yes, they are appropriate.

23 MR. RIESER: Thank you.

24 HEARING OFFICER DESHARNAIS: Any follow-up on

1 742.915?

2 (No response.)

3 HEARING OFFICER DESHARNAIS: Next section on
4 which there's prefiled questions is 742.920 entitled
5 impractical remediation, again from the Site
6 Remediation Advisory Committee.

7 MS. ROSEN: These have been touched on
8 briefly, but we would like to ask them for the
9 purposes of the record.

10 Question number one, what standards or criteria
11 will be used for determining technical
12 impracticability under this section?

13 MR. KING: This is kind of a long answer, so
14 I'm going to just read these. These are kind of the
15 factors that we have ascribed in reviewing this
16 question.

17 The concentration of the contaminants, the
18 toxicity of the contaminants, the amount of the
19 contaminants, the estimated migratory pathways, the
20 presence of any free phase contaminants, whether soil
21 attenuation capacity is exceeded, whether soil
22 saturation limits have been exceeded, whether a sheen
23 is visible either in the soil, groundwater or surface
24 water, whether remaining contamination will be

1 disturbed by construction workers or other human
2 activities, whether remaining contamination will be
3 disturbed by natural or animal forces, such as
4 infiltration, highly permeable units such as
5 geological units, sand seams and burrowing animals,
6 whether the release point of the contamination can be
7 located, for instance under -- the comparison is
8 between the LUST program, which we already have
9 identified a tank with a known release point versus
10 the -- a site in the -- under the Part 740 rules where
11 the release point is more unknown, and thus you have
12 to have a different characterization of contamination,
13 the intended post remedial use of the property, and
14 whether there's a permanent structure such as a
15 building over the contamination.

16 MR. RIESER: Is there an element of technical
17 impracticality that you've listed there? In other
18 words, the infeasibility of getting to or removing the
19 contamination?

20 MS. McFAWN: Mr. Rieser, can you use that
21 microphone?

22 MR. RIESER: I'm sorry, the infeasibility,
23 would you also consider the infeasibility or
24 impracticality of either getting to or removing the

1 contamination?

2 MR. KING: That would be an included factor,
3 yes.

4 MR. RIESER: And the relative cost of dealing
5 with the contamination compared to the risk of leaving
6 it in place?

7 MR. KING: Yeah, in a -- again you always
8 come back to the issue of being practical. But yeah,
9 it would be a pragmatic kind of thing. I don't think
10 we are going to look at specific cost analysis things,
11 but it's going to be more of a pragmatic
12 consideration.

13 MR. RIESER: Is this different from the
14 factors you talked about with respect to the common
15 sense type issues?

16 MR. KING: No, these are -- this is an
17 amplified list where we got to that specific question.

18 MR. RIESER: Okay. Thanks. If I can go back
19 to something on Section 915(a), you talk about one of
20 the standards for looking at risk assessment is
21 whether the risk assessment procedures is nationally
22 recognized and accepted, and I think Mr. O'Brien
23 addressed this in response to another question on
24 another section, but would the Agency look at risk

1 assessment procedures that are new and not nationally
2 recognized?

3 MR. O'BRIEN: Well, I think we'd consider in
4 -- this is the section on formal risk assessment, and
5 there I think we'd look at how much deviation there
6 was from national consensus approach and whether that
7 made sense considering the factors at the site.

8 HEARING OFFICER DESHARNAIS: Miss Prena.

9 MS. PRENA: Well, for example if there were
10 new risk assessment procedures being used in
11 California, would those be -- and they were used in
12 California but not in the rest of the country because
13 they were new, would that still be something that
14 you'd look at?

15 MR. O'BRIEN: Well, we have to look at them in
16 the context of this, of the site and what it was. I
17 mean it's -- the point of Tier 3 is to have an area of
18 flexibility so where we can look at some things that
19 aren't nailed down to let us look at innovative
20 approaches to things, but we've still got to kind of
21 consider whether that's relevant to the site and to
22 general principles underlying national consensus, the
23 approaches to this.

24 MS. VIRGIN: We'd also want to make sure that

1 the new risk assessment procedures offered equivalent
2 of protection as the other nationally recognized
3 procedures.

4 MS. PRENA: Well, that is you'd be looking at
5 the quality of the approach rather than whether it was
6 nationally recognized?

7 MS. VIRGIN: Right, right.

8 MR. RIESER: Thank you.

9 HEARING OFFICER DESHARNAIS: Any additional
10 follow-up again on 915?

11 (No response.)

12 HEARING OFFICER DESHARNAIS: Did the Site
13 Remediation Advisory Committee wish to ask its second
14 question on 742.920?

15 MR. RIESER: Yes, this also has been touched
16 on in the context of the common sense approach, but I
17 think it makes sense to ask it under this section as
18 well.

19 Will the impractical remediation provision apply
20 for areas off-site, i.e. under roadways?

21 MR. KING: That's again as we were saying
22 before, that's really a site-specific kind of issue,
23 and I think I really don't have too much to add beyond
24 the colloquy that Randy Schick and I were having

1 relative to that issue.

2 MR. RIESER: But let's take it out of the
3 roadway context, let's suggest that there is a
4 building right on the property line that's off-site
5 and the contamination is under that off-site
6 structure.

7 MR. KING: It's possible, again the issue
8 with off-site contamination, the key issue there is
9 relative to the acceptance of that remediation
10 strategy by the off-site landowner.

11 MR. RIESER: Which kind of begs the next
12 question, which is what happens then if a -- it says
13 roadway, but let me substitute it for this adjoining
14 property owner, will not agree to an institutional
15 control regarding remaining contamination under the
16 structure, even if it is technically impractical to
17 remove it?

18 MR. KING: Well, I think what happens then is
19 it changes the nature of the NFR determination. The
20 NFR determination is not going to cover that off-site
21 area.

22 MR. RIESER: Unless you got the approval of
23 the adjoining property owner to expand the remediation
24 site?

1 MR. KING: That's correct.

2 MR. RIESER: Okay.

3 HEARING OFFICER DESHARNAIS: Additional
4 follow-up on 742.920?

5 MS. McFAWN: I have a question. You know
6 that list you read, Gary? And maybe you already
7 answered this, but is that in the rules anywhere?
8 Because that was the second time I'd heard that list
9 of factors you would consider.

10 MR. SHERRILL: No.

11 MS. McFAWN: Thank you, Mr. Sherrill.

12 MS. ROBINSON: Is that list meant to be all
13 inclusive?

14 MR. SHERRILL: No.

15 HEARING OFFICER DESHARNAIS: Mr. Watson?

16 MR. WATSON: How was that list developed?

17 MR. KING: Well, it was kind of a -- as
18 follow-up to the questions that were presented
19 relative to this hearing process, and we kind of sat
20 down and reviewed our experience relative to these
21 issues and set forth what the different issues were
22 that people were considering when they went through
23 this process.

24 MR. WATSON: So it doesn't comes from a

1 specific guidance document?

2 MR. KING: No, it does not.

3 HEARING OFFICER DESHARNAIS: Additional
4 follow-up?

5 (No response.)

6 HEARING OFFICER DESHARNAIS: The next section
7 on which there are prefiled questions is 742.925
8 concerning exposure routes by the Site Remediation
9 Advisory Committee.

10 MS. ROSEN: Number one, on page 6 of Miss
11 Virgin's testimony she states that "Section 742.925
12 provides guidance for submittals made to the Agency
13 demonstrating that a particular exposure route is not
14 viable at a site."

15 When Miss Virgin uses the term viable, does she
16 mean that Section 742.925 is another mechanism to
17 exclude an exposure route that is not complete, for
18 example meaning a contaminant of concern, an exposure
19 route, and a receptor activity at the point of
20 exposure that could result in contaminant of concern
21 intake?

22 MS. VIRGIN: Yes, Section 742.925 is another
23 mechanism to exclude a route.

24 MS. ROSEN: Okay. And when you use the word

1 viable, that's what you intended?

2 MS. VIRGIN: Yes.

3 MS. ROSEN: Okay, thank you.

4 HEARING OFFICER DESHARNAIS: Any follow-up
5 questions? Mr. Reott.

6 MR. REOTT: If you exclude a route under that
7 section, do you need to also do the analysis under I
8 think it's 305 and the other sections that immediately
9 follow it? That's the pathway exclusion, Subpart C.

10 MR. SHERRILL: It's not specifically
11 required, but we would look at those issues.

12 MR. REOTT: When you say you would look at
13 those issues, the pathway exclusion, pathway exclusion
14 rules in Subpart C have some very specific
15 requirements that must be met in order to exclude
16 pathways. Do you have to meet those specific
17 requirements in order to exclude a pathway under the
18 Tier 3 provision?

19 MS. VIRGIN: No, you do not have to meet
20 those requirements.

21 HEARING OFFICER DESHARNAIS: Additional
22 follow-up on 925?

23 MS. McFAWN: I just want to make sure I
24 understand this. So if you go this route through the

1 925 provisions you don't have to do anything
2 addressing Subpart C?

3 MS. VIRGIN: Well, we would look at some of
4 those factors if the site warrants it. The factors in
5 Subpart C are not required. Tier 3 is designed to be
6 more flexible than Tier 2.

7 MS. McFAWN: Okay, so you say you would look
8 at it, that being the Agency. What if the applicant
9 hasn't provided you any information under it, because
10 they're thinking well, I don't have to address that?

11 MR. SHERRILL: Well, under 742.225 -- I'm
12 sorry, under 742.925, we have this (a) through (f), we
13 have this (a) through (f) which kind of they need to
14 address those particular parameters, and by addressing
15 those you indirectly address some of those issues
16 under Subpart C. Because the --

17 MS. McFAWN: But it's probably not all
18 inclusive, it's probably not as detailed as Subpart C,
19 or is it?

20 MR. SHERRILL: It's not intended to be.
21 There again, you know, it's a site-specific call. And
22 like for example that under (a) description of the
23 route evaluated, you're either going to be looking at
24 ingestion, inhalation, migration to groundwater,

1 injection of groundwater, you know, which Subpart C
2 lays out in detail.

3 Well, so a description of the route, you're going
4 to have to provide an applicant or a respondent's
5 going to have to provide something describing that
6 particular route they're wanting to exclude.

7 MR. KING: I think part of the reason why
8 we're a little bit unclear perhaps in our answer here
9 is that we want to -- I think the answer really those
10 criteria in Subpart C are going to be looked at as
11 sort of a bench mark, even if they're not directly
12 applicable.

13 If somebody came in and they said well, I don't
14 meet this requirement for three feet of cover, but I
15 can show that it's going to be two feet nine inches, I
16 can't make it three but I can make it two feet nine
17 inches, and it's really going to be okay with that
18 kind of level, you know, I think that using that as
19 kind of a factor or bench mark makes the decision
20 process a little easier for us.

21 So I think it will be -- they'll be used not in a
22 mandatory sort of way, but as a way to kind of help
23 guide some of the process under 925. And there may be
24 -- there may be totally different approaches, you

1 know.

2 For instance I think under the -- when we look at
3 some of the groundwater issues and the migration to
4 groundwater issues, we really -- we haven't --
5 Subpart C doesn't -- has an exclusion, a way of
6 excluding the groundwater pathway based on the -- when
7 the contamination is in the groundwater, but doesn't
8 talk about the migration to groundwater issue.

9 And I think we'll get into some situations under
10 925 where that will become a proposal as far as
11 excluding a pathway.

12 MR. RAO: So would it make sense for somebody
13 who cannot meet all the criteria under Subpart C to
14 exclude a pathway to do it under Tier 3?

15 MR. KING: I think we will see proposals like
16 that, yes.

17 HEARING OFFICER DESHARNAIS: Mr. Rieser?

18 MR. RIESER: Yes, just two issues, but to
19 clarify on the last part. There's actually a
20 provision under Subpart C that references Subpart I so
21 that pathways can be excluded. It is clear from a
22 review of Subpart C that even if you don't meet the
23 Subpart C factors you can still exclude a pathway
24 under this section, correct?

1 MR. KING: I would agree with that.

2 MR. RIESER: And one other clarification, and
3 this is a follow-up on Mr. Reott's point. 742.305 has
4 some very, very specific factors in terms of
5 saturation, soil attenuations, soil saturation, those
6 levels which would exclude you from a demonstration
7 under Subpart C, and I want to clarify that an
8 exceedance of any of those would not automatically
9 exclude you from a demonstration under 925.

10 MR. KING: I think that's correct.

11 MR. RIESER: Thank you.

12 MR. HORNSHAW: Can I follow up just a little
13 bit? Going a little bit beyond that, if I understood
14 Mr. Reott's question correctly, I thought if you
15 excluded a pathway under 925, that you wouldn't have
16 to meet any of the things in Subpart C. And I can see
17 situations for instance where as Gary pointed out if
18 somebody comes in with two feet nine inches of clay,
19 we would probably agree that the ingestion pathway is
20 excluded from further consideration.

21 But I can see where we'd still be concerned for
22 instance if the soils at the site in 305(d) where
23 you're talking about pH, if we had real acidic or real
24 basic soils, we'd still be concerned about that, even

1 if the pathway of ingestion has been excluded.

2 MR. RIESER: But you could still make a
3 demonstration that the pathways, that all the pathways
4 are excluded based on site-specific factors, even if
5 that was the case.

6 MR. HORNSHAW: That's correct.

7 HEARING OFFICER DESHARNAIS: Mr. Feinen.

8 MR. FEINEN: The Agency doesn't intend to
9 exclude or make a determination that someone didn't
10 demonstrate exposure pathway exclusion based on 925
11 because it didn't meet the requirements of Subpart C.
12 That's not going to be done. You're not going to list
13 something in Subpart C and say you didn't do this and
14 therefore we're not going to give you a 925 exclusion.

15 MR. KING: That's correct.

16 MR. RAO: I have a question about this
17 exposure in a route exclusion. What's the difference
18 between a Subpart C exclusion and a Tier 3 exclusion
19 pathways? You know you have the Subpart C criteria
20 and then you say well, as an alternative you can go to
21 Tier 3.

22 MR. SHERRILL: When we were developing the
23 742 rules with the site -- with the committee, the
24 Agency's initial proposals we didn't even -- there was

1 not a Subpart C, and the advisory committee provided
2 guidance on developing Subpart C, which would be a
3 prescriptive by rule approach to excluding pathways.

4 And through consultation with various Agency
5 people and people outside the Agency and working with
6 the committee, we came up with Subpart C. And then --
7 but Subpart C is a prescriptive by rule approach where
8 those certain guidelines had to be met, and the Agency
9 has experience where there are sites where other
10 routes, where routes cannot be excluded by meeting
11 those criteria, such as what Gary brought up on let's
12 just say if you just wanted to look at the migration
13 to groundwater route, and there's so many variables
14 that can go into that, we wanted to offer a flexible
15 procedure under Tier 3.

16 MR. KING: If you think about Subpart C as
17 really creating what I would call a safe harbor, if
18 you meet these criteria, then that's going to be an
19 acceptable proposal. One of the -- I think the
20 committee saw one of the problems, from their point of
21 view one of the problems with Tier 3 on this issue was
22 there was just not enough specificity.

23 And so this is a way that creates a specific way
24 of doing it that somebody can use as a safe harbor,

1 and, you know, so we agreed that there should be that
2 kind of safe harbor. We just wanted to make sure that
3 there was flexibility to consider types of proposals.

4 MR. RAO: Thank you.

5 MS. McFAWN: Mr. Rieser or maybe Mr. Watson
6 can answer this. Is the committee going to testify
7 about this development of Subpart C? This is the
8 second time I've heard this come up that really
9 originated with the committee versus the Agency.

10 MR. RIESER: We can certainly, we can offer
11 testimony on this issue.

12 MS. McFAWN: That would be appreciated.

13 MR. RIESER: Okay.

14 HEARING OFFICER DESHARNAIS: Mr. Watson?

15 MR. RIESER: Then we will.

16 MR. WATSON: I'd just like to clarify in my
17 mind the discussion here and how it relates I think to
18 discussions we had at the initial hearing, and it
19 relates to 305 specifically (c) through (e), and again
20 we've talked today about this is being a prescriptive
21 approach, and really what these are is there are
22 specific criteria, if you don't meet them under
23 Subpart C then you cannot exclude the exposure
24 pathway.

1 And arguably they do not consider a formal risk
2 assessment approach as you would consider in 925, and
3 I guess what I would like is clarification that the
4 Agency will not use the values generated in the 305
5 analysis to automatically kick you out of exposure
6 route exclusion under Tier 3 925, is that correct?

7 MR. KING: Yeah, I think that's what I said
8 earlier. And I'll just -- but again we have to get
9 back to the point that Tom was saying, these criteria,
10 although they may not be specific denial points,
11 certainly are the kinds of issues that need to be
12 considered and evaluated in determining whether a
13 pathway is excluded.

14 I mean if we are -- if the contaminant levels are
15 such that they're above the soil saturation limits,
16 then that's indicative of -- for instance those Tier 2
17 models, they're just not going to work right. So we
18 are going to look at those as factors to consider
19 whether the proposal itself makes sense.

20 MR. WATSON: Right. And for instance again
21 if you have high pH levels, you've got to deal with
22 those in a 925 risk assessment analysis of course.
23 But the mere existence of those levels above what
24 would be -- what would allow you to get out of section

1 -- a pathway under 305 would not -- could not be a
2 basis for the Agency to say that you can't exclude a
3 pathway under a risk assessment approach, correct?

4 MR. KING: That's correct.

5 HEARING OFFICER DESHARNAIS: Additional
6 follow-up on 925?

7 (No response.)

8 HEARING OFFICER DESHARNAIS: Okay, the next
9 prefiled questions concern 742.935, which is entitled
10 agricultural uses and ecological receptors, and it's
11 listed as a reserved section.

12 I would just clarify at this point that the Joint
13 Committee on Administrative Rules does not allow us to
14 include reserve sections in a proposal, so therefore
15 this would not be present in the final adopted
16 proposals as it exists there as a reserve section.

17 It may be something that the Agency is considering
18 drafting a proposal for, and it's a good indication of
19 where they would put that. But it's not something
20 that will be included in the final adopted proposal by
21 the Board.

22 So with that we'll turn to the prefiled question
23 from the Site Remediation Advisory Committee.

24 MR. RIESER: And the questions are still

1 valid, even if this section is removed, because there
2 was a discussion earlier last week in terms of how the
3 issues were going to be handled, and that comes up
4 under some footnotes in the Tier 1 tables. And so
5 they still need to be addressed because there's an
6 underlying issue in agricultural issues back there.

7 So is it correct that unless there's evidence to
8 indicate the presence of an ecological issue at the
9 site, a detailed ecological assessment will not be
10 required?

11 MR. O'BRIEN: We anticipate that unless there
12 is evidence to indicate the actual presence of an
13 ecological issue, that we won't require detailed
14 ecological assessment, but we haven't proposed any
15 specific wording in this section, and we don't really
16 have the specifics of an approach in mind. So I
17 wouldn't want to make statements at this time that
18 would lock us into something without having the
19 flexibility of developing an approach, being able to
20 articulate it in detail and having discussion and
21 consideration at some future point.

22 MR. RIESER: And the reason the Agency
23 doesn't have a proposal here at this time is that
24 nationally there's not really recognized means for

1 doing that, is that correct?

2 MR. O'BRIEN: Yes, well, nationally there's a
3 lot of talk and theory, but there's not the kind of
4 specifics regarding exposure factors, et cetera, that
5 -- and national consensus on how to go about doing
6 that to the degree that there is with respect to human
7 health.

8 MR. RIESER: What standards or factors will
9 be used to determine the presence of an ecological
10 issue?

11 MR. O'BRIEN: We anticipate that the presence
12 of wet lands, presence of threatened or endangered
13 species in the post remedial use was intended to be a
14 conservation area, or if commercial or sport fishing
15 is evident, those types of factors would be the types
16 of things we'd look forward to in determining whether
17 or not there was a significant ecological issue.

18 MR. RIESER: And those would be factors
19 associated with the area where the contamination was
20 or where it might impact?

21 MR. O'BRIEN: Right, where the exposure to
22 the organisms, to the ecological organisms would
23 occur.

24 MR. RIESER: If the section -- well, this may

1 be modified based on the Hearing Officer's discussion,
2 but if section for ecological assessment were to be
3 added in a rule making at a later date, is it correct
4 that the Agency does not intend to reopen all of the
5 sites where NFR determinations have been issued and
6 require an ecological assessment at those previously
7 closed sites?

8 MR. O'BRIEN: That's correct, the Agency does
9 not intend to reopen sites that have been dealt with.

10 MR. RIESER: Thank you.

11 HEARING OFFICER DESHARNAIS: Any additional
12 follow-up on 935?

13 (No response.)

14 HEARING OFFICER DESHARNAIS: Okay. The next
15 sections in the prefiled questions that specifically
16 address a particular section would go on to the
17 institutional control. Before we move on to that, Mr.
18 Reott, do you have any additional questions on --

19 MR. REOTT: They've all been dealt with.

20 HEARING OFFICER DESHARNAIS: Then what we're
21 going to do is after lunch we'll continue with the
22 institutional controls and the D questions. We'll
23 take an hour break for lunch, so we'll be back here at
24 approximately quarter after.

1 (A recess was taken for lunch.)

2 HEARING OFFICER DESHARNAIS: If we could get
3 ready to go back on the record. Welcome back from
4 lunch everybody. We're going to continue with the
5 prefiled questions. Beginning with Subpart J,
6 institutional controls, Part 742.1000. Beginning with
7 the questions of the Site Remediation Advisory
8 Committee.

9 MR. RIESER: Our first question is on page 24
10 of Mr. Sherrill's testimony he discusses the fact that
11 remediation objectives based on an
12 industrial/commercial property must have an
13 institutional control in place. He also states in
14 conclusion that "it is anticipated some commercially
15 zoned property could be subject to residential use if
16 it is evident that children have the opportunity for
17 repeated exposure to contaminants through ingestion or
18 inhalation."

19 Is it the intent of his testimony to say that
20 zoning is insufficient as an institutional control?

21 MR. SHERRILL: Yes.

22 MR. RIESER: And why is that?

23 MR. SHERRILL: We've gone through and put in
24 definitions of what an institutional control is, and

1 we do not think that zoning provides the proper intent
2 of our definition to restrict on how you would
3 restrict property use as far as an institutional
4 control.

5 MR. RIESER: It wouldn't be sufficiently
6 specific to an individual site, is that what you're
7 saying?

8 MR. SHERRILL: Potentially, yes. I think we
9 had gone over this somewhat, Gary King had, Mr. King
10 had in our previous testimony on what we wanted to
11 make clear was the distinction between commercially
12 zoned and our definition of residential under Part
13 742.

14 HEARING OFFICER DESHARNAIS: Mr. Watson?

15 MR. WATSON: I've got a follow-up question on
16 that. And I guess I don't understand the distinction
17 between an ordinance, which is a municipal action, and
18 a zoning, which seems to be a similar sort of
19 municipal action that would control and dictate land
20 uses, and I guess I just don't see how the distinction
21 that the Agency is drawing in terms of why one is
22 acceptable and one is not acceptable.

23 MR. KING: I think if you look at a typical
24 zoning ordinance for instance that a community adopts,

1 where it designates what is industrial/commercial
2 property, it's not automatically excluding all other
3 uses relative to that property. So you could clearly
4 have certain things that we would consider residential
5 for purposes of the Part 742 definitions could be a
6 legal use within a commercial zoning designation that
7 would be typically enacted by a local government.

8 MR. WATSON: What if there was a showing made
9 that there were no residential uses being placed on a
10 property that was zoned commercial or industrial? If
11 we could make that showing, would that allow you to
12 point to the zoning as being something that could be a
13 potential institutional control?

14 MR. SHERRILL: Well, the purpose --

15 MR. KING: No.

16 MR. WATSON: And why not? The reasons stated
17 previously?

18 MR. KING: Because we designated certain
19 things as institutional controls. This is not a Tier
20 3 issue. This is an issue of what our -- should be
21 the legally recognized mechanism.

22 Now if somebody were -- I mean if somebody were to
23 come in and make a demonstration, I suppose that our
24 general understanding of the way these ordinances work

1 is totally wrong, I suppose that would be something to
2 consider, but I don't think that's the case.

3 MR. RIESER: Let me finish up on the rest of
4 this question one. Would the Agency refuse to accept
5 a land use identification as commercial use if
6 children happen to be present, and if so, what
7 criteria would be used to make such a determination?

8 MR. SHERRILL: I'll give the example where we
9 may have a property that may be zoned commercial but
10 is being used as a child day care center with open
11 playgrounds, potential soil exposures, we would
12 consider that per our definition of residential
13 property to be considered residential property.

14 MR. RIESER: But a children's activity spot
15 such as Discovery Zone for example in a strip mall
16 where there's no outside exposure, that wouldn't come
17 into that example, would it?

18 MR. KING: You know I hate to get too
19 specific in trying to figure out whether Discovery
20 Zone is -- should be qualified as a residential
21 property. My kids like to go there, too. But I don't
22 know if we want to make that kind of site-specific
23 exclusion.

24 MR. RIESER: Well, I'm using this as an

1 example of something that's totally -- at least the
2 one I'm familiar with totally enclosed, has no outdoor
3 exposure, is not really different from being in any
4 type of other store, commercial establishment, and
5 establishing that the key factor is exposure to the
6 soil rather than the fact merely of children being
7 present.

8 MR. SHERRILL: I guess I, you know, just keep
9 going back to the definition under 742.200.

10 Residential property means any real property that is
11 used for habitation by individuals or properties where
12 children have the opportunity for exposure to
13 contaminants through ingestion or inhalation, and
14 educational facilities, health care facilities, child
15 care facilities or playgrounds, and then the
16 definition for industrial/commercial means any real
17 property that does not meet the definition of
18 residential property, conservation property or
19 agricultural property.

20 So, you know, I mean if children did not have the
21 opportunity under residential property for exposure to
22 contaminants through ingestion or inhalation, you
23 know, I mean that's something we can look at.

24 MR. RIESER: And that would be the

1 determining factor?

2 MR. SHERRILL: I guess there again it's that
3 definition of residential property, yes.

4 HEARING OFFICER DESHARNAIS: Mr. Watson?

5 MR. WATSON: Could you provide some
6 amplification with respect to what you mean by a
7 playground? I mean I think that that's an area where
8 I see as being a real problem area. Certainly we want
9 it -- to the extent that there are children that are
10 being exposed at a particular activity, that that, you
11 know, that's something that we certainly want to
12 protect against.

13 But, you know, you start getting into things like
14 Discovery Zone and a McDonald's that has an outdoor
15 slide or swing, and then you've got hotels that maybe
16 have a swing set or something, and I think the concern
17 is that we've got that broad term that brings in a lot
18 of historically commercial uses where there really
19 isn't a realistic exposure to children on a chronic
20 basis, and yet, you know, it just becomes a very
21 difficult issue to deal with, especially since so much
22 of this program is dependent upon how you classify
23 your site.

24 MR. KING: Well, you also have to remember

1 when we started off developing these definitions, like
2 over a year ago, we had the catchall definition was
3 residential. And so everything fell to that. Okay,
4 and the argument was made to us that no, you really --
5 you should do it the other way.

6 Well, so we agreed that yeah, okay, let's change
7 it around and do it the other way. So I think there
8 has to be -- I mean one way to do things would be to
9 leave that residential as kind of open ended as kind
10 of the catchall thing, and then try to define other
11 uses specifically. But we really concluded that, you
12 know, for purposes of the program working properly, it
13 was better to do it this way.

14 Now, there's admittedly as we sit here today, we
15 can't make decisions on every potential exposure to
16 children. I think that's something that is going to
17 have to come up on specific cases, and I think most of
18 the time when the opportunity arises, you know, owners
19 tend to design their projects to minimize those kind
20 of exposures.

21 If somebody is designing a shopping center and
22 they know there's contamination in a specific
23 location, they intend to leave it there, well, I'm
24 sure they're going to try to not put it underneath

1 something they know where children are going to be
2 exposed to, because it's just creating a potential
3 problem for themselves long term.

4 So I think again it's one of those kind of -- you
5 have to look at it and figure out what's the most
6 sensible practical application.

7 MR. WATSON: Okay, thank you.

8 HEARING OFFICER DESHARNAIS: Additional
9 follow-up questions?

10 (No response.)

11 MS. ROSEN: Number two. Assume that there is
12 a piece of property in an area that is both
13 residential and commercial and the background levels
14 on the piece of property equal the Tier 2 residential
15 levels. The owner demonstrates that the site is at or
16 below those levels.

17 Is it required that an institutional control
18 restricting land use be imposed, and will any other
19 conditions be imposed on the site?

20 MR. SHERRILL: We needed clarification -- at
21 the beginning of your question, assume that there's a
22 piece of property in an area that is both residential
23 and commercial. We're not clear what you mean by
24 that.

1 MS. ROSEN: Well, I'm sure we've all seen
2 areas where there are both residences but there are
3 also commercial businesses. So you have a piece of
4 land that might have residences next to it, but at the
5 same time there might be a business being conducted, a
6 commercial business being conducted in a -- the other
7 direction.

8 MR. SHERRILL: Are you saying that you have a
9 site that's large enough that would incorporate, part
10 of the site is residential and part of the site is
11 commercial?

12 MS. ROSEN: No, not necessarily. I'm just
13 saying that the area where your site is located is
14 surrounded by a mix of residential and commercial
15 properties.

16 MR. SHERRILL: Well, which one is the site?
17 Is the site residential or is the site commercial?

18 MS. ROSEN: Let's assume that the site is
19 residential.

20 MR. SHERRILL: So then what's your question
21 then?

22 MS. ROSEN: Are you going to require that an
23 institutional control restricting land use be imposed
24 on that site, merely because I've utilized Tier 2 to

1 show that I meet levels.

2 MR. SHERRILL: If you meet Tier 2 residential
3 levels and it's a residential site, are you saying do
4 you need an institutional control?

5 MS. ROSEN: Yes, that's my question. May I
6 change the question? Assume that it's a commercial
7 property.

8 MS. McFAWN: Can you just answer the question
9 they did pose?

10 MR. SHERRILL: Well, no, because I'm
11 confused. Because they said the site is both
12 residential and commercial.

13 MS. McFAWN: But now the site's residential.

14 MR. SHERRILL: Okay, if you --

15 MS. McFAWN: It meets the Tier 2 residential
16 levels and they asked you if you need an institutional
17 control.

18 MR. SHERRILL: There could be the scenario --
19 Part 742 is not intended to make waste determination
20 decisions, and so I know Mr. King had brought up, you
21 know, we had talked about RCRA in our last hearing,
22 which touches on waste determination decisions, and in
23 the -- if this is touching on somewhat what you're
24 getting at is there controls, there may be controls on

1 disturbing that waste that's in place and the
2 management of that potential waste.

3 MR. RIESER: I'm sorry, I thought that --
4 we're getting a little far afield. I thought there
5 was testimony that that would not be one of the
6 restrictions imposed, because that's common to all
7 sites. That the types of restrictions would be land
8 use or use of drinking water, things of that nature.

9 And I think the first question Whitney asked was
10 given a residential property that achieves Tier 2
11 residential levels, are institutional controls
12 required.

13 MS. ROSEN: That's correct, that's what I
14 asked.

15 MS. McFAWN: So Mr. Rieser, you're saying
16 that when this question was posed you assumed the
17 answer would be no?

18 MR. RIESER: It was my belief that the answer
19 would be no. But --

20 MS. McFAWN: So when it was written that's
21 what you assumed?

22 MS. ROSEN: Yes, correct.

23 MS. McFAWN: Does that make sense to the
24 Agency?

1 MR. KING: Yes, I think the answer is no.

2 MS. McFAWN: Okay.

3 MR. KING: I mean if it's a residential use
4 and it meets -- well, if it's a commercial use and its
5 meets those Tier 2 residential numbers, then it would
6 not need an institutional control relative to use.

7 MS. McFAWN: Okay.

8 MS. ROBINSON: I think we were just confused
9 by the way the question was structured. It started to
10 make us wonder if there was more to the question.

11 MS. ROSEN: We aren't trying to trick you.

12 MR. RIESER: Would there be other -- you used
13 the phrase regarding use. Would there be other
14 controls, will other conditions be imposed on this
15 site?

16 MS. ROBINSON: Do you mean as far as
17 institutional controls?

18 MR. RIESER: Yes. Thank you.

19 MR. KING: Offhand I can't think of any
20 institutional controls that would be required. There
21 obviously would be conditions on the NFR letter, I
22 mean there's all sorts of things that would be
23 included, but I don't know if those would be
24 necessarily in the NFR letter would be recorded as

1 control relative to the site.

2 MR. RIESER: Right. So you'd have a recorded
3 NFR and it would have the standard conditions for NFR
4 letters as described in 740, but it wouldn't have any
5 specific land or use restrictions, land use or other
6 types of use restrictions on them?

7 MR. KING: I think that's correct, yes.

8 HEARING OFFICER DESHARNAIS: Miss Prena, did
9 you have some follow-up?

10 MS. PRENA: Just to clarify this, that means
11 that if you have a commercial property that cleans up
12 to residential standard, that no institutional
13 controls would be required?

14 MR. KING: That's basically correct.

15 MR. GOBELMAN: My name is Steve Gobelman, I'm
16 with the Department of Transportation. If you meet
17 residential numbers, does that mean that -- and
18 there's no institutional controls, can a person then
19 go back and excavate and haul that material off-site
20 without any problems with waste management? Can it be
21 excavated off, that's considered clean fill?

22 MR. SHERRILL: At this time we're not
23 intending to answer waste determination decisions
24 through Part 742 in that manner.

1 MR. GOBELMAN: So it could be considered a
2 waste is what you're saying?

3 MR. CLAY: It would not automatically be
4 considered clean fill. It would have to be determined
5 whether or not that was waste or not.

6 MR. GOBELMAN: Through solid waste
7 determination process?

8 MR. CLAY: Well, through the -- I think it's
9 807 determining whether it's a waste, and that takes
10 into account the use of that material.

11 MR. GOBELMAN: Okay.

12 MR. RIESER: This brings up a question in my
13 mind about some other testimony that I think was
14 delivered, but I'm not sure, which was that I remember
15 some testimony to the extent that any soil which
16 exceeded the Tier 1 residential would be deemed
17 special waste.

18 Is the Agency saying that that's not the case
19 anymore and that that determination is based on the
20 appropriate waste determination rules?

21 MR. SHERRILL: Is the question soils that
22 exceed Tier 1 numbers, is that a special waste?

23 MR. RIESER: Just by virtue of that fact.

24 HEARING OFFICER DESHARNAIS: Mr. Rieser, do

1 you believe that testimony was given at this set of
2 hearings?

3 MR. RIESER: Yes.

4 MR. REOTT: I don't believe so.

5 MR. RIESER: I'm sorry, I've been informed
6 that that was in the 740 proceeding and it was
7 clarified at that time. 740 clarified at that time
8 that that was not the case.

9 MS. McFAWN: So do you withdraw your
10 question?

11 MR. RIESER: Yes.

12 MR. SHERRILL: Thank you.

13 Mr. RIESER: You're welcome.

14 HEARING OFFICER DESHARNAIS: Moving on to the
15 next question. We have questions on 742.1000 that
16 were filed by Mayer, Brown & Platt. Miss Prena.

17 MS. PRENA: This is question 14. Where
18 contamination extends onto neighboring property, can
19 institutional controls be proposed by an RA,
20 remediation applicant, who doesn't own the property?

21 MR. KING: They can be proposed. However, it
22 has to -- there certainly would have to be a
23 recognition that there has to be a way of legally
24 effectuating those restrictions for a proposal to be

1 granted or to make sense.

2 MS. PRENA: I guess for example if you looked
3 at (c) sections 4 and 5 discussing ordinances that
4 might be adopted by a unit of local government or
5 agreements between the property owner and highway
6 authority, those would be institutional controls that
7 might be acceptable?

8 MR. SHERRILL: Are you citing 742.1000(c)?

9 MS. PRENA: Yes.

10 MR. KING: Yes, those are -- yeah, those are
11 two identified institutional controls that can go
12 off-site.

13 MS. PRENA: So even though those might affect
14 a neighboring property, they could still be
15 considered?

16 MR. KING: Well, yeah, because with an
17 ordinance that's -- an ordinance, obviously it's been
18 adopted by -- a unit of local government under its
19 authorities as defined by the statute adopt ordinances
20 regulating its own behavior and the behavior of people
21 within it. And an agreement with a highway authority,
22 I mean that's something that the highway authority
23 would be accepting.

24 MS. PRENA: What about with respect to No

1 Further Remediation Letters, restrictive covenants,
2 deeds, restrictions and negative easements?

3 MR. KING: For those items there would have
4 to be an acceptance by the off-site person relative to
5 those.

6 MS. PRENA: Okay. The next question.

7 MS. ROBINSON: Could I just ask a question of
8 you? When you ask this question, you use the term
9 remediation applicant, which is a term specific to the
10 Part 740 regulations. I just want to clarify that if
11 it's in the term, if you're using it in the context of
12 740, that would be correct. But if you're using it in
13 the context of the 732 open regulations it may be an
14 owner/operator. So was your question directed
15 specifically to 740 or in general?

16 MS. PRENA: No, I think we should clarify in
17 the record that that would include an owner/operator
18 or any person that would be an applicant.

19 MS. ROBINSON: Okay.

20 MS. PRENA: Can I ask the next question?

21 HEARING OFFICER DESHARNAIS: Sure.

22 MS. PRENA: Why are acceptable institutional
23 controls limited to those "recognized" in Subsection
24 (c)?

1 MR. KING: We thought that it was very
2 important to have a clear set of designated
3 institutional controls. When we started out with our
4 initial development of the proposal we only had the
5 first three NFR letters, restrictive covenants and
6 negative easements and it was -- we added four as a
7 result of discussions with the advisory committee, I'm
8 not sure when, but at some point we had those
9 discussions, and then the fifth one was added because
10 of discussions with Department of Transportation.

11 Now if there are other institutional controls
12 which can take the kind of legal effect and
13 significance that these type of controls do, then
14 yeah, I think that is -- should be presented and
15 something to be considered.

16 MS. PRENA: Okay.

17 MR. WATSON: I'm sorry, I've got a follow-up.

18 HEARING OFFICER DESHARNAIS: Mr. Watson,
19 follow-up.

20 MR. WATSON: Were you following up on that?

21 MS. PRENA: Yeah.

22 MR. WATSON: I'm sorry.

23 MS. PRENA: Would that include under
24 Subpart (k) engineered barriers, 742.1100 Subpart (d)

1 discusses maintenance requirements for engineered
2 barriers being considered an institutional control on
3 page 74.

4 MS. McFAWN: Could you give the section
5 number for that?

6 MS. PRENA: 742.1100, subparagraph (d).

7 MS. McFAWN: Thank you.

8 MR. KING: Well, that provision is saying
9 that those maintenance requirements are included in an
10 institutional control. So you'd go back to
11 Subpart (j) and it would be one of those institutional
12 controls, most likely one, two or five.

13 MS. PRENA: Okay. So you look at that as
14 being part of a No Further Remediation Letter or some
15 kind of deed restriction?

16 MR. KING: Right.

17 MS. PRENA: Okay.

18 HEARING OFFICER DESHARNAIS: Mr. Watson, did
19 you have some follow-up?

20 MR. WATSON: How would a party -- when you
21 said that additional institutional controls may be
22 considered, how would a party go about or how would
23 Illinois EPA consider that? Are you suggesting that
24 you could -- we could propose additional institutional

1 controls, or would that necessitate amending the
2 regulations?

3 MR. KING: In my mind it would necessitate
4 amending the regulations.

5 HEARING OFFICER DESHARNAIS: Any additional
6 follow-up on that point?

7 (No response.)

8 HEARING OFFICER DESHARNAIS: Next question.

9 MS. PRENA: Why wouldn't an agreement with a
10 governmental body other than a highway authority be
11 acceptable?

12 MR. KING: It could be. The issue would
13 become how you effectuated that agreement. I would
14 think it could be done in terms of the NFR letter
15 extended and placed on that additional property or
16 restrictive covenant placed on that additional
17 property.

18 Number five is there because of the real
19 interesting problem that the Department of
20 Transportation has relative to allowing restrictive
21 covenants to be applied with regards to property they
22 own.

23 They have -- there's legal restrictions relative
24 to that. So they needed to have a special provision,

1 because the other provisions relative restrictive
2 covenants wouldn't work for that.

3 MS. PRENA: So other institutional controls
4 could be developed under and fit within the No Further
5 Remediation Letter?

6 MR. KING: Right, if there was an agreement.
7 If for instance the local government property was the
8 off-site property, and they were willing to accept a
9 use restriction, the local government was willing to
10 accept a use restriction relative to that property
11 they owned, and was -- and could put that on a deed of
12 record, that would be acceptable.

13 MS. PRENA: I'm going to have another
14 question on -- a follow-up question on this, but I
15 just need a moment.

16 MR. RIESER: The question, the further
17 question being considered is the No Further
18 Remediation Letter specified here in (c)(1) is
19 specific to the site remediation program under part
20 sub 4, correct, or 732?

21 MR. KING: Yes, that's correct.

22 MR. RIESER: So for a RCRA site the
23 institutional control would be whatever the Agency
24 would issue, whatever closure document it would issue

1 in that context, and we talked about that at the
2 beginning of the hearings, and the restrictive
3 covenants and deed restrictions would be the documents
4 that were reported to put the limitations on the
5 property that were required under this section, is
6 that correct?

7 MR. KING: That's correct.

8 MR. RIESER: So the restrictive covenants and
9 deed restrictions are to be used in circumstances
10 where you don't have a No Further Remediation Letter
11 that's being recorded as part of the program?

12 MR. KING: That's the way I would see it,
13 yes.

14 MR. RIESER: Okay.

15 MS. McFAWN: They could be used for other
16 purposes though, too, couldn't they?

17 MR. KING: Yes, that's correct.

18 MS. PRENA: So that could include the
19 agreements with other -- with agencies other than the
20 highway authority and some of the other examples that
21 we talked about?

22 MR. KING: Yes, that's correct.

23 MS. ROBINSON: I'm not sure I know what
24 you're getting at. Could you give an example of what

1 you might have in mind as another --

2 MS. PRENA: Yes. Stepping back, we were
3 talking about the fact that under this definition the
4 only things that are considered recognized
5 institutional controls are listed as 1 through 5, but
6 that there are other types of institutional controls
7 that are not on this list, and that the Agency will
8 consider them as being acceptable institutional
9 controls.

10 However, it appears that they seem to fall under
11 like 1, 2 and 5.

12 MS. ROBINSON: I don't think that's what our
13 testimony was. I think what we said is there there
14 may be conditions that fall under one of these as part
15 of 1 through 5, but I don't think we had -- there are
16 other institutional controls that are necessarily
17 acceptable, and I think what we testified was that if
18 there were it would require an amendment to the rule
19 making.

20 MS. PRENA: So what are those -- how are
21 those factors considered? Are they not considered
22 institutional controls? What are those factors
23 called?

24 MS. ROBINSON: I don't want to get sworn in

1 here so I'm trying to --

2 MS. PRENA: Yes.

3 MR. KING: I guess I'm confused by the
4 question. When you say factors, I guess I'm not quite
5 sure what you mean. You mean why would -- why did we
6 -- why would we not have an item number six, is that
7 what you're getting at?

8 MS. PRENA: Yeah, we're getting into the
9 issue that you've limited the number of institutional
10 controls to these five types of items.

11 MR. KING: Right.

12 MS. PRENA: And we've just spent the last few
13 minutes talking about other types of controls that can
14 be placed upon properties, and at the moment we're --
15 the discussion is that those can't be considered,
16 quote, institutional controls, but that they are
17 conditions or factors that are evaluated by -- in the
18 application, and would have to be included under -- in
19 a No Further Remediation Letter or as a deed
20 restriction, et cetera.

21 And I was -- what I was get getting at is trying
22 to flesh out where -- or further describe those types
23 of conditions that might appear.

24 MS. ROBINSON: Would it help if we provided

1 an example, just make a hypothetical type of site
2 where these conditions, which I think is what you're
3 getting at is conditions of for instance an NFR
4 letter, which the NFR letter is the institutional
5 control, I think you're trying to get at the
6 conditions that might go into something like that, is
7 that right?

8 MS. PRENA: Yeah.

9 MS. ROBINSON: If we provide an example,
10 would that help illustrate?

11 MS. PRENA: Yes.

12 MR. SHERRILL: A typical condition that we'd
13 put in the NFR letters that have gone out, the ones
14 I've seen, a typical condition could be there would be
15 a brief sketch or map attached to the NFR letter, and
16 in this brief sketch or map there would be a
17 designated area on this map, and it would say in this
18 area no well is to be installed for groundwater
19 purposes for potable use. That's a typical condition
20 contained within an NFR letter.

21 And then that NFR letter gets recorded with the
22 local county or county recorder. That's a typical
23 condition.

24 MS. PRENA: Okay. Is that a condition that

1 would also -- could also be used under number 2,
2 restrictive covenant and deed restriction, or not?

3 MR. SHERRILL: I would think so.

4 MS. PRENA: Are there any other examples?

5 MR. SHERRILL: Another example on the NFR
6 letter could be that the property remain
7 industrial/commercial as per the definition -- in the
8 deciding question or the piece of property the
9 question remain industrial/commercial.

10 Or another condition would be that a -- someone
11 comes in and they say we have a paved barrier over the
12 contamination that we wish to leave remaining in
13 place, and so the condition in the NFR would be well,
14 as long as that paved barrier remained there, you
15 know, the contamination can remain in place.

16 Those are typical conditions within an NFR.

17 MS. PRENA: And would those be also of
18 several conditions under a restrictive covenant and
19 deed restriction?

20 MR. SHERRILL: Yeah, that would be something
21 typical. Another typical one is people leave
22 contamination in place and it would warrant a worker
23 caution if someone were to do excavation or some type
24 of future activity in that contaminated area. So the

1 condition we'd put in the letter is that
2 owner/operator, whoever, is -- someone has a duty to
3 inform, notify, provide protective equipment for these
4 workers in this contaminated area.

5 MS. McFAWN: It would seem like that's a
6 fairly common condition if the contamination is
7 allowed to remain, wouldn't it be?

8 MR. SHERRILL: Yes.

9 MR. WATSON: I've got a question.

10 HEARING OFFICER DESHARNAIS: Follow-up, Mr.
11 Watson.

12 MR. WATSON: A follow-up question. Do No
13 Further Remediation Letters and deed restrictions,
14 restrictive covenants always work in concert with each
15 other? You're most -- and you going to have both of
16 them at a site, correct? You'll have the --

17 MR. SHERRILL: The ones I've been familiar
18 with is people have had No Further Remediation Letters
19 and conditions that I've just described but they --
20 the NFR I believe is the deed restriction. There's
21 not a duplicity of efforts here.

22 MR. WATSON: Under what circumstances would
23 you use a deed restriction then and not an NFR?

24 MR. KING: I think we went over that. You

1 use that in the context of a program where you didn't
2 have the NFR letter.

3 MR. WATSON: All right, thanks.

4 HEARING OFFICER DESHARNAIS: Additional
5 follow-up?

6 MS. McFAWN: I have one. At (c)(4) when the
7 Agency talks about ordinances, I assume you mean
8 excluding zoning ordinances, is that right?

9 MR. KING: Right. What we're referring to
10 there is the -- specifically the type of ordinance
11 that's set out in 1015.

12 MS. McFAWN: Set out in, pardon me?

13 MR. KING: Section 742.1015.

14 MS. McFAWN: Thank you.

15 HEARING OFFICER DESHARNAIS: Before we move
16 on to the next section, the Agency has included a work
17 note that says definitions in the Illinois Highway
18 Code for highway authority, highway and right-of-way
19 are applicable to this part.

20 Would the Agency have any objection to including
21 those definitions in the section number rather than a
22 Board note?

23 MS. ROBINSON: I don't think we have any
24 problem with that. Do you mean you want them in the

1 definitions section itself?

2 HEARING OFFICER DESHARNAIS: That would be
3 one way to handle it.

4 MS. ROBINSON: That's fine. I would request
5 then that Illinois Department of Transportation maybe
6 provide those as a piece of testimony. This was your
7 suggestion I believe.

8 MR. SCHICK: All right.

9 HEARING OFFICER DESHARNAIS: Thank you.

10 MR. SCHICK: And I've got a question for you.
11 I have a question on the boundary of the area that the
12 institutional control applies to, which I believe John
13 Sherrill said a sketch would do, you don't need a
14 meets and bounds or legal description of that area?
15 Maybe I should ask a lawyer.

16 MR. SHERRILL: I believe under 740, the site
17 remediation program, I believe we do require a legal
18 description of the property, if that's what you're
19 getting at.

20 MR. SCHICK: The boundary to which the
21 institutional control applies?

22 MR. SHERRILL: Correct. Is that -- was that
23 your question?

24 MR. SCHICK: Yeah. I guess also then that

1 also can apply to the engineered barrier, I guess the
2 question is do you want a legal description of the
3 engineered barrier?

4 MR. KING: I don't think we need that,
5 because the engineered barrier is always coupled with
6 some institutional controls anyways. You know, I'm
7 sure there would be an engineered description of the
8 engineered barrier.

9 MR. SHERRILL: I want to make a distinction.
10 You know, this whole thing with conditions and NFR's
11 and the property boundaries, it's not uncommon that
12 people will ask for a condition only on one part of
13 the site or that the NFR covers only one piece of the
14 property.

15 So I don't want to -- I just want to make that
16 distinction, that we've tried to construct the NFR's
17 or utilize the NFR for that distinction is clear.

18 HEARING OFFICER DESHARNAIS: Mr. Rieser?

19 MR. RIESER: Yeah, with respect to the (c)(5)
20 issue on highway authority. When you use the term and
21 a highway authority, would those cover other highway
22 authorities than the Illinois Department of
23 Transportation?

24 MR. KING: That's correct.

1 MR. RIESER: Okay. And the definitions in
2 the Illinois Highway Code, and maybe this will be
3 questions for Mr. Schick if he testifies regarding
4 this matter, would those apply to other highways and
5 highway authority other than those controlled by the
6 Illinois Department of Transportation?

7 MR. KING: I think the answer to that is
8 going to be yes.

9 MR. RIESER: Okay. But we'd have to review
10 those definitions to confirm that.

11 MR. KING: Right. Just to give you
12 background, our discussions with Department of
13 Transportation have been with regards to that kind of
14 issue, that they would -- they will be providing
15 guidance to local highway authorities as to the -- as
16 to what their views are the way this should be
17 handled.

18 MR. RIESER: Thank you.

19 HEARING OFFICER DESHARNAIS: Any additional
20 follow-up on Section 1000?

21 (No response.)

22 HEARING OFFICER DESHARNAIS: Okay, the next
23 prefiled question concerns Section 1005, and again
24 filed by Mayer, Brown & Platt. Miss Prena.

1 MS. PRENA: Can a "focused" NFR letter be
2 used as an institutional control?

3 MR. KING: My assumption is you mean --
4 you're referring to a NFR letter resulting from a
5 focused investigation Part 740. And if that's true
6 then the answer is yes.

7 MS. PRENA: Okay.

8 HEARING OFFICER DESHARNAIS: Any follow-up?

9 (No response.)

10 HEARING OFFICER DESHARNAIS: The next
11 prefiled question concerns 742.1010, again filed by
12 Mayer, Brown & Platt.

13 MS. PRENA: If an NFR letter itself acts as
14 an institutional control, when would a restrictive
15 covenant, deed restriction or negative easement also
16 be necessary?

17 MR. KING: I think we've talked about that
18 already. I'm not sure if I have anything really to
19 add to what we were saying earlier.

20 You're really talking about programs where the NFR
21 letter is not going to be applicable, or you could
22 also be in a situation where for some reason the
23 off-site person is willing to accept a deed
24 restriction on the property but doesn't want the No

1 Further Remediation Letter filed on the property.

2 MS. PRENA: Well, you've just described two
3 situations where you would use either an NFR letter or
4 a restrictive covenant. What is the situation where
5 you would be using both?

6 MR. KING: On a single piece of property, is
7 that what you're referring to?

8 MS. PRENA: Yes.

9 MR. KING: As John Sherrill said earlier,
10 we're really not anticipating that that would occur.
11 I suppose if somebody wanted to file an NFR letter and
12 file a separate document called a deed restriction, I
13 suppose somebody could do that. We're not requiring
14 that to occur.

15 MS. PRENA: All right.

16 MR. KING: From our perspective the NFR
17 letter works effectively like a deed restriction,
18 because it's running with the land, so there's no need
19 to have a separate document if the NFR letter is
20 there.

21 MS. ROBINSON: And isn't it true as properly
22 recorded it's attached to the chain of file, so
23 therefore if somebody does a proper title search on a
24 transfer of property it's going to show up as

1 effectively a deed restriction?

2 MR. KING: That's correct.

3 HEARING OFFICER DESHARNAIS: Additional
4 follow-up?

5 (No response.)

6 HEARING OFFICER DESHARNAIS: Next question.

7 MS. PRENA: The next question, if remediation
8 objectives must be met before any of these mechanisms
9 can be considered "institutional controls", why do
10 subsections (b) (2), (3), and (4) refer to areas and
11 extent of contaminants which exceed objectives?

12 MR. SHERRILL: To clarify that question, when
13 you say if remediation objectives must be met, which
14 remediation objectives are you talking about?

15 MS. PRENA: General cleanup objectives.

16 MR. SHERRILL: I mean if you met a Tier 1,
17 for example if you met a Tier 1 remediation objective,
18 is that what you're talking about?

19 MS. PRENA: (2), (3) and (4) talk about
20 concentrations of contaminants and remediation
21 objectives. So to clarify I'm talking about if you
22 are required to meet those types of remediation
23 objectives.

24 MR. SHERRILL: What the intent there of this

1 (b), (2), (3), and (4) then just to clarify, you're
2 talking about 742.1010 (b) (2), (3) and (4), is that
3 correct?

4 MS. PRENA: Yes, right.

5 MR. SHERRILL: What we're looking at there is
6 someone's proposing to leave behind contamination, and
7 it is important to know where that contamination is
8 left in place and the applicable concentrations. And
9 for example a construction worker may enter the
10 contamination area, and we want to know kind of on
11 public record recorded and so forth where these
12 respective environmental concerns are still located.
13 And the applicable way to do that is, you know, that
14 the NFR letter or as we've said, recorded with the
15 title of the property.

16 MS. PRENA: Under Section 742.1010(a) it says
17 the Agency has determined that a No Further
18 Remediation is required as to the property. And I
19 understand that to mean that this section means that
20 you would have met remediation objectives. I just
21 need clarification on how this works.

22 MR. SHERRILL: The term No Further
23 Remediation kind of, correct me if I'm wrong, you
24 could kind of interpret that as no further corrective

1 action in a sense. Because you've -- you know,
2 because you're proposing to use or you have instituted
3 these institutional controls.

4 MR. RIESER: I think the real -- the question
5 is did (2), (3), and (4) require a demonstration
6 showing the horizontal extent of contamination above
7 the applicable remediation objectives, and the
8 question is what are the applicable remediation
9 objectives that you're showing? You've already
10 decided that, you know, you've had your remediation
11 objectives at the boundary, so what does this map
12 demonstrate?

13 MR. KING: Part of the confusion is, because
14 you guys caused it on this, because when we originally
15 drafted this we had it as above the Tier 1 remediation
16 objectives, which made it very clear. Then you go in,
17 you go into the table, you look up your Tier 1 number,
18 there it is, and now you can show on a map what's
19 above the Tier 1 number.

20 The suggestion was made by the committee that that
21 might not be the -- you know, wouldn't be good if you
22 had -- if your remediation objectives were established
23 under Tier 2 or Tier 3. So we put it in terms of
24 applicable, so it was clear that it could be one of

1 the other levels.

2 MR. RIESER: Or a construction worker
3 scenario, to go back to Mr. Sherrill's example, if the
4 issue is the construction worker, you want to show a
5 construction worker where they are and that's what
6 your map would demonstrate.

7 MR. KING: Right, I guess I was thinking of
8 as a -- for example you could have determined your
9 remediation objectives based on under Tier 2, okay?
10 And you might have an area that's above those Tier 2
11 remediation objectives. But the conclusion was that
12 could stay there because of an engineered barrier or
13 whatever.

14 So then your map would show where on the site the
15 contaminants were above the Tier 2 numbers.

16 HEARING OFFICER DESHARNAIS: Mr. Reott,
17 follow-up?

18 MR. REOTT: Can I just offer a suggestion?
19 Maybe the language would be clearer, and I think it
20 would meet what you're trying to get at, Gary, if it
21 said above the otherwise applicable remediation
22 objectives that would apply in the absence of the
23 institutional control or the engineered barrier or
24 whatever, you know.

1 MR. KING: Well, that's something we can
2 certainly think about, whether that might make it
3 clearer. I'm not sure that it -- I think that the key
4 difficulty here that's been expressed with the
5 questions is what does applicable mean in this
6 context, and saying otherwise applicable, I'm not sure
7 that resolves that question. But we can take a look
8 at it and think about it.

9 HEARING OFFICER DESHARNAIS: Any additional
10 follow-up on that question?

11 (No response.)

12 HEARING OFFICER DESHARNAIS: Mr. Rieser, did
13 you have anything further?

14 MR. RIESER: No, I did not, I'm sorry.

15 HEARING OFFICER DESHARNAIS: Additional
16 questions on 742.1010, Mr. Watson?

17 MR. WATSON: You know I'm going to ask my
18 question. When you talk about in 742.1010(b) (2), (3)
19 and (4), this does not impose upon a party an
20 obligation to identify the extent of contamination
21 above Tier 1 numbers, does it?

22 MR. KING: Well, it does if that's the
23 remediation objectives that were determined from the
24 site.

1 MR. WATSON: But if not, if you're relying on
2 something other than Tier 1 numbers, there isn't a
3 general obligation to define site conditions above
4 Tier 1 standards, is that right?

5 MR. KING: At this point?

6 MS. ROBINSON: Do you mean something other,
7 meaning Tier 2 or Tier 3?

8 MR. WATSON: Right.

9 MS. ROBINSON: I think he already answered
10 that, but go ahead, Gary.

11 MR. KING: Now you're not talking about the
12 whole site investigation and all that kind of stuff,
13 are you?

14 MR. WATSON: No.

15 MR. KING: Well, then to -- you -- no.

16 MR. WATSON: Okay.

17 HEARING OFFICER DESHARNAIS: Moving on to the
18 next prefiled question on 742.1010 filed by Gardner,
19 Carton & Douglas, Mr. Watson?

20 MR. WATSON: I think that all of my
21 questions, all of my remaining questions have been
22 answered. So I don't have anything further from my
23 prefiled questions.

24 MS. McFAWN: Your question number 10 has been

1 answered?

2 MR. WATSON: I think we went over this issue
3 in extensive detail in the 740 hearing, and I don't
4 see a need to go through that issue again. If you'd
5 like me to ask it again and get it on the record in
6 this proceeding, I'd be happy to.

7 MS. McFAWN: No, it's fine, if you're
8 satisfied.

9 HEARING OFFICER DESHARNAIS: Okay, the next
10 prefiled questions concern 742.1015. We'll start with
11 those filed by the Site Remediation Advisory
12 Committee.

13 MR. RIESER: Has the Agency confirmed whether
14 an ordinance really exists which prohibits the use of
15 groundwater within the Chicago city limits?

16 MR. KING: As far as we know there is no such
17 ordinance.

18 MR. RIESER: So the Agency cannot provide a
19 citation for that ordinance?

20 MR. KING: That's correct.

21 MR. RIESER: And that takes care of the next
22 questions as well. Does the Agency intend to enter
23 into a memorandum of understanding with the city of
24 Chicago?

1 MR. KING: Once they -- it's our
2 understanding they are intending to adopt an ordinance
3 that will satisfy the criteria of 1015 and be acting
4 just -- it's our belief that they're going to be --
5 once that ordinance is in effect they'd be willing to
6 pursue the type of MOU that we've discussed.

7 MR. RIESER: Does the Agency intend to enter
8 into such memorandums of understanding with any other
9 local communities?

10 MR. KING: Right now we don't have any
11 requests to do so, but if we do get those we certainly
12 will consider them.

13 MR. RIESER: Does the Agency know of a city
14 which does have an ordinance?

15 MR. KING: At this point we've approved three
16 of them. Tazewell County, the city of LaGrange, and
17 the village of Orland Park.

18 MR. RIESER: Thank you. With respect to
19 Subsection (d) of the Section 1015, what is the
20 purpose of this requirement? This is the requirement
21 to monitor activities of the unit of local government
22 in the future.

23 MR. KING: The purpose there is to maintain
24 assurances in the event there's not a memorandum of

1 understanding with a local government that the
2 institutional control is going to remain in effect.

3 MR. RIESER: Is the Agency aware of whether
4 these ordinances are typically modified in any
5 respect?

6 MR. KING: I think generally they are
7 modified, but I don't know that they're modified in
8 ways that really undermine the total integrity of the
9 ordinance, no.

10 MR. RIESER: In other words, they might be
11 modified as to the extent of their coverage but they
12 wouldn't be -- I should say to expand the extent of
13 their coverage but not to reduce it?

14 MR. KING: I think that's typical. These
15 ordinances have been adopted for -- typically have
16 been adopted for reasons of maintaining the integrity
17 of the public water supply system, so it really --
18 there really is not an incentive for them to eliminate
19 them.

20 MR. RIESER: And they might also be adopted,
21 and I don't know if you've included this, maintaining
22 the integrity, but also in the context of insuring
23 that everyone within the municipality uses the water
24 supply so that they've all hooked on and paying their

1 water fees.

2 MR. KING: Yeah, that's one of the purposes,
3 but they do have, you know, grandfather clauses and
4 those kinds of things.

5 MR. RIESER: Once a local ordinance is
6 present restricting the use of groundwater, would not
7 the State Water Well Code (415 ILCS 30/1 et seq. 77
8 Ill. Adm. Code 920) preclude drilling a potable well
9 in the area of contamination?

10 MR. KING: I don't have the greatest
11 familiarity with the Water Well Code, but it's one of
12 the problems that is the case relative to the Water
13 Well Code is it's not something that we're able to
14 directly enforce. And the Water Well Code I don't
15 think is really addressing the potential of
16 contamination to -- yeah, we were just talking about
17 there's also an issue of how the notification would
18 occur relative to that issue.

19 So it's just sort of a combination of factors. We
20 just -- we don't think that the Water Well Code fits
21 very well in the context of 742.

22 MR. RIESER: And that would answer our last
23 question on that issue, which is why is the Water Well
24 Code not available as an institutional control.

1 I have one question on notification. The
2 regulation requires notification of landowners to
3 properties that are affected by groundwater
4 contamination that the institutional control is being
5 -- ordinance is being used as an institutional
6 control, but when it has access to the property on
7 those properties. Would you have to notify an
8 adjacent property owner if that property owner had
9 signed off on including that adjacent property within
10 the remediation site?

11 MR. KING: The way this is phrased the answer
12 would be -- the answer would be yes.

13 MR. RIESER: Would it be possible -- would
14 the Agency be interested in language that would allow
15 for an exception for those situations where the
16 adjacent property owner's permission had already been
17 obtained prior to the remediation site?

18 MR. KING: I think we could review that type
19 of language. We'd have to make sure that everything
20 obviously fits together properly, but we could review
21 that.

22 MR. RIESER: Thank you.

23 HEARING OFFICER DESHARNAIS: The next
24 prefiled question's concerning 742.1015 filed by

1 Mayer, Brown & Platt. Miss Prena.

2 MS. PRENA: Must an ordinance restrict
3 groundwater use county-wide to qualify as an
4 institutional control?

5 MR. KING: No.

6 MS. PRENA: Could you elaborate?

7 MR. KING: Well, you know, for instance if
8 you have a unit of local government that's a
9 municipality that's within a county, its jurisdiction
10 would not extend throughout the entire county. So it
11 couldn't be county-wide.

12 MS. PRENA: Well, could it be an ordinance
13 that would only restrict portions of groundwater use
14 within the municipality or jurisdictional boundary?

15 MS. ROBINSON: What do you mean by portions,
16 I'm sorry?

17 MS. PRENA: I guess I'm trying to understand
18 how narrow the ordinance can be in restricting
19 groundwater use. Narrow in terms of the area of
20 groundwater affected.

21 MR. SHERRILL: That would kind of be up to
22 the unit of local government on how they adopt their
23 ordinance. And under 742.1015(a) it's written in an
24 ordinance adopted by a unit of local government that

1 effectively prohibits the use of groundwater as a
2 potable supply of water.

3 I'm kind of paraphrasing, it's got a little bit
4 more, but that's our intent there.

5 MS. PRENA: So that could just cover a
6 specific portion of groundwater within that
7 locality --

8 MR. KING: Yeah, we hadn't really thought of
9 it in that context, but I don't know why that wouldn't
10 be a possible option. Normally what our experience
11 has been -- we've seen is that a community is going to
12 -- if a community is going to adopt one of these
13 ordinances it covers the entire local government. So
14 we hadn't really thought about it in the context of a
15 partial -- being partially applicable.

16 MR. O'BRIEN: What would be necessary though
17 is to satisfy 742.320(c) if you were using that type
18 of ordinance to restrict a water supply. The
19 groundwater ingestion route, exclusion if it was used
20 in that context, then it would have to cover the area
21 indicated there, 2500 feet from the source.

22 MS. PRENA: Can you give me that site again?

23 MR. O'BRIEN: 320(c).

24 MR. SHERRILL: Of 742.320(c).

1 MR. O'BRIEN: It's at the end of Subpart C.

2 MS. PRENA: Okay.

3 HEARING OFFICER DESHARNAIS: Next question.

4 MS. PRENA: Can other property owners'
5 objections preclude the use of an ordinance as an
6 institutional control?

7 MR. KING: I think -- I'm not sure that
8 preclude is the right kind of terminology. Obviously
9 if we received information as a result of -- as a
10 result of notification, that information could change
11 our conclusions as to the applicability of what was
12 being suggested.

13 For instance, if as a result of one of these
14 notifications somebody reported back that they were --
15 had an ongoing use of a water supply well, and that
16 was an illegal use, and that condition had not been
17 identified before, that would be the type of
18 information I think we would certainly have to factor
19 in as far as looking at the entire remediation
20 activities.

21 The other possibility is, you know, perhaps the
22 person objects to the ordinance and the local
23 government ends up changing their ordinance, so if
24 that happened then we would have to account for that

1 as well.

2 MS. PRENA: Would you account for the fact
3 that the ordinance was passed?

4 MR. KING: Right, or had been amended or
5 whatever as a result of the notification.

6 MR. RIESER: Just to follow-up, just for the
7 -- the objection would be sufficient, there would have
8 to be a demonstration that there was an actual use in
9 that instance?

10 MR. KING: Right, it's not the fact that the
11 objection is received that results in the different
12 decisions, it's what that -- what was the basis for
13 that objection.

14 HEARING OFFICER DESHARNAIS: Next question?

15 MS. PRENA: Are the duties in Subsection (d)
16 to monitor local government activities and notify the
17 Agency intended to be perpetual?

18 MR. KING: They are intended to remain in
19 effect as long as the NFR letter is in effect.

20 MS. PRENA: In the case where there's a deed
21 transfer, I would assume that the new owners would
22 then take on the responsibility by assignment?

23 MR. KING: They would certainly take on that
24 responsibility. I don't know if by assignment is the

1 right term, but they would take on that
2 responsibility.

3 MS. PRENA: Okay.

4 MS. ROBINSON: Do they have the option of
5 coming back to the Agency and for instance getting new
6 remediation objectives if they decide they want to
7 clean up the site completely to Tier 1 levels?

8 MR. KING: Yes, that's an option.

9 MS. ROBINSON: Okay.

10 HEARING OFFICER DESHARNAIS: Next question?

11 MS. PRENA: Does a memorandum of
12 understanding MOU between the Agency and the local
13 government relieve the applicant of the duty to
14 perpetually monitor the local government's activities?

15 MR. KING: Yes, that would be correct, as
16 long as the MOU remained in effect.

17 MS. ROBINSON: Same clarification here on the
18 term remedial applicant. It could be owner/operator
19 or other person, depending upon what program they're
20 coming in?

21 MS. PRENA: Yes.

22 HEARING OFFICER DESHARNAIS: Mr. Reott?

23 MR. REOTT: One of my prefiled questions
24 relates to this section. I thought I'd ask it now.

1 And I'm going to phrase it slightly differently from
2 the way it was filed, it's number 30, just because in
3 this context I think it comes out a little
4 differently.

5 The requirement that you get an ordinance for
6 people within 2500 feet of your source of your
7 release, does that apply at all directions, in other
8 words, including upgradient of the release?

9 MR. KING: I thought you asked that last
10 time. The answer is yes.

11 MR. REOTT: Okay. What's the basis for
12 making you get an ordinance or worry about the impact
13 to groundwater systems that are upgradient the
14 release?

15 MR. SHERRILL: You're making the assumption
16 that upgradient, downgradient are fixed physical
17 constraints. And it's been our experience, you know,
18 when you have pumping wells and so forth, depending
19 upon where your site is, or depending upon if you're
20 near a river, that groundwater flow can change
21 direction.

22 There are seasonal fluctuation changes, changes in
23 river levels, so forth.

24 MR. REOTT: If there was a site where those

1 physical characteristics weren't present -- would the
2 Agency be willing to consider -- I guess this would
3 occur in Tier 3, excluding the groundwater pathway
4 where the ordinances that were available and that were
5 used to exclude that pathway were only the
6 downgradient 2500 feet communities?

7 MR. KING: I think that as I recall that also
8 applied to Tier 2. I mean the Tier 2 groundwater
9 equation allows for that type of approach.

10 HEARING OFFICER DESHARNAIS: Mr. Rieser?

11 MR. RIESER: The issue of the 2500 foot only
12 applies in the context of Subpart C, is that correct?

13 MR. KING: That's right.

14 MR. RIESER: So that's really sort of the --
15 sort of the instant pathway exclusion provision?

16 MR. KING: Right, that's correct.

17 HEARING OFFICER DESHARNAIS: Mr. Reott, did
18 you have any additional questions?

19 MR. REOTT: I think the others were covered.

20 HEARING OFFICER DESHARNAIS: Mr. Watson, did
21 you wish to ask a question on this section?

22 MR. WATSON: No.

23 HEARING OFFICER DESHARNAIS: Then move on to
24 742 Appendix D which we have questions filed by the

1 Site Remediation Advisory Committee.

2 MR. RIESER: With respect to page one,
3 paragraph two, is there language missing in this first
4 sentence?

5 MR. KING: We looked at this and we didn't
6 see that there was language missing.

7 MR. SHERRILL: You're referring to Section
8 742 Appendix D, procedures for determination of Class
9 II groundwater?

10 MR. RIESER: That's correct. With respect to
11 page two, paragraph two, what is the basis for the
12 requirement that all potable wells located within one
13 mile of the site be identified if the maximum setback
14 zone for potable well is 2500 feet?

15 MR. KING: I think we changed that on errata
16 sheet one to change that from one mile to 2500 feet.

17 MR. RIESER: The appendix on -- referring
18 specifically to page three, this appendix discusses
19 the possibility of a perched zone. Will the Agency
20 consider a perched zone differently than a saturated
21 unit and not as a Class I groundwater?

22 MR. SHERRILL: Regarding perched groundwater,
23 the Agency can consider a perched zone differently
24 than a Class I groundwater unit. This determination

1 depends upon many site-specific and program-specific
2 factors, including the size of the perched zone, its
3 communication with other groundwater units, the amount
4 and concentration of contamination, sources and
5 availability of potable water supply wells, local
6 geology, whether the perched zone is covered or not,
7 the source of the contamination.

8 MR. RIESER: Why would the amount or source
9 of the contamination be a factor in a determination
10 whether something was a perched zone as opposed to a
11 Class I aquifer?

12 MR. SHERRILL: If you had a -- the size of
13 your -- and concentrations of your contaminants, it's
14 been the -- because that would factor into the
15 communication with the other groundwater units,
16 because it's been our experience that a lot of perched
17 zones are in communication with other groundwater
18 units. And when you have very highly contaminated
19 perched zones, those can communicate with other
20 groundwater units.

21 MR. RIESER: How are you defining perched
22 zone when you use it in this appendix?

23 MR. LISS: Basically standard textbook for
24 hydrogeology. It's a zone of saturation that really

1 we don't consider an aquifer. It sits -- say you want
2 to call it a lens of water having some aerial extent
3 above a more impermeable geologic formation.

4 MR. RIESER: And it usually is perched
5 because it doesn't have any communication with other
6 water bearing units, isn't that correct?

7 MR. LISS: That's the concept in
8 understanding perched zone, but in Illinois in the
9 glacial environment these things could be localized
10 across a site, several perched zones across a site,
11 not aerially extensive across an entire site. So it
12 would have vertical communication.

13 I guess if you want to consider it, they would
14 spill over eventually. There's this lens of water on
15 this impermeable geologic material, and as
16 infiltration recharges this eventually it would
17 migrate, you know, laterally and then go vertically
18 downward.

19 MR. RIESER: Migrate laterally until it found
20 an area of lesser or greater permeability and it would
21 infiltrate downwards is what you're saying?

22 MR. LISS: Right, to migrate downwards.

23 MR. RIESER: Is it accurate to state that a
24 person only needs to consult the Illinois State Water

1 Service or the Agency's Division of Public Water
2 Supplies regarding the existence of potable water
3 supply wells and that one does not have to consult
4 other sources?

5 MR. SHERRILL: To check for the existence of
6 potable water supply wells, local, state and federal
7 record, governmental records as appropriate should be
8 consulted. In addition to a visual inspection of the
9 area, I think we have within 200 feet of the area of
10 concern.

11 MR. RIESER: But don't you specify the use of
12 the Illinois State Water Service and the Division of
13 Public Water Supplies in this document?

14 MR. SHERRILL: In Appendix D, yes, the
15 Illinois State Water Survey and/or the Division of
16 Public Water Supply or the Agency should be contacted
17 as I'm reading out of it, as well as other appropriate
18 state and federal entities to obtain this information.
19 And then we also have on there also a visual
20 inspection of the area within 200 feet of the units of
21 concern should be conducted when possible.

22 MR. RIESER: What other state and federal
23 agencies would have to be consulted?

24 MR. SHERRILL: Well, I know a lot of times --

1 I mean USEPA's done a lot of work and they have a lot
2 of good information on investigation of sites and
3 investigation of where potable wells are in use and so
4 forth.

5 MR. RIESER: So for any Class II
6 determination you'd have to consult the USEPA?

7 MR. SHERRILL: No, the -- what we're getting
8 at is just when it's applicable.

9 MR. RIESER: And when is it applicable?

10 MR. LISS: I can provide you with a pretty
11 relevant example. This is in the East St. Louis area.
12 We looked for the usual sources, water survey, wells
13 that were dug in an area, found the ones on record.
14 There's a city water supply that was -- that was
15 supplied to the residents, and this is a creosoting
16 type operation, PNA's that were multiple across the
17 site. We were attempting to do the cleanup. The city
18 didn't have any real good records except who paid for
19 water and who did not.

20 And the company thought it was their
21 responsibility to diligently look for anyone that
22 might be using that water, illegally or not, you know,
23 whether there was an ordinance in the city that said
24 that you have to hook up to the city's water. This

1 example that we looked at the map of the city, they
2 plotted out those individuals who were paying for
3 water, and then went around the area to houses that
4 looked like they contained people, even though they
5 weren't paying for water.

6 We turned up I know about seven people that were
7 using a private well that that's the only record,
8 there were no records, that was the only way we could
9 find them.

10 MR. RIESER: Thank you. I guess I'm trying
11 to get to the question of when other governmental
12 sources need to be consulted and what those sources
13 are.

14 MS. McFAWN: Well, wasn't that an example of
15 when they contacted the city, another governmental
16 entity?

17 MR. RIESER: That was one example where the
18 Agency was doing the investigation. This is basically
19 putting into regulatory form some guidance on making a
20 Class II determination which is in addition to the
21 Board's, in a way in addition to the Board's Part 620
22 regulations. This is I think different answers about
23 what governmental entities you have to speak with to
24 verify that you've done a thorough enough

1 investigation to document a water well. And I just --
2 additional existence of water wells.

3 So I'm trying to find out what the extent of that
4 investigation has to be with respect to contacting
5 other governmental agencies.

6 MR. SHERRILL: I guess it's a professional
7 opinion, but, you know, I mean when you're checking
8 for potential potable water supply uses, you want to
9 really be thorough in making sure, as Ken Liss has
10 said, you want to make sure nobody's drinking the
11 water there if you're planning on investigating the
12 groundwater of that area. I mean so if you thought
13 you needed to contact USEPA, you know, I would do
14 that.

15 MS. ROBINSON: Would it be clearer, Mr.
16 Rieser, if we changed the wording around a little bit
17 so that it read as well as other state and federal
18 entities where appropriate, rather than other than
19 appropriate state and federal agencies?

20 MR. RIESER: I just don't know when it's
21 appropriate.

22 MR. KING: The other option is we just go --
23 we can go through them and list about three or four
24 other potential agencies that would have to be

1 contacted in every situation. I mean we can do that.
2 I'm not sure that we want to do that. It's a little
3 over --

4 MR. RIESER: I guess my point is if there are
5 other agencies, and I'm aware of instances where it's
6 required that other agencies be contacted other than
7 those two that have been specified here, if it's the
8 Agency's practice to require those to be contacted all
9 the time, it strikes me that that should be in the
10 regulation.

11 If these are the only two agencies that have to be
12 contacted all the time, then you would -- and you
13 would only have to contact other agencies in certain
14 situations, then that should be specified, and there
15 should be some idea of what those situations are in
16 which those other agencies ought to be contacted.

17 I think when you're requiring people to do certain
18 things you have to give them some idea of when you do
19 those things, or if you're always going to require
20 that the people contact other agencies besides those
21 two, that should be documented.

22 If not, if those are the only two except in
23 special circumstances, and we can talk about what
24 those special circumstances are, then that's what you

1 say.

2 MS. ROBINSON: I think we'll take another
3 look at that language and see if we can't tighten it
4 up a little bit, at least clarify when we think it
5 would be appropriate for them to look at these other
6 agencies.

7 MR. RIESER: Right, thanks.

8 MS. ROBINSON: All right.

9 MR. RIESER: Paragraphs (B) and (C), this is
10 again on page three, discuss providing documentation
11 as to formations beneath the site. How deeply does a
12 person need to go to identify the formations beneath
13 the site?

14 MR. SHERRILL: Documenting the formation and
15 depth at which to identify beneath the site can be
16 programmed as site-specific issues. Consideration is
17 given to local and regional geological information
18 that could be obtained let's say from public records
19 and ISGS documentation, state geological survey.

20 The concentration of contaminants, toxicity of the
21 contaminants, the amount of contaminants, the
22 estimated migratory pathways, whether any free phase
23 product or contaminants is present, whether the soil
24 attenuation capacity is exceeded, whether the soil

1 saturation is exceeded, whether remaining
2 contamination will be disturbed by natural forces,
3 highly permeable units, getting back to whether the
4 release points of the contamination could be
5 identified, and the availability of public water
6 supplies.

7 MR. RIESER: So those are all the factors
8 that go into the depth of the formation that you need
9 to examine, is that correct?

10 MR. SHERRILL: I don't know if I would
11 consider that all inclusive.

12 MR. RIESER: Okay. But use of geologic maps
13 such as the IGS stratigraphy map for example would be
14 acceptable?

15 MR. SHERRILL: We commonly reference those,
16 yes.

17 MR. RIESER: Thank you.

18 HEARING OFFICER DESHARNAIS: Any additional
19 follow-up questions on that?

20 MR. LISS: It wouldn't be appropriate for all
21 programs. I mean say you're going to apply that to
22 the RCRA program, I don't think we accept just the
23 fact that you referenced a map. Because our programs
24 require that a certain amount of work, you know,

1 physical work be done on-site.

2 MR. RIESER: By virtue of the RCRA
3 regulations?

4 MR. LISS: Yes.

5 MR. RIESER: Okay, thank you.

6 HEARING OFFICER DESHARNAIS: Any additional
7 follow-up on Appendix D?

8 MR. REOTT: I had a prefiled question on
9 Appendix D.

10 HEARING OFFICER DESHARNAIS: Mr. Reott.

11 MR. REOTT: This has to do with what I'll
12 call straddling units, units that straddle the ten
13 foot line in 620.

14 MS. ROBINSON: The question number?

15 MR. REOTT: It's question number 42. I'll
16 just give you a couple examples here. You know, there
17 is a straddling unit that straddles the ten foot line
18 in 620, in Part 620 the Board left --

19 MS. McFAWN: Mr. Reott, you need to explain
20 that for the record.

21 MR. REOTT: Okay. In Part 620 the Board
22 determined that water systems, aquifers that were
23 within the top ten feet were by definition not Class I
24 systems. And there's a lot of testimony about that in

1 the 620 regulation as to why that occurred, having to
2 do with surfacial impact to them, that even if they
3 met all the hydraulic definitions they were simply not
4 going to be treated as Class I.

5 MS. McFAWN: Could I interrupt? You seem to
6 be paraphrasing your question that you presubmitted at
7 number 42. Could you just read that into the record?

8 MR. REOTT: Well, we could just read that
9 into the record, yes. In Part 620 the Board
10 established that groundwater within ten feet of the
11 surface cannot be Class I groundwater. In Section
12 742. Appendix D, the Agency proposes that the Board
13 adopt the Agency's internal interpretation of Part 620
14 for how to classify groundwater systems that straddle
15 the upper ten foot prohibition on Class I groundwater.

16 In other words, you know, a groundwater system
17 that's partially above, partially below the ten foot
18 line.

19 Why should such a straddling unit be treated
20 generally as Class I rather than Class II when the
21 original Part 620 regulations prohibit a Class I
22 designation based on 1, the likelihood of surface
23 impacts for groundwater systems shallower than ten
24 feet, and 2, the inappropriateness of using such

1 shallow water for Class I drinking water purposes.

2 MR. SHERRILL: If I could read in 742
3 Appendix D, I'm starting at the third line, and then
4 I'm going to jump to number two, because I think we
5 provide clarification in Appendix D.

6 Groundwater is classified in 35 Illinois
7 Administrative Code 620 as a Class II general resource
8 groundwater when it, and then I'm going to jump to
9 number 2 here, has been found by the Board to be a
10 Class II groundwater, pursuant to the petition
11 procedure set forth in 35 Illinois Administrative Code
12 620.260, if a continuous zone containing groundwater
13 begins within ten feet of the ground surface and
14 extends greater than ten feet below the ground surface
15 it will not be considered a Class II groundwater if an
16 additional criterion is met under 35 Illinois
17 Administrative Code 620.210, in this case it would be
18 considered Class I groundwater.

19 Although, and this is the point I'm emphasizing,
20 it may be possible, it is unrealistic to try to
21 designate two distinct classes of groundwater within
22 the same saturated hydrogeological unit.

23 But, if the person conducting the remediation can
24 demonstrate that by cleaning the groundwater within

1 ten feet of the surface to Class II specifications
2 will not degrade the groundwater greater than ten feet
3 below the ground surface above Class I standards, the
4 Agency may approve both Class I and II standards in
5 accordance with the location of the groundwater.

6 MR. REOTT: Let me go back to my question,
7 John, because I'm not sure that answered it. What I
8 think what I understand you right is what you're
9 saying is for the portion of the groundwater system
10 that's above the ten foot line, if someone makes that
11 demonstration, you're willing to say that that's Class
12 II and that the portion below the line is Class I,
13 right?

14 MR. SHERRILL: Correct.

15 MR. REOTT: Now, the other alternative here
16 would be to classify a straddling unit either always
17 Class I or as Class II. I mean you could make it
18 another -- you could essentially agree with you that
19 it's unrealistic to try to designate two different
20 classes for a straddling unit, and I don't think
21 anyone would dispute that.

22 Why did the Agency choose this pathway, which
23 tries to give different designations to different
24 portions of the same unit of groundwater, rather than

1 just accept the single classification of it being
2 Class II? That's -- I'm trying to redo my question to
3 --

4 MR. KING: What's the depth of the bottom of
5 the Class I, the bottom of that?

6 MR. REOTT: This here?

7 MR. KING: Yes, how deep is that?

8 MR. REOTT: It could be anything,
9 theoretically, Gary. It could be an inch, it could be
10 two feet, it could be 50 feet.

11 MR. KING: What's at 50 feet?

12 MR. REOTT: It could be 50 feet.

13 MR. KING: What's at 200 feet?

14 MR. REOTT: It could be anything, it's a
15 site-specific question. But the Board has said
16 specifically that this part can't be Class I, and then
17 since I think everybody would agree that it's
18 unrealistic to really try to treat it as two separate
19 units, the question is what label do you put on it.

20 And what I'm trying to get at, John, is why you
21 choose to do it this way where you have two different
22 labels potentially for the same unit, rather than just
23 picking a label and having the Board make that
24 decision now?

1 MR. SHERRILL: Are you saying why in your
2 example there the area of above the ten foot, why we
3 would consider that Class I? Is that what you're
4 asking?

5 MR. REOTT: No, your Appendix D reference
6 that you just read creates the possibility that you'll
7 have two different classes in the same groundwater
8 unit, even though you agree that's unrealistic. And I
9 think everybody else would agree that's unrealistic.
10 It's really one body of water.

11 The other alternative choice for the Agency in the
12 rule making was to give this unit, a straddling unit,
13 one designation, either Class I or Class II, but only
14 one designation.

15 MR. LISS: It might help if you -- to
16 understand how this occurred first of all. That the
17 -- when the rule was written there was a concern that
18 this being an agricultural state that there might be
19 certain things subject from surface infiltration say
20 due to crops, pesticides, et cetera.

21 MR. REOTT: When you say the rule, you mean
22 the 620 rules?

23 MR. LISS: The 620 rules and that's how this
24 ten foot line came here. The only other time it comes

1 into effect in this manner here is the Class II would
2 be considered ten feet below the bottom of a fill.
3 That's something else in 620.

4 So yes, and there is no guidance really in the
5 rule itself as to how to do that.

6 When you look at cleaning up a contamination, if
7 there is a -- this Class I down there, beneath your
8 Class II or this portion of the unit that is now
9 greater than ten feet below the surface, what if that
10 is potable?

11 MR. REOTT: This portion?

12 MR. LISS: Right, it is potable, it's Class
13 I. Now what if there's sufficient volume there to use
14 it? I think it's best to take a look at the
15 protection of that groundwater, and that's how we've
16 interpreted 620, and that's how that Appendix D,
17 that's why it was written that way.

18 There's instances I think through these new rules
19 here that we're discussing that you could make a
20 demonstration probably that the Class I is Class I,
21 but it's not going to be used maybe because there's
22 only four feet of Class I, ten feet of Class II.

23 And a different -- that might be done through a
24 different tier, but you might apply the Class II to

1 the Class I instead of. Do you understand what I'm
2 saying? I think that's -- if you go into a different
3 tier, I would say that would be something we could
4 probably accept.

5 MR. REOTT: Let me follow up with a reference
6 to what Gary said before. In other words, what you're
7 saying is that in the lower tiers if the -- let's say
8 if there's, you know, eight feet above the ten foot
9 line and only one foot below, that might be a reason
10 that you would classify it as Class II, you know,
11 lower tier, if it's eight feet above ten foot and 50
12 feet below, you know, that's a reason you might tend
13 to classify it as Class I, is that what you're saying,
14 Ken?

15 MR. LISS: The protection of that 50 feet of
16 Class I. And until these rules here, these 742 rules
17 came along, it's been difficult to figure out a way to
18 do that I'll admit.

19 MR. O'BRIEN: To clarify things, the reason
20 that ten foot, that ten was chosen, because the
21 Department of Public Health's Water Well Code requires
22 a sanitary seal ten foot below the surface, so you
23 can't have a screened interval above that ten feet and
24 install a new legal well.

1 MR. RAO: I have a follow-up question. So
2 are you saying that, you know, if the depth of the
3 hydrogeologic unit below ten feet is, you know,
4 relatively less, then it would be considered Class II?
5 Because Appendix D doesn't seem to say that.

6 MR. SHERRILL: We're not -- by the 742 rules
7 we're not proposing -- in the 620 rules are the
8 classifications of groundwater with I and II being the
9 ones we primarily deal with most often. And through
10 the 742 rules we are not proposing on new definitions
11 for classification of groundwater.

12 MR. RAO: So what you have proposed under
13 Appendix D is consistent with the 620 rules?

14 MR. SHERRILL: We believe so. And whereas
15 620 identifies the four classes of groundwater, 742 is
16 addressing how do we, quote, clean up, remediate
17 groundwater, what kind of objectives we're trying to
18 achieve.

19 MR. RAO: Okay, under 742 Appendix D, number
20 2, you talk about a scenario where you say which may
21 be highly unrealistic but could happen, where a person
22 conducting remediation can demonstrate the groundwater
23 above ten feet with Class II specifications can show
24 that it will meet the Class I standards below ten

1 feet.

2 MR. SHERRILL: Correct.

3 MR. RAO: Okay, if we found this to be, you
4 know, really unrealistic, what would be the
5 classification for such a hydrogeologic unit?

6 MR. SHERRILL: What the -- from a practical
7 or technical viewpoint here, when you screen
8 groundwater and you're collecting groundwater samples,
9 and we're kind of cutting hairs here in the sense of
10 saying are you collecting a groundwater sample at
11 exactly nine feet eleven inches versus ten feet one
12 inches, in a practical viewpoint most screens that we
13 deal with are ten feet screens, and in our groundwater
14 collection monitoring wells, and it becomes an
15 engineered difficulty to try and really cut hairs in
16 saying water is above ten feet and water is below ten
17 feet, and they're not in communication with each
18 other.

19 MR. RAO: So what would be the classification
20 of such unit?

21 MR. SHERRILL: Of which units?

22 MR. RAO: Would it be Class I as you say in
23 Appendix D?

24 MR. SHERRILL: The classification would be as

1 what 620 is, as what 620 would dictate.

2 MR. RAO: So as Mr. Reott was saying, if you
3 assign a single designation to the example he has put
4 up on the --

5 MR. SHERRILL: In the example that I see over
6 here on the flip chart for practical -- it would
7 probably be argued that when you were collecting a
8 groundwater sample from this type of scenario, your
9 sample is actually being collected from the unit above
10 and below the -- this ten foot interval, therefore
11 you're looking at Class I groundwater. You would have
12 to do some kind of feat to be able to collect a sample
13 and prove or demonstrate that it was only being
14 collected and only being impacted above that ten foot
15 area.

16 MR. RAO: Thank you.

17 MS. McFAWN: Just for the record, the diagram
18 that Mr. Reott put up for us, it shows a ten foot line
19 and Class II above the ten foot line with eight foot
20 indication, below the ten foot line is a Class I
21 designation with a 50 foot increment.

22 HEARING OFFICER DESHARNAIS: Mr. Reott, did
23 you have some follow-up?

24 MR. REOTT: Yeah, just a follow-up, John.

1 Suppose your well screen is actually much smaller, you
2 know, a foot, and your well is screened well above a
3 ten foot line, you know, it's screened only six foot
4 below the surface and it's only a one foot screen, and
5 so you're pulling your water from the water that the
6 Board in Part 620 has said is Class II water.

7 Should you look at the Class II standards then for
8 determining whether your groundwater meets cleanup
9 objectives, because that's where the well is screened?

10 MR. LISS: I think that's a program-specific
11 call on the site classification. If it's appropriate
12 to limit your screens to say this Class II zone in the
13 upper portion, then that would be borne out in your
14 site classification, because you would have
15 demonstrated that there is no contamination I would
16 assume in that lower part of the aquifer which would
17 be called Class I.

18 I mean that's the way we handle it right now.
19 When we get to this invisible line we look at it that
20 way. If there's no contamination down at -- in the
21 Class I based on your illustration, during the site
22 classification then we might concentrate our efforts
23 and the rest of the investigation on the Class II part
24 of the groundwater. And then you would try to achieve

1 Class II objectives.

2 MR. SHERRILL: I do have -- I'm familiar with
3 a site in Chicago that I'm reviewing that the
4 hydraulic conductivity of the upper ten feet would
5 tend to make it Class I. It's like ten to the minus
6 three or ten to the minus four hydraulic conductivity,
7 and there is a clay layer starting at exactly within
8 an inch of ten feet. And it's like the perfect
9 scenario, and so that class has Class II groundwater.
10 Because the permeable water is all within the upper
11 ten feet. That's just a -- that just happens to be
12 specific to that site.

13 MS. McFAWN: Is that why there's this caveat
14 in paragraph 2 of Appendix D?

15 MR. SHERRILL: The caveat in number two is
16 because there's many, many places in Illinois where
17 the -- I'll think of like Henry County, Moline area,
18 many areas up in our agricultural belts up in
19 northwest Illinois where the groundwater starts three,
20 four, five feet below the surface, but it continues on
21 down to 40 or 50 feet below the ground surface, and we
22 have this -- and people are actively using that for
23 their water supply, their drinking water supply.

24 And so this zone of their water that they're

1 drawing from is from four feet below the surface to 50
2 feet below the surface. And their spills, releases
3 and so forth can occur on the surface.

4 MR. REOTT: John, as a follow-up, if the
5 Board wanted to have a more predictable system
6 for classifying a straddling unit where the regulated
7 community knew always how the Agency was going to
8 react to the situation, you could theoretically base
9 that kind of system, a more predictable system just on
10 the ratio of the portion of the unit that's below the
11 ten foot line to the portion of the unit that's above
12 the ten foot to the line. In other words, if you had
13 eight feet above and one foot below, eight-ninths of
14 it is above, therefore you shifted into the Class II
15 category. If it's eight feet above and 50 feet below
16 like the diagram on the chart, then the majority of
17 it's in the Class I, and then you shifted into Class
18 I.

19 What would the Agency think about that sort of
20 system? Just so that you'd have more predictability
21 for people trying to figure out what classification
22 they're in.

23 MR. SHERRILL: I think we want to live with
24 620 the way it is, on classification of groundwater.

1 MR. LISS: I mean if somebody were to make a
2 proposal and open a docket for 620, my personal
3 opinion and professional opinion would be to get rid
4 of the ten foot zone then and call it all Class I if
5 it's straddling Class I and Class II. Because I think
6 we've -- we're trying to approach it based on this
7 risk where assessment procedures where the 620 rule
8 says ten feet down and you have Class I below it, and
9 then looking at the risk assessment, and in 742, if
10 you can demonstrate that some other standard could be
11 applied to that Class I groundwater, and it fits into
12 these tiers, it's acceptable. I think right now
13 that's the best way we could do this.

14 Let me clarify for the record, too, that I'm not
15 suggesting we open 620.

16 MR. REOTT: Well, no.

17 MR. LISS: I was trying to explain to you
18 that we found a way to work through this and are
19 comfortable with it right here.

20 MR. REOTT: Wouldn't this effectively amend
21 620 by doing it, by putting this Appendix D here with
22 this language?

23 MR. LISS: I don't think so.

24 MR. SHERRILL: No, I don't think so.

1 MS. McFAWN: Is that because of the statutory
2 exception? I mean why wouldn't you think so? I kind
3 of understand where Mr. Reott's coming from, and I'm
4 wondering if the Agency -- I've heard two of you say
5 no, and I'm wondering if that's because of the
6 statutory exception which allows 620 to be bypassed by
7 this.

8 MS. ROBINSON: Is that question for Mr.
9 Reott?

10 MR. REOTT: I'll answer it, I think this
11 amends 620.

12 MS. McFAWN: I know you do by your question.
13 I'm wondering what the Agency thinks.

14 MR. SHERRILL: Our question, you know,
15 Appendix D is really just procedures for determination
16 of Class II groundwater. I really don't follow your
17 question.

18 MR. RAO: I think what Miss McFawn was
19 talking about was the statute allows the adoption of
20 groundwater objectives which may be higher than 620
21 numerical standards.

22 MR. SHERRILL: The Appendix D was not put --

23 MR. REOTT: I know.

24 MR. SHERRILL: -- does not talk about that.

1 MR. RAO: I know. So Appendix D is the
2 Agency's interpretation of what, you know, how to
3 classify groundwater as Class II. There may be other
4 interpretations. Right?

5 MR. SHERRILL: Correct.

6 MR. RIESER: Are there other interpretations
7 which the Agency would accept other than what's in
8 Appendix D?

9 MR. SHERRILL: I guess I'd go back to, you
10 know, we look at 620.

11 MR. KING: I'm getting awfully confused by
12 all of this. I mean we had a very simple purpose in
13 putting Appendix D in here. The 742 discusses the
14 fact that you establish remediation objectives based
15 on whether it's a Class I or a Class II groundwater.
16 This was intended to provide a procedure for making
17 that determination, that distinction, and that's what
18 it's there for, it's not --

19 MR. REOTT: But Gary, doesn't Appendix D,
20 number 2 here, create a presumption that a straddling
21 unit is Class I? I mean it's not just procedural.

22 MR. KING: Well, tell me, does 620 answer
23 that question?

24 MR. REOTT: No, I don't think 620 answers

1 that question. But I just want to make sure the Board
2 understands that question, that it's being asked, a
3 really important question, that's really a 620
4 question that was not resolved in 620.

5 MR. KING: It's a 742 question because the
6 issue comes up under 742 and will come up under 742.
7 So we wanted to try to answer that question in this
8 proceeding. I don't want to go back and reopen 620 to
9 answer it there. We want to try to answer questions
10 related to how you determine remediation objectives in
11 the context of this proceeding. And if there isn't --
12 you're right, there is a question about how do you
13 handle a straddling unit. We felt that the more
14 environmentally protective way to do that was to do it
15 the way we're doing it here.

16 HEARING OFFICER DESHARNAIS: Why don't we go
17 ahead and take a ten minute break and we can answer
18 any additional follow-up on this when we get back.

19 (A recess was taken.)

20 HEARING OFFICER DESHARNAIS: Let's go back on
21 the record, please. We've been addressing questions
22 concerning 742 Appendix D. Does the Agency have
23 anything further on that section at this time?

24 MS. ROBINSON: No, we do not.

1 HEARING OFFICER DESHARNAIS: Are there any
2 additional follow-up questions on that section at this
3 time?

4 (No response.)

5 HEARING OFFICER DESHARNAIS: Okay, that
6 brings us to the --

7 MS. McFAWN: Before we move on then can I ask
8 will the committee be testifying about this at all or
9 will there be any further testimony from the Agency or
10 the committee, any further consideration of our
11 discussion about Appendix D?

12 MR. RIESER: With respect to the committee,
13 there may be on this issue. That is something the
14 committee has to discuss. Harry Walton was involved
15 in the 620 proceedings significantly with all our
16 clients, so it may be something we'll look at.

17 MS. McFAWN: Is there any chance that
18 Appendix D and especially this language originated
19 with the committee, or is this from the Agency?

20 MR. KING: It's from the Agency.

21 HEARING OFFICER DESHARNAIS: Would the Agency
22 be intending to address this further?

23 MR. KING: I don't know. I was trying to
24 summarize our position as clearly as I could. If that

1 was understood, then I don't think we have anything
2 else really to add.

3 MS. ROBINSON: We may address the issue
4 further in public comments, but at this point I think
5 the Agency needs to reconvene on its own and just make
6 sure that we're clear.

7 HEARING OFFICER DESHARNAIS: Okay, thank you.
8 Mr. Reott, you had indicated that you had two
9 additional questions remaining on --

10 MR. REOTT: Yeah, I had the only questions on
11 engineered barriers, Part 1100. There are questions
12 32 and 33.

13 HEARING OFFICER DESHARNAIS: Would you please
14 begin by reading the questions into the record,
15 please.

16 MR. REOTT: How will the Agency, number 32,
17 how will the Agency make certain that engineered
18 barriers such as paving remain intact and in place in
19 the future?

20 MR. KING: I think that's one of the
21 functions of an institutional control. That's why
22 we've always coupled the notion of an engineered
23 barrier with an institutional control. That's
24 primarily going to be the responsibility of owners,

1 successive owners to make sure that that engineered
2 barrier remains in place.

3 I anticipate at some point we'll end up doing some
4 spot checking of these sites to see if things are
5 being maintained.

6 MS. McFAWN: What will you do if you find out
7 they're not being maintained?

8 MR. KING: Well, the rules provide a process
9 for voidance which would begin with a notification to
10 the owner that would identify our findings that a
11 barrier was not being maintained, and then it would be
12 given an opportunity to correct that. If they didn't
13 then the letter could be -- the NFR letter could be
14 voided.

15 HEARING OFFICER DESHARNAIS: Miss Rosen?

16 MS. ROSEN: How would that work in the
17 context where you don't have a No Further Remediation
18 Letter that's acting as your institutional control?

19 MR. KING: You still where you have a -- for
20 instance where you have a deed restriction, you still
21 have an NFR determination which would be voidable.

22 MR. FEINEN: My question was along those
23 lines. When you say voidance procedures, are you
24 talking about the voidance procedures in 742 if there

1 are any, or 732 like we talked -- well, the hearing
2 that was held yesterday, or 740?

3 MR. KING: I believe they're all pretty
4 similar. We tried to keep them as consistent as
5 possible. As I was saying, I think we have to look at
6 the individual rules that are governing that. They
7 were intended to be consistent.

8 MS. ROBINSON: Could I ask a clarifying
9 question here? Gary, if we're looking at procedures
10 to void an NFR letter, say it's a LUST site, would we
11 then look to 732 for those procedures?

12 MR. KING: That's correct.

13 MS. ROBINSON: And likewise, if it were a
14 site remediation site, would we then look to the Part
15 740 procedures for voiding an NFR letter if that were
16 the issue?

17 MR. KING: That's correct.

18 HEARING OFFICER DESHARNAIS: Mr. Reott?

19 MR. REOTT: As a practical matter does the
20 Agency view any standards as to whether pavement's
21 being maintained, quote, unquote, how will someone
22 know whether they're doing what the Agency thinks they
23 ought to be doing?

24 MR. KING: Well, there will be a condition

1 relative to an engineered barrier, that's one of the
2 conditions of the NFR determination. So I suppose if
3 somebody wants a specific set of maintenance criteria
4 in there, I suppose they could propose those.

5 MR. REOTT: Okay.

6 MS. ROBINSON: Is it possible that if they're
7 using a cement block, like a paved parking lot or
8 something as an engineered barrier, that it might be
9 in the NFR letter that they maintain that so that
10 there's not significant cracks where something could
11 migrate? Would that be a possible example?

12 MR. KING: Yes, I think so.

13 MR. REOTT: Number 33, if caps are recognized
14 engineered barriers for the migration to groundwater
15 pathway, and there's a cite here to the portion of
16 this subpart that recognizes that, 742.1105(c)(1)(A),
17 should 742.305 and 742.320 be amended to allow the use
18 of engineered barriers to exclude the migration to
19 groundwater pathway, you know, through a cap?

20 MR. KING: No, I don't think so. That's not
21 the way 320 is functioning. Really what 320 is
22 assuming is that you really have contamination in the
23 groundwater already, and in that context a barrier
24 isn't doing any good. I mean you're not looking at

1 the migration of groundwater pathway under 320, you're
2 looking at the actual groundwater itself. So it's a
3 little bit -- you're comparing apples and oranges to
4 do that.

5 MR. REOTT: Well, let me just follow-up,
6 Gary. You know, there are various requirements in
7 Part 742.320 for excluding the ingestion of
8 groundwater pathway, 742.1105 the Agency recognizes
9 that a cap is a recognized and acceptable engineered
10 barrier for the groundwater ingestion route, and -- I
11 guess what I'm looking at is it sort of seems
12 inconsistent to recognize that a cap is an engineered
13 barrier back in Section 1100, but not in the Subpart C
14 determination for pathway exclusion.

15 MR. KING: Well, I don't -- they're
16 different, because if you look at 1105(c), we've
17 described the ones that are applicable for the
18 migration to groundwater portion of the groundwater
19 ingestion route, and then we've got other engineered
20 barriers, this is under (c)(4), which talk about the
21 actual ingestion of groundwater exposure routes.

22 So we have really followed the logic of that
23 there's two portions to the overall groundwater
24 ingestion exposure route. There's the migration of

1 contaminants through the soil to the groundwater, and
2 then movement of the groundwater -- contaminants in
3 the groundwater to the exposure point.

4 And I think what you're suggesting be done, you
5 can't do it, because as I said, like I said before,
6 you're mixing apples and oranges. Because 320 is not
7 looking at the migration to groundwater.

8 MR. REOTT: It's looking at both parts of the
9 groundwater ingestion route?

10 MR. KING: No, it's just looking at the
11 latter, it's only looking at the portion dealing with
12 how the contamination moves in the groundwater.

13 MR. SHERRILL: We have said under testimony
14 that under this 742.320 that when you exclude the
15 groundwater ingestion exposure route, you're excluding
16 both. But what we're doing in 1105 is we're breaking
17 down those two components as far as under engineered
18 barriers.

19 MR. REOTT: To make the two portions
20 consistent then, wouldn't it be appropriate
21 to amend 320 to say that with regard to that one
22 portion of the groundwater ingestion route, a cap is a
23 recognized means of controlling that exposure route?

24 MR. KING: You know, when we were first --

1 when we were first discussing -- began discussing this
2 issue with the advisory committee back in the spring
3 of this year, we had internally put together something
4 that would have dealt with this migration to
5 groundwater exposure part, but it was really a long --
6 I mean it was -- you know, it would be another whole
7 section of material that you'd have to deal with.

8 I mean it would be its own kind of complicated
9 thing. And that was as we talked to the advisory
10 committee, I mean their preference was to go with the
11 procedure that's outlined in 320 as opposed to the
12 migration of groundwater aspect.

13 MR. REOTT: So other than that was their
14 preference, is there any reason you can think of that
15 you couldn't amend 320 to provide that a cap does
16 exclude that pathway, that portion of the groundwater
17 pathway?

18 MR. SHERRILL: An attempt was made to address
19 how you could exclude the migration to groundwater
20 route. There is a literature review and so forth, and
21 there was not a consensus on how that particular -- if
22 you wanted to just look at only that particular route,
23 in a rule format with equations and so forth, how you
24 could exclude that route, and so what we envision is

1 that most people if they're going to try to -- if
2 they're going to just try to exclude this migration to
3 groundwater route, just that portion of it, that
4 they're going to do it under 742.925.

5 MR. REOTT: In Tier 3 then.

6 MR. SHERRILL: Correct.

7 HEARING OFFICER DESHARNAIS: Follow-up
8 questions.

9 MR. NICKELL: In line with that then it would
10 seem that it would be the Agency's position then that
11 a cap by itself would not be sufficient to exclude the
12 pathway of migration to groundwater, which is what you
13 would be asking to be done by amending Subpart C to
14 include caps as a way to exclude migration to
15 groundwater pathway.

16 MR. SHERRILL: If I can -- you know, just a
17 cap in itself would not exclude the migration to
18 groundwater route.

19 HEARING OFFICER DESHARNAIS: Excuse me, could
20 you identify yourself for the record?

21 MR. NICKELL: Chris Nickell, I'm with the
22 IEPA Bureau of Land.

23 HEARING OFFICER DESHARNAIS: Thank you. Any
24 additional follow-up questions?

1 (No response.)

2 HEARING OFFICER DESHARNAIS: Moving on, then
3 that finishes up the original prefiled questions. We
4 do have a set of additional prefiled questions that
5 were filed.

6 MR. RIESER: Now that it's late in the
7 afternoon I ask my heavy technical questions here to
8 keep everybody awake, but I'll try to get through
9 these as quickly as I can. These are some questions
10 filed on behalf of the Illinois Petroleum Council in
11 particular.

12 In Tier 2 is it correct that chemical specific
13 default degradation rates, as listed in Appendix C,
14 Table E, can be used in Equation R26?

15 MR. HORNSHAW: Yes.

16 MR. RIESER: In Tier 2 is it correct as
17 stated in Section 742.810(a)(1)(H) that the first
18 order degradation constant to be used in Equation R26
19 can be obtained either from Appendix C, Table E, or
20 from "measured groundwater data"?

21 MR. KING: You know, it says that, and after
22 we saw that we realized we shouldn't say it that way.
23 That phrase shouldn't be there at all. That really
24 should be a Tier 3 issue.

1 So I mean we're planning on going back and taking
2 that phrase "or from measured groundwater data" out of
3 Tier 2.

4 MR. RIESER: Okay, but under Tier 3 the first
5 order of degradation constant could be a measured
6 value?

7 MR. HORNSHAW: That's correct. And actually
8 we looked further into that when we got this
9 additional set of prefiled questions. We don't
10 believe it's appropriate that measured groundwater
11 data referred to in the field type of measurements,
12 the degradation if it's measured in the field is most
13 likely going to be confounded in with loss of a
14 chemical due to dispersion in all three directions, so
15 we feel that the degradation rate should be measured
16 in the laboratory, and there are at least four ASTM
17 standard methods for doing that in the lab.

18 HEARING OFFICER DESHARNAIS: Excuse me, could
19 the Agency clarify that the changes to the language
20 concerning measured groundwater data would be
21 addressed in the next errata sheet?

22 MR. KING: That's correct.

23 HEARING OFFICER DESHARNAIS: Thank you.

24 MR. RIESER: So are you saying you would not

1 approve a Tier 3 demonstration the first order of
2 degradation constants based on field measurement?

3 MR. HORNSHAW: At this time we're not aware
4 of measures that can effectively ferret out the loss
5 of compound that's truly due to degradation of the
6 compound versus loss of the compound due to dispersion
7 on the X, Y and Z axis.

8 MR. RIESER: If you took the current model
9 and had the information about -- talked about velocity
10 along the centerline and actually measured that,
11 couldn't you use that same model and use that to
12 calculate the dispersion, I'm sorry, not the
13 dispersion but the first order of degradation
14 constant?

15 MR. HORNSHAW: You would also need to have
16 estimates of the dispersion in the Y and Z direction,
17 too, as well as along the centerline of the boom.

18 MR. RIESER: So if you had that information
19 to control the dispersion, would that allow you to
20 calculate with field measurements the first order
21 degradation constant?

22 MR. HORNSHAW: I suspect it could be done. I
23 might add that would be done under Tier 3.

24 MR. RIESER: Understood, understood.

1 Assuming source and free product removal, if
2 site-specific data taken over a period of time
3 demonstrates that a dissolved chemical groundwater
4 plume is stable or shrinking, is this a sufficient
5 demonstration pursuant to 742.805(a) (4) and (5)
6 respectively to demonstrate that groundwater within a
7 minimum setback zone of a well will meet Tier 1
8 groundwater remedial objectives and groundwater
9 discharged into surface water will meet the applicable
10 surface water standard for that chemical?

11 MR. SHERRILL: No.

12 MR. RIESER: Why not?

13 MR. SHERRILL: You could -- it's somewhat
14 common to have a -- you could have a stable or
15 shrinking plume but it is still migrating, and it can
16 be migrating to someone's potable supply well.

17 MR. RIESER: If it's stable --

18 MR. SHERRILL: I did not interpret -- when
19 you said stable, I did not interpret -- I interpreted
20 that it could still be moving.

21 MR. RIESER: I think stable here was meant in
22 the sense of static or not moving. And shrinking was
23 used in the sense of getting smaller.

24 MR. KING: I think John's point still holds,

1 you still -- whether it's stable or shrinking, if you
2 have a well in that plume, it wouldn't meet those
3 criteria.

4 MR. RIESER: Okay. So if you would already
5 impact the well, then it wouldn't meet those criteria,
6 I understand that. But I guess the other assumption
7 that we needed to put here is assuming that that was
8 not the case, that having established the extent of
9 the contamination and establishing by virtue of field
10 measurements that it wasn't getting larger, either not
11 getting larger or in fact getting smaller, would that
12 be -- and assuming that it did not impact the minimum
13 maximum setback zone of well or surface water system,
14 would that be a sufficient demonstration?

15 MR. CLAY: I think there would need to be a
16 lot of data, because we see a difference in
17 concentrations on quarterly sampling all the time.
18 One time it's up, one time it's down. I mean they're
19 all over the place.

20 So I think there's a lot of different situations
21 that could indicate or could give you a false
22 indication that it is shrinking or stable.

23 So there would probably have to be a lot of data
24 collected over a long period of time for us to make

1 that demonstration. Ken, do you have anything?

2 MR. LISS: No, you're going to make the
3 decision basically on a limited amount of data over a
4 certain period of time, a snapshot. John's earlier
5 description when we talked about the setbacks, what if
6 somebody developed groundwater in the area, maybe due
7 just to construction, dewatering, that might cause
8 that to be mobile.

9 Now I mean in the future, also the chemical
10 dispersion itself is a slower process, and I guess we
11 would want to take that into account. Just because
12 you might show based on this time data, this snapshot
13 that things appear to be stable, there might be the
14 chemical dispersion itself that's occurring.

15 MR. RIESER: But if you had sampling over a
16 period of time, and had a mechanism such as an
17 institutional control where you could rule out other
18 influences on the groundwater system such as the one
19 you described --

20 MR. LISS: You mean such as monitoring and
21 some responsive action?

22 MR. RIESER: Well, monitoring, yeah, I'm
23 talking monitoring movable free product.

24 MR. KING: Well, I think we probably can

1 devise enough criteria as we sit here to finally get
2 to the kind of the conclusion we want to get. But,
3 you know, what it really comes down to is there would
4 be a lot of site-specific factors to consider before
5 you reach that kind of conclusion.

6 MR. RIESER: Site-specific factors having to
7 do with enough information to reach that conclusion
8 and enough information to demonstrate that stability,
9 that those conditions would maintain over time.

10 MR. KING: Right.

11 MR. WATSON: I've got a follow-up question.

12 HEARING OFFICER DESHARNAIS: Mr. Watson?

13 MR. WATSON: Once you've made the appropriate
14 demonstration during your -- as you refer to as a
15 snapshot, is it true that your obligations with
16 respect to these establishment of these remediation
17 objectives has been satisfied?

18 MR. LISS: We're talking about source and
19 free product removal is what we're talking about. I
20 thought we were in the context of leaving free product
21 behind. I'd say that the snapshot in time is
22 appropriate to evaluate that these things can be left
23 there and your obligation based upon the current
24 snapshot, you know, is satisfied with these

1 objectives.

2 MR. SHERRILL: When we make any of our
3 determinations we base it on the information we have
4 at hand, you know, whether it be long term or -- I
5 mean all historical data and up to that present. And
6 that's what the information is made on. If I think --
7 I think this is what you're getting at. If conditions
8 change upon which we made that NFR, I believe some of
9 the NFR's we've written, I mean we state in there we
10 made this decision based upon the information we have,
11 and so if those conditions change, there could be
12 steps taken to void an NFR.

13 MR. WATSON: To the extent there's any post
14 remediation obligations to do sampling or confirm site
15 conditions, that would be included in the NFR, is that
16 right?

17 MR. SHERRILL: Well, correct, but I can think
18 of a scenario. I mean if you had a site -- I guess
19 this relates back to criteria on when an NFR is voided
20 or steps to take to void an NFR.

21 MR. WATSON: Okay.

22 HEARING OFFICER DESHARNAIS: Additional
23 follow-up?

24 (No response.)

1 MR. RIESER: Going on to my question four.
2 Can a site-specific and compound-specific degradation
3 rate be determined by calibrating Equation R26 using
4 site-specific data obtained over time, and can
5 Equation R26 be used with this degradation rate in
6 742.805(a)(4) and (5)?

7 MR. KING: Is this the same question --

8 MR. RIESER: I think it's basically the same
9 question which is --

10 MR. KING: Okay. And it would be basically
11 the same answer.

12 MR. RIESER: And my understanding of the
13 answer was yes.

14 MR. HORNSHAW: With a lot of site-specific
15 data.

16 MR. RIESER: I guess the fundamental question
17 is, you know, the Tier 2 basically requires that
18 certain modeling be done, and the fundamental question
19 is if you have actual site data, instead of a model,
20 in other words, the model is there to predict the
21 results, and you've got the site data over time which
22 gives you a picture of what those -- of how this
23 system actually operates over a time period, is it
24 acceptable to use those results in a Tier 3 setting?

1 MR. HORNSHAW: It's approved in Tier 3 and
2 then the results are plugged into the Tier 2 model.
3 Is that what you're asking?

4 MR. RIESER: I think even whether model is
5 used or not, that that actual site data will tell you
6 what the site -- how the site's going to behave
7 instead of the model, and is that acceptable for the
8 Agency to use the real time, real data, rather than
9 modeling information to determine how that site's
10 going to behave?

11 MR. SHERRILL: When I read calibrating
12 Equation R26, under 742.910 we have the provision
13 that, you know, alternative models can be proposed.

14 MR. RIESER: And as I said, I think I'm
15 talking about using -- as opposed to modeling, using
16 real data to demonstrate how that system behaves,
17 assuming you had enough data to make that
18 demonstration.

19 MR. O'BRIEN: But I think the point he was
20 making is that in practicality you pick a point to put
21 your monitoring well in, and then you extrapolate from
22 the data you collect from your monitoring wells based
23 upon your original model of how things work to
24 describe it, and that's what he was getting to when he

1 talked about calibrating the model using actual site
2 data.

3 MR. RIESER: Oh, I see. Okay.

4 HEARING OFFICER DESHARNAIS: Moving on to the
5 next question.

6 MR. RIESER: And I think number five is
7 really along those -- I believe number five's also
8 been answered in the affirmative, that this monitoring
9 over a specified period of time to acquire data to
10 demonstrate that a chemical plume is stable or
11 shrinking.

12 Just let me go on to six. Under Tier 3 can the
13 inhalation pathway be eliminated by measuring soil
14 vapor concentrations at the site?

15 MR. SHERRILL: I know under six, you know,
16 just a clarification, we don't use the word eliminate.

17 MR. RIESER: Thank you.

18 MR. SHERRILL: Please exclude.

19 MR. RIESER: Exclude it.

20 MR. SHERRILL: But this measuring soil vapor
21 concentrations, the concern there is, you know, you
22 can measure them one day, and then due to disturbances
23 at the site we may have a control that we would make
24 the NFR determination based upon the information that

1 we had, so things that -- this thing of like vapor
2 concentrations, you have temperature changes, whether
3 there's been rain events before and after when you do
4 this measuring. So other things go into this, and I
5 guess under a simple answer would be yes, but there's
6 other things, other considerations that go into it.

7 MR. RIESER: But the other considerations
8 would be whether they're representative of site
9 conditions, and so it would evaluate how those
10 measurements were taken and make some determination
11 about whether they were representative of site
12 conditions, is that correct?

13 MR. SHERRILL: Correct.

14 MR. RIESER: Seven is taken care of by the
15 changes that we started the day talking about.

16 Eight, with regard to the variable GWobj in
17 Appendix C, Table B --

18 MR. REOTT: obj.

19 MR. RIESER: Thank you, for people who know
20 the alphabet. If the Agency used USEPA Health Based
21 Levels from the SSL for deriving Tier 1 soil
22 remediation objectives for contaminants which do not
23 have an MCL, and identified those values in the newly
24 added Appendix C, Table F, should not those same

1 values be used in this table, that being Table B?

2 MR. HORNSHAW: We chose the USEPA Health
3 Based Levels to try and maintain consistency as much
4 as possible in the Tier 1 approach. When we got to
5 the Tier 2 approach we felt it was probably more
6 appropriate to use state values, and that's why that
7 table was only intended to be used to calculate Tier 1
8 values.

9 As I stated in my testimony, we put that table in
10 because consultants were calling and saying how come I
11 can't recreate the Tier 1 numbers using the Tier 1
12 groundwater remediation objectives.

13 And the reason for that is there were some
14 significant differences in a few cases of
15 noncarcinogens, so we put that table in so people
16 could recreate the Tier 1 numbers.

17 MR. RIESER: If you used the SSL's for
18 creating the Tier 1, then why isn't it appropriate to
19 use them in -- and in doing so you ran them through
20 that same SSL model that at least forms the basis for
21 Tables A and B under Appendix C, why isn't it
22 appropriate to use those same values for a Tier 2
23 demonstration?

24 MR. HORNSHAW: As I stated before, we thought

1 in Tier 1 only we wanted to maintain consistency as
2 much as possible with USEPA's look-up table which was
3 intended to be applied nationwide. We feel it's more
4 appropriate in Tier 2 to use the state's groundwater
5 criteria as the values.

6 MR. RIESER: And the basis for that is what?
7 Why is it more appropriate?

8 MR. HORNSHAW: In Tier 1?

9 MR. RIESER: In Tier 2.

10 MR. HORNSHAW: In Tier 2 I guess it's just an
11 Agency decision.

12 MR. RIESER: And it's based on?

13 MR. KING: It comes down to really you have
14 to make a decision as to how things are going to be
15 put together, and perhaps it would have been more
16 logical for us to use the state derived numbers and
17 then develop other cleanup objectives under Tier 1.
18 That perhaps would have been a more consistent way of
19 doing things.

20 I think we didn't want to do that. I think you
21 would end up generating for those contaminants in at
22 least a number of occasions you'd be coming up with
23 remediation objectives which are more conservative
24 under Tier 1.

1 We felt that the Tier 1 numbers were -- that the
2 SSL document had come up with were consistent enough.
3 So it really was not so much a question of using the
4 SSL process in Tier 2, but whether should we use those
5 state numbers in Tier 1. We concluded that those
6 would generate numbers that would be more conservative
7 than we needed.

8 MR. RIESER: But having decided to use the
9 SSL values in Tier 1, why not use them in Tier 2 as
10 well?

11 MR. KING: Well, I think we saw the Tier 2
12 process as being more of a -- more of a -- I don't
13 know if state oriented is the way to do things, but
14 there you're taking the remediation objectives in --
15 for groundwater and doing the calculations in Tier 2
16 based on those. So that otherwise you'd be using a
17 number, your input number for your groundwater
18 objective would not be consistent with what's in Tier
19 1 for those groundwater numbers.

20 MR. RIESER: But I thought the Tier 1 was the
21 SSL's. So we're talking about using the SSL's in Tier
22 1 and in Tier 2?

23 MR. KING: No, I don't think that's what
24 we're saying.

1 MR. RIESER: It was my understanding that
2 Tier 1 is the SSL, but Tier 2 is the state values and
3 the question is why you use the --

4 MS. ROBINSON: Could we maybe have a five
5 minute break to caucus?

6 MS. McFAWN: Why don't we move on to
7 questions 9, 10 and 11. I think everyone's getting
8 rather tired, and the Agency has tried to answer this,
9 and why don't you take the next -- you know, take a
10 look at the transcript afterwards and see if you need
11 to readdress it or if you're satisfied with your
12 answer.

13 MR. RIESER: I'm fine with that.

14 MS. McFAWN: Okay. I just -- the reason I
15 interjected here is I would note that I think that
16 exhaustion is setting in. So I just mean these are
17 very complex questions.

18 MR. RIESER: And I understand that, so I
19 would like to have that question answered. I don't
20 believe it's answered, but I'm willing to just move
21 on.

22 MR. McFAWN: Okay, you can always
23 provide testimony on what you think would be the right
24 answer as well.

24 MR. RIESER: Right. Nine, in Appendix -- oh,

1 I have a question about Appendix B, Table F. I note
2 that there are attributions for some but not all of
3 the values as either from equation -- that's 17 from
4 the health based limit or from the 620 standards. And
5 for those that aren't attributed, where are they from?

6 MR. HORNSHAW: Could you repeat that again?

7 MR. RIESER: In Appendix B, Table F, there
8 are notes on what I'm calling attributions to some but
9 not all of the values. And for those values without
10 footnotes, where are they from? This is not all of
11 them, but just generally.

12 MS. ROBINSON: Is this a new question?

13 MR. RIESER: It is a new question, I'm sorry.
14 There's so much to explore here.

15 HEARING OFFICER DESHARNAIS: We'll take a
16 five minute break now and then we'll continue.

17 MR. RIESER: I can move on to the --

18 MS. McFAWN: We'll take a break.

19 MR. RIESER: We'll take a break? Okay.

20 (A recess was taken.)

21 HEARING OFFICER DESHARNAIS: If we could get
22 ready to reconvene, please. We have three remaining
23 prefiled questions, and the additional prefiled
24 questioned are number 9, 10 and 11.

1 What we're going to do is we'll have those
2 questions read into the record by the proponent, have
3 the Agency response, not allow any follow-up at this
4 time. If there's any follow-up, that will occur next
5 time.

6 MS. McFAWN: Is that acceptable to you, Mr.
7 Rieser?

8 MR. RIESER: Sure. Number 9. In Appendix C,
9 Table B, a value for both infiltration rate or "I" and
10 for infiltration rate for migration to groundwater
11 mass limit equation, I_{m-1} , is provided. Functionally
12 are there any differences between these infiltration
13 rates? If so what are the differences?

14 MR. SHERRILL: Yes, they are fundamentally
15 different. This is a good question that also relates
16 to question ten. In the Part 742 appendices the value
17 under the ASTM RBCA infiltration rate is .3 meters per
18 year. This "I" is the default rate in the ASTM
19 standard. I just want to note that .3 meters is
20 approximately 11.7 inches a year.

21 For the 742 SSL's the infiltration rate equals .3
22 meters per year, which we adopted from this ASTM and
23 RBCA standard. Under the USEPA SSL user's guidance
24 provides an infiltration for the mass limit the I_{m-1}

1 is .18 meters a year, and I'll explain how these two
2 infiltration rates are functionally different.

3 "I" is just one parameter that is used to
4 calculate a dilution factor. When developing a new
5 dilution factor all assumptions and inputs must be
6 reviewed and not just infiltration.

7 I would like to point out that a dilution factor
8 of ten was originally proposed by the USEPA during
9 1994, but after much national review was revised to
10 20. A dilution factor of 20 provides a less
11 restrictive remediation objective than a dilution
12 factor of ten.

13 So when we were discussing infiltration for the
14 SSL infinite source model, we need to review the
15 dilution factor in its entirety. The dilution factor
16 in the numerator is one plus the aquifer hydraulic
17 conductivity times hydraulic gradient times the mixing
18 zone depth, and then the denominator is infiltration
19 rate times source length parallel to groundwater flow.

20 And this is a quote out of the USEPA Soil
21 Screening Guidance User's Guide, "Because of the
22 uncertainty resulting from the wide variability in
23 subsurface conditions that affect contaminant
24 migration in groundwater, defaults are not provided

1 for the dilution model equation. Instead, a default
2 of 20 has been selected as protective for contaminant
3 sources up to half acres, a half acre in size. A
4 further discussion of the basis for this default is
5 provided and a description of the mass limit analysis
6 is provided in the USEPA technical background
7 document", and we provided earlier testimony on this
8 source size versus site size.

9 The dilution factor is demonstrating as
10 contaminant, as contamination of the soil leachate
11 moving through the soil and groundwater and
12 contaminant concentrations are attenuated by
13 absorption and degradation.

14 In the aquifer, dilution by clean groundwater
15 further reduces concentrations before the
16 contamination reaches a receptor point. This
17 reduction is expressed as a dilution attenuation
18 factor. The lowest possible DAF is one, meaning a
19 situation where there is no dilution or attenuation of
20 a contaminant. That is where the concentration in a
21 receptor well is equal to the soil leachate
22 concentration.

23 Here's my second point. It gets shorter. The
24 USEPA SSL guidance addresses only one of the dilution

1 attenuation processes, contaminate dilution in
2 groundwater, while Part 742 does allow for degradation
3 through this RBCA equation that we've been discussing
4 earlier. The mixing zone equation is derived from a
5 water balance relationship to calculate a
6 site-specific dilution factor.

7 Now in regards to this, that's in regards to the
8 big "I". Now, the I_{m-1} , the mass limit soil level for
9 migration to groundwater approach represents the level
10 of contamination in the subsurface that is still
11 protective when the entire volume of contamination
12 leaches over the 30-year exposure duration and the
13 level of contamination at the receptor does not exceed
14 the health based limit.

15 More site-specific information is utilized in this
16 mass limit model. In other words, when you use the
17 mass limit model you know more about your site than
18 when you're using the other model.

19 And consequently a less restrictive infiltration
20 rate is used. So this big "I" is used for the
21 infinite source assumption model, while the I_{m-1} is
22 used for when the source area and depth volume of the
23 source are known or can be reliably estimated. That
24 ends my quote.

1 MR. RIESER: Thank you. And at the Hearing
2 Officer and Board members direction I'm not going to
3 follow up on this. I'll reserve the right to do so in
4 the future.

5 Going on to 10, in Appendix C, Table C, is it
6 accurate that the Domenico model does not include
7 constituent retardation?

8 MR. LISS: It's true.

9 MR. RIESER: Should not retardation be
10 included either in the definition of groundwater
11 velocity $U = K_i/O_tR$ where R is retardation
12 factor = $1 + K_{dps}/O_t$, or included directly in R15 and
13 R26?

14 MR. LISS: First of all I can't find a
15 citation that references that configuration that you
16 put in here for that term. I found two that are
17 similar, but they're not the same by any means.

18 Should a retardation factor I guess it could be
19 applied, the author of the model itself Domenico says
20 in his paper, which is referenced in Exhibit F to John
21 Sherrill's testimony, that it can be applied to the
22 formula.

23 MR. RIESER: Okay. Thank you. And again I'm
24 waiving the follow-up until the following hearing.

1 MS. McFAWN: Thank you, Mr. Rieser.

2 MR. RIESER: In 11, in Table C, Equation R11,
3 which identifies the subsurface soil volatilization
4 factor, does the Agency agree that ASTM overstates the
5 rate of vapor releases from subgrade soils?

6 MR. SHERRILL: We don't know that to be the
7 case. I guess that would be a question for ASTM, is
8 that correct?

9 MR. HORNSHAW: Well, or somebody to
10 demonstrate.

11 MR. SHERRILL: Or somebody to demonstrate.

12 MR. RIESER: Would the Agency consider
13 amending the definition column for R11 to note
14 "whichever is less between L11 and R4"?

15 MR. SHERRILL: I guess the answer would be no
16 at this time, unless we had this information presented
17 to us to make this demonstration.

18 MR. RIESER: Thank you. And based on the
19 direction of the Hearing Officer, that will conclude
20 my questioning. But I reserve the right to ask
21 further questions on these, and also there is one
22 other question that we were discussing and cut off
23 discussion right before the break, that I'm reserving
24 further questions on.

1 MS. McFAWN: And that's correct. Did the
2 Agency find that answer during the break by any
3 chance? it had to do with footnotes.

4 MR. RIESER: I'm sorry, there were two other
5 questions right before the break where the Agency was
6 -- and I'm willing to wait for the next hearing to get
7 final answers on both of those.

8 MS. ROBINSON: We can answer the footnote
9 question.

10 MS. McFAWN: Please do.

11 MR. HORNSHAW: Going back to Appendix B,
12 Table F I think it is, the chemicals listed under
13 Class I that do not have footnotes were chemicals that
14 were derived using Subpart F of 620. Specifically
15 those are chemicals that are Class C carcinogens and
16 USEPA's Health Based Limit is one in a million risk
17 value. And since the legislation only identifies A
18 and B carcinogens as those which must be treated as
19 carcinogens, we recalculated the Class I groundwater
20 objective using the procedures of Subpart F and the
21 noncancer end point.

22 And for those chemicals listed under Class II that
23 do not have a footnote, those values were derived as I
24 discussed in my testimony using Agency policy on the

1 equivalent of a Class II health advisory using the
2 estimation of treatment or removal, removability from
3 Class II groundwater using methylene chloride and
4 ethyl benzene as cutoff chemicals as I discussed in my
5 testimony.

6 MR. RIESER: Thank you.

7 MS. ROBINSON: Could you just state for the
8 record what the other question is that we're going to
9 do in January? I don't know that I heard it.

10 MR. RIESER: It was number eight.

11 MS. ROBINSON: Just for follow-up purposes?

12 MR. RIESER: Yes.

13 MS. ROBINSON: Okay.

14 MS. McFAWN: We agreed earlier that the
15 Agency would look at that and see if it had anything
16 further to add.

17 MR. RIESER: Yes.

18 MS. McFAWN: If not you're free to offer
19 testimony.

20 MR. RIESER: Yes.

21 HEARING OFFICER DESHARNAIS: Thank you, Mr.
22 Rieser. That brings us to the initial ending of the
23 prefiled questions and the end of this hearing. I
24 would note that a second hearing is scheduled to begin

1 January 15th. It will be held at 201 Municipal Center
2 West, Seventh and Monroe Street, Council Chambers,
3 third floor here in Springfield.

4 This will be to address testimony from other
5 interested parties and questions directed to those
6 witnesses. We will actually begin with any remaining
7 follow-up to these questions from the Agency that we
8 were discussing here today.

9 Prefiled testimony for the second set of hearings
10 must be filed with the Board on or before December
11 23rd, 1996. And prefiled questions for those
12 testifying must be filed on or before January 6th,
13 1997. When prefiling please contact the Board to
14 obtain the current copy of the service list.

15 MS. McFAWN: I would just note that when we
16 resume these hearings in January I would hope that the
17 questions that the Agency has would be fairly brief at
18 the outset because we will be anxious to have those
19 who have prefiled testimony be at the hearings and
20 avail -- allow us to have enough time for them to give
21 their testimony and have questions posed to them.

22 So for the most part we would then at the
23 conclusion of the prefiled testimony and the questions
24 to those participants, that's when we will return if

1 we need to further questions of the Agency. That's
2 how I see January really shaping up.

3 Thank you for your time today. I know the
4 conditions here were rather warm, it was a rather long
5 day and hopefully at the Municipal Center it will be a
6 nicer atmosphere.

7 HEARING OFFICER DESHARNAIS: Does the Agency
8 have anything further at this time?

9 MS. ROBINSON: Not at this time.

10 HEARING OFFICER DESHARNAIS: This hearing is
11 adjourned. Thank you.

12 (Which were all the proceedings held on
13 the hearing of this cause on the date.) 14

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