

1 BEFORE THE POLLUTION CONTROL BOARD

2 STATE OF ILLINOIS

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5 IN THE MATTER OF:
6 TIERED APPROACH TO CORRECTIVE ACTION
7 OBJECTIVES (T.A.C.O.) NO. R97-012
8 35 ILL. ADM. CODE 740

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13 Hearing held, pursuant to Notice, on the 16th day
14 of January, 1997, at the hour of 10:00 a.m., at 201
15 Municipal West, Seventh & Monroe Streets, City Council
16 Chambers, Springfield, Illinois, before Kevin
17 Desharnais, duly appointed Hearing Officer.

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21 TRANSCRIPT OF PROCEEDINGS

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 CAPITOL REPORTING SERVICE, INC.
 SPRINGFIELD, ILLINOIS 217-525-6167

1 PRESENT:

2	MS. MARILI McFAWN	Board Member
	MR. JOSEPH YI	Board Member
3	DR. RONALD FLEMAL	Board Member
	MR. KEVIN DESHARNAIS	Hearing Officer
4	MS. K.C. POULOS	Board Attorney
	MS. AUDREY LOZUK-LAWLESS	Board Attorney
5	MR. ANAND RAO	Technical Staff
	MS. KIMBERLY ROBINSON	Attorney, IEPA
6	MR. H. MARK WIGHT	Attorney, IEPA
	MR. GARY P. KING	IEPA
7	MR. JOHN SHERRILL	IEPA
	MR. JAMES PATRICK O'BRIEN	IEPA
8	MR. DOUGLAS CLAY	IEPA
	MR. THOMAS C. HORNSHAW	IEPA
9	MS. TRACEY E. VIRGIN	IEPA
	MS. VICKY L. VonLANKEN	IEPA
10	MR. LAWRENCE EASTEP	IEPA

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EXHIBITS:

IDENTIFIED

ADMITTED

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Exhibit Number 22

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1 HEARING OFFICER DESHARNAIS: Good morning, my
2 name is Kevin Desharnais, I'm the hearing officer for
3 this proceeding entitled in the matter of Tiered
4 Approach to Corrective Action Objectives 35 Illinois
5 Administrative Code Part 742. It is docketed before
6 the Board as R97-12.

7 Today is the second day of the second set of
8 hearings in this matter. And we have several matters
9 left to address. We have the testimony of David
10 Rieser, and response to the Agency's rebuttal
11 testimony which was delivered yesterday.

12 Additionally the Agency has indicated that they
13 want to make a summary of their position on the risk
14 issues.

15 MS. ROBINSON: To help clarify the record, I
16 think some confusion arose at the end of yesterday
17 that we'd like to at least try to clarify before we
18 open it up for questions.

19 HEARING OFFICER DESHARNAIS: So I'll just go
20 ahead and do some introductions of who's here on
21 behalf of the Board. We have Board member Marili
22 McFawn.

23 MS. McFAWN: Good morning.

24 HEARING OFFICER DESHARNAIS: Board member

1 Joseph Yi.

2 MR. YI: Good morning.

3 HEARING OFFICER DESHARNAIS: Board member
4 Ronald Flemal. And Board assistant K.C. Poulos.

5 MS. POULOS: Good morning.

6 HEARING OFFICER DESHARNAIS: And technical
7 staff member Anand Rao.

8 MR. RAO: Good morning.

9 HEARING OFFICER DESHARNAIS: We're going to
10 begin today with the testimony of David Rieser. Mr.
11 Rieser.

12 MR. PEACH: Good morning, Mr. Hearing
13 Officer, and others present. I'm David Peach here on
14 behalf of the Illinois Steel Group. I'd like to
15 present our first witness, David Rieser, and ask that
16 he be sworn.

17 (The witness was sworn.)

18 MR. PEACH: Mr. Hearing Officer, I have the
19 prefiled testimony of David Rieser and I'd like that
20 entered as Exhibit 22 I believe.

21 HEARING OFFICER DESHARNAIS: That's correct.

22 MR. PEACH: Mr. Rieser, I'll show you the
23 Exhibit 22 and ask if that is a true and accurate copy
24 of your testimony?

1 MR. RIESER: It is. Thank you. My name is
2 David L. Rieser and I'm a partner in the Chicago law
3 firm of Ross & Hardies. I've been a member of the
4 Illinois Bar since 1980 and much of my practice is
5 focused on environmental law. This includes four
6 years during which I was an attorney for the Illinois
7 Environmental Protection Agency.

8 I'm testifying here today on behalf of the
9 Illinois Steel Group for the limited purpose of
10 discussing the area background concept and how it
11 should be applied in these regulations.

12 I realize that we make an effort to summarize the
13 testimony, but mine is so brief and the summaries tend
14 to be so halting and tend to be longer, so I'm just
15 going to read through it as it is.

16 In March of 1995, as a representative of the
17 Illinois Manufacturer's Association and the Illinois
18 Steel Group, I became involved in the drafting of the
19 legislation which was adopted as Title XVII of the
20 Illinois Environmental Protection Act.

21 I personally participated in numerous drafting
22 sessions involving the proposed legislation with
23 representatives of the Agency, representatives of
24 other trade associations including the State Chamber

1 of Commerce and members of Governor Edgar's staff.

2 After the legislation was adopted, I was asked by
3 the Chemical Industry Council to serve on their behalf
4 on the Site Remediation Advisory Committee which was
5 formed by the legislation.

6 I participated in numerous meetings with the
7 Agency which have been referenced in previous
8 testimony. Through this work I believe I can speak
9 authoritatively on the intent of the legislation and
10 how the regulated community believes it should be
11 implemented through the Part 742 regulations.

12 The concept of area background is an essential
13 feature of these rules as they apply to industrial or
14 brownfield sites. Subpart D of Part 742 allows the
15 evaluation of background conditions so that levels of
16 contaminants as a result of conditions that are
17 ubiquitous to industrial areas or natural soil levels
18 can be approved outside of the tiered risk approach.

19 This is based on a policy decision that it does
20 not make sense to force a person seeking to remediate
21 a site to address conditions which are not of their
22 making and are historic or area wide or which would
23 result in a small clean property in the middle of a
24 widely contaminated area.

1 It also would apply to areas in which the elevated
2 levels are the result of natural conditions.

3 In drafting the statutory language, we
4 specifically discussed historically industrialized
5 areas such as the southeast side of Chicago or the
6 Metro East area outside St. Louis as examples where
7 this type of approach should apply. We agreed that
8 the area background approach could apply unless it
9 could be determined, as the statute states, that the
10 release was solely the result of on-site activities.
11 The proposed regulations also reflect this focus.

12 My testimony is directed more toward the
13 application of the regulations than the actual
14 language.

15 In its response to questions regarding this issue,
16 the Agency correctly indicated that it would not apply
17 the area background approach to sites where the
18 release was solely result of on-site activities. This
19 position is based both on the statutory language and
20 the appropriate policy concern that the person ought
21 not to be able to contaminate an area and then avoid
22 responsibility for that contamination because it is
23 widespread. Sort of the environmental equivalent of
24 killing your parents and throwing yourself on the

1 mercy of the court because you're an orphan.

2 Yet there was a sense in the Agency's answers that
3 the area background concept would have limited
4 application and might not apply, for example as stated
5 by Dr. Hornshaw, to slag or fill in wetlands.

6 There was also a sense that a person seeking to
7 use the area background concept would have to
8 determine the source, even if it was unknown and even
9 if the contaminants were of very old historic vintage
10 and the companies or persons responsible were no
11 longer present.

12 While I agree that the policy of not allowing the
13 property which contained the sole identifiable source
14 of the contaminants to use the area background concept
15 is consistent with the statutory intent, I do caution
16 that this policy may have limited application to
17 historical issues at areas which have been heavily
18 industrialized since the beginning of the century or
19 areas which are entirely underlain by manmade fill.

20 Taken literally, Dr. Hornshaw's statement would
21 rule out many of the areas for which this concept was
22 intended to be used. Area background was
23 unquestionably designed to apply to this type of
24 historic slag or fill situations.

1 Further, in those instances where the source is
2 probably unknown and the companies which may have
3 operated at the source are long gone, the policy
4 concerns discussed above has far less import. It is
5 my understanding of the intent of the drafters of the
6 statute that, in these instances, the area background
7 regulations would apply.

8 I want to address one other item that I didn't
9 have at the time I drafted my testimony, but was in
10 the transcript of the previous hearings, and that was
11 an exchange between Mr. King and myself regarding
12 Section 58.5(b)(2) of the statute which has to do with
13 the conversion of property, the residential use of
14 property that had background conditions on them. The
15 language of the statutes says in the event that the
16 concentration of a regulated substance of concern on
17 the site exceeds the remediation objective adopted by
18 the Board for residential land using the property may
19 not be converted to residential use unless such
20 remediation objective or an alternate risk-based
21 remediation objective for that regulated substance of
22 concern is first achieved.

23 And the question that I proposed to Mr. King was
24 given that if the property was residential to start

1 with, and I used the example of naturally occurring
2 background conditions which might exceed the
3 residential standard, would there have to be dead
4 restrictions on these properties.

5 And I think the answer he gave was they weren't
6 sure, they'd have to look at it on a site-specific
7 basis, and I pointed the statute out and the
8 interpretation I suggested, he said well, it could be
9 read that way.

10 I'm testifying here to say that it was my
11 recollection of the discussion of the statute that it
12 was written the way it was to say that if it was
13 industrial property, you couldn't convert it to
14 residential use without -- if it exceeded the
15 residential values, without first achieving
16 appropriate residential objectives.

17 But with respect to residential property, I don't
18 think there was any intention to require that there be
19 some restriction required in that situation to allow
20 it to continue to be residential property, especially
21 in a situation which involves naturally occurring
22 background conditions.

23 Obviously that has nothing to do with whether
24 there was an acute risk on the property that would

1 have to be dealt with immediately. But I wanted to
2 add that to my testimony.

3 And that concludes my testimony. I'll be here if
4 there's any questions.

5 HEARING OFFICER DESHARNAIS: Thank you, Mr.
6 Rieser. Are there any questions?

7 MS. ROBINSON: The Agency has no questions
8 for Mr. Rieser.

9 HEARING OFFICER DESHARNAIS: Are there any
10 questions from any other party?

11 (No response.)

12 HEARING OFFICER DESHARNAIS: Mr. Rieser,
13 since your testimony was actually read into the record
14 it will not be necessary to have it admitted as an
15 exhibit.

16 MR. RIESER: Okay. I'd like to -- Mr. Roy
17 Ball was supposed to be here today to testify
18 regarding a couple of issues, one of which is
19 reflective of his testimony and one of which is not.

20 He was not able to come because of the weather.
21 And I'd like to have his testimony entered as an
22 exhibit if that would be acceptable that's presented
23 here.

24 HEARING OFFICER DESHARNAIS: Generally if the

1 testimony is not delivered it is entered into the
2 record as a public comment.

3 MR. RIESER: Okay, thank you very much.

4 HEARING OFFICER DESHARNAIS: But we can admit
5 the testimony of Roy Ball as a public comment in the
6 record.

7 MR. RIESER: Okay, thank you very much.

8 MS. McFAWN: Before you leave us, Mr. Rieser,
9 actually I have a question of the Agency. Mr. Rieser
10 has commented extensively on what he believed or part
11 of his comments were based on what he understood Dr.
12 Hornshaw to say, and I guess I'd like some kind of
13 dialogue or affirmance from the Agency that that is
14 accurate, that Dr. Hornshaw does not believe that
15 background concept would apply to slag or fill in
16 wetlands, and is his approach to this correct or --

17 DR. HORNSHAW: The concern about having slag
18 or fill in wetlands is that the metals that are part
19 of slag, at least some slag, can be available and pose
20 a risk to the wetlands, and I guess my comment stands.

21 MR. RIESER: Well, and I think my testimony
22 stands, that the slag that was deposited to provide
23 the literal base for the industrial areas of both East
24 St. Louis and the southeast side of Chicago and

1 everyplace else were placed in what at the time were
2 viewed as swamps and now they're viewed as wetlands,
3 that was the type of activity to which I -- I mean
4 which we discussed when we were talking about an area
5 background concept.

6 And it really has to do not specifically with the
7 language of either the statute or the regulation, but
8 how they are interpreted and apply. So that if a
9 chemical company on the southeast side of Chicago that
10 is built on slag deposited there a hundred years ago
11 had to address that slag because of the reason Dr.
12 Hornshaw just laid out, that would in my opinion be
13 contrary to the intent of the people who put the
14 statute together, and certainly vitiate the concept of
15 what area background was intended to do.

16 MS. McFAWN: But wouldn't they have to
17 address it or could they leave it unaddressed and then
18 that the No Further Remediation Letter would just not
19 address it?

20 MR. RIESER: Well, obviously that would
21 depend on the context in which they were dealing with
22 the issue. In a situation where they were seeking a
23 focused site remediation to address the specific spill
24 or problem, it may well not come up.

1 Although I can see situations where it could
2 because of the nature of the slag, and that would be
3 the substrate which they were dealing with that would
4 have to be in some manner addressed. And of course
5 they were dealing with something that was different
6 than native soils.

7 But certainly in a comprehensive site evaluation,
8 this would be part of their site evaluation, and it
9 would be a -- something that was different from
10 natural soil. There may be constituents of the slag
11 that may be elevated above a Tier 1 value, and thus
12 would have to be in some way resolved.

13 And to not be able to say this was placed here
14 hundreds of years ago, a hundred years ago by the
15 people who originally built this, which was three
16 companies ago, and it's not having an acute impact on
17 the people who work on the site, and to have that not
18 be accepted, would be contrary to the concept of area
19 background.

20 MS. McFAWN: But isn't that exactly what we
21 know that Illinois Power did in that it was
22 historically deposited material that they remediated
23 or proved to the Agency that the pathways were
24 excluded, and so I mean you say here in your testimony

1 that the background concept would have to apply.

2 MR. RIESER: I guess I have a different -- if
3 you're referring to the --

4 MS. McFAWN: Gas manufacturing sites.

5 MR. RIESER: The gas manufacturing sites, I
6 guess in my mind there's a difference. In that
7 situation you would have a release and a source
8 property, where here you've got the material and a
9 release as a result of, you know, the manufacturing
10 operations that stuff came out of the facility.
11 Whereas here you had a building material, the example
12 I'm giving you you have a building material that was
13 placed on the ground to support the facility, to
14 literally hold the buildings up, that in discussions
15 at least was intended to be addressed under the area
16 background concept.

17 MS. McFAWN: When you say a building
18 material, then you don't mean just debris that was
19 used as fill, you mean actually like the supporting,
20 the supports of the building?

21 MR. RIESER: No, I'm talking about debris,
22 the slag, whatever was used on -- those areas that I'm
23 talking about were all swampy areas which had to be
24 filled in for buildings to be built there, and they

1 were filled in with a wide variety of materials. The
2 purpose of the materials was to provide solid ground
3 to build the building on.

4 MR. KING: Can I just come jump in here a
5 little bit, just to give you kind of a real life
6 example. One, you know, we haven't gotten too hung up
7 on this issue because in most cases it tends to fall
8 out, it becomes really kind of a moot kind of thing.

9 Giving an example, we've got USX owns a 500 acre
10 site which was a former steel making location in the
11 southeast part of Chicago, and they filled in, you
12 know, 500 acres of Lake Michigan, you know. So they
13 filled in 500 acres of Lake Michigan, and we're
14 working through with them, they're in a voluntary
15 program and we're kind of in the last stages of making
16 decisions about issuing them a No Further Remediation
17 letter. And it doesn't require them to dig up all the
18 slag that's been there. We've just kind of addressed
19 it in terms of addressing the various tier level
20 issues at the site.

21 So as I was saying, I think the -- these issues
22 tend to kind of fall out as you go along in dealing
23 with a specific case.

24 Here's an example where we haven't raised --

1 neither USX or the Agency hasn't raised any kind of
2 background issue, we just dealt with the fact that
3 there's 500 acres of steel making slag there and we're
4 not going to require it to be all removed because
5 there's no point to that.

6 MS. McFAWN: So is that based on there is no
7 pathway or a restriction on the deed that it not
8 become residential, or why is it that you set that
9 aside?

10 MR. KING: Yes, it's a combination of those.
11 We've looked at issues relative to the impact on Lake
12 Michigan, we've had them investigate is any
13 contamination from the slag moving into the
14 groundwater, if it is in the groundwater and now is it
15 impacting Lake Michigan, and we have investigated and
16 established that there is no impact.

17 There will be restrictions on use of any
18 groundwater at the site in terms of potable, as far as
19 a potable use. And there will be appropriate
20 restrictions as far as the development itself,
21 whenever it occurs, on the piece of property.

22 So that's kind of the way we've ended up handling
23 the site.

24 DR. HORNSHAW: And I might add that owners of

1 the site have done a site-specific evaluation of the
2 true bioavailability of the metals that are bound up
3 in the slag, and that evaluation showed that for the
4 most part those metals are tightly bound in with the
5 slag, they're not moving anywhere. The little bit
6 that is in groundwater is not a threat to Lake
7 Michigan or the Calumet River, and so we've said this
8 is an okay material to leave behind.

9 HEARING OFFICER DESHARNAIS: Is this being
10 conducted under a Tier 3 analysis?

11 DR. HORNSHAW: Yes, it is.

12 HEARING OFFICER DESHARNAIS: Or would it be
13 if the program were actually adopted at that point?

14 MR. KING: Well, yeah, we've been using Tier
15 3 approach on that.

16 HEARING OFFICER DESHARNAIS: Thank you.

17 MR. RIESER: I guess in response it would be
18 my point that the intent of the legislature here was
19 that that level of analysis should not be required for
20 those types of situations where it's not a result of a
21 release solely as a result of the release on the
22 property. That was the purpose of writing that in.

23 When you add something ubiquitous of that nature,
24 the idea was not only I think very clearly not only

1 are we not going to remediate it just because this
2 particular industry decided to seek an NFR letter from
3 the Agency, we're not -- once you make the
4 determination that it's not from the source property
5 and there's no acute risk to the workers on the
6 property, and it's not -- and the other thing is it's
7 not residential, that it won't be used in the future
8 for residential use, that should be the end of it.
9 And I think that's exactly what the legislature said.
10 I think that's exactly what the intent of this
11 language is in the Act.

12 MR. KING: If we had taken that approach with
13 this site, this project would not have been able to go
14 forward, because of the fact we've got a number of
15 community groups that are highly interested in what's
16 going on. And if we had taken the position that okay,
17 it's been there for a hundred years, we can ignore any
18 kind of potential impact from it, there would have
19 been a sufficient disruption of the process that
20 things would not have gotten to the point they are
21 now.

22 So I think we have to look at these issues not in
23 a vacuum, but in the context of what the real life
24 situation is, and taking into account everything

1 that's related to the site and potential impact, so
2 that's the way we've approached that one.

3 MR. WATSON: But isn't the U.S. Steel site,
4 isn't that a different site than what Mr. Rieser's
5 talking about in terms of southeast Chicago? I mean
6 it is again a part of the former manufacturing
7 operations at that facility. So arguably it would be
8 a source issue.

9 MR. REOTT: That slag may actually be solely
10 from the site.

11 MR. KING: Well, it is.

12 MR. REOTT: Then it doesn't fit the
13 definition. The statutory definition says that if
14 it's solely from the site, it's not area background.

15 MR. SHERRILL: Initially, too, on this
16 background issue, I know we've got several other sites
17 in the Site Remediation Program, and we asked them to
18 try to make a determination on whether the material,
19 we'll call it fill material or whatever, where the
20 source of that material has come from. And I know I
21 have several sites that it's a combination of fill
22 material brought onto the site and a combination of
23 multiple releases from their site.

24 And in relation to -- in support of what Gary King

1 was saying, we handled it under Tier 3 to say, you
2 know, we couldn't discriminate individual particles on
3 the site and say one -- the one I'm thinking of
4 specifically is in Moline in the Quad City area, they
5 have mercury from their site and fill brought onto
6 their site all commingled together, and there again
7 we've put a restriction on it. There again we've put
8 a -- you know, that no potable use of groundwater
9 should be there. But we didn't -- didn't have them
10 remove all the fill.

11 MR. RIESER: Well, I think it would be that
12 rare situation where the Agency would require the
13 removal of fill in any of these circumstances. But
14 there are a lot of costs associated with addressing
15 the fill in the way that you've described it. Now it
16 may be that U.S. Steel in its dealing with the
17 community group believed that it was necessary to take
18 that approach, and that may well have been warranted
19 in that situation.

20 Because they've got a lot of -- in terms of how
21 that property's going to be handled they've got a lot
22 of things to deal with, and I think most companies
23 with a site of that nature would make the same type of
24 call.

1 I'm making the point that for sites that don't --
2 the point I'm making is that when we -- when I was
3 working on the legislation, my understanding of the
4 intent of what that was, the language was intended to
5 mean, it was directly intended to apply to those types
6 of situations.

7 And to require -- and maybe U.S. Steel's a bad
8 example, just because of its size and the community
9 pressures and the point that Mr. Reott made. But to
10 apply that same type of -- to take what Dr. Hornshaw
11 said literally about well, if it's in the wetlands we
12 have to look at it, literally I think is to ignore
13 what the language of the statute says for handling
14 these issues.

15 Because the legislature made a very specific
16 determination on how this is to be handled, and I
17 think it required if it's area background and it's not
18 a release from the site, then -- and it's not an acute
19 threat to the people on the property, then those are
20 the decisions which are to be made, and the only
21 decisions which are to be made.

22 MS. McFAWN: Let me ask this. This is
23 helping me, and so what would you do for instance in
24 the Metro East area with the reentrainment of lead?

1 If someone came to you and said I want to address my
2 piece of property and how would you treat that as
3 background, if they want a source for that, just
4 simply reentrainment now in the surface soil.

5 MR. KING: Yeah, there's -- there's been some
6 severe contamination problems from lead smelting down
7 in that area, and for instance for people who are
8 off-site where that lead has rained down on them over
9 a number of decades, that they could address that as a
10 background issue, as to how they handled it.

11 Now, in a number though of course in those
12 situations whether it's background or not, there
13 certainly has been a serious health risk related.

14 MS. McFAWN: That would be the question, is
15 it an acute threat. Then you would reach that
16 question.

17 MR. KING: Right, and well, we've also been
18 looking at down there because you have had, you know,
19 kids playing in their yards, and there's high levels
20 of lead and maybe they're of course the residents
21 aren't legally responsible for cleaning up those,
22 they're getting cleaned up through actions against the
23 responsible party who caused the stuff to get there to
24 begin with.

1 We were just talking about the major pollution
2 problems that occurred down there has been a site
3 called N.L. Industries, and it's not just looking at
4 an acute threat from lead, there it was looking at
5 chronic impacts.

6 MS. McFAWN: Thank you.

7 HEARING OFFICER DESHARNAIS: Just to clarify
8 that, if it was not an acute threat but potentially
9 represented a chronic threat for a site that was not
10 responsible as a source of the lead, would that become
11 an issue in the cleanup of their site?

12 MR. KING: That would be an issue relative to
13 forcing the company that caused the contamination to
14 leave their site and to go onto somebody else's piece
15 of property. And so there could be a cleanup of that
16 off-site property, not at the responsibility of the
17 off-site owner, but at the responsibility of the
18 people who caused the emissions and the problems to
19 occur.

20 HEARING OFFICER DESHARNAIS: But would that
21 act as a bar to the owner of the site getting an NFR
22 letter?

23 MR. KING: The tension that we face, and
24 again we really hit on an important problem in

1 focusing on these sites down in the Metro East area,
2 the NFR letter is supposed to be a statement that the
3 site doesn't pose any risk to people. And even if it
4 -- you know, it is in those situations a background,
5 the stuff has come onto the piece of property, but it
6 becomes -- we were trying to figure out how we'd
7 actually handle an NFR letter in that context, because
8 how were we able to represent that that's a healthful
9 situation for people to live in when it's not?

10 MR. RIESER: Well, if I can follow up on
11 that, I think if you've got -- first of all the NFR
12 letter, the decision to seek an NFR letter is solely
13 with the property owner and whoever doing -- the
14 remediation applicant, it's not the property owner,
15 and so they would in the first instance be making the
16 decision about what they want to do with their
17 property and what's appropriate for the property.

18 So that an industrial owner of industrial property
19 may make a decision we've got a problem to solve on
20 our property, and we want to get an NFR letter for a
21 variety of reasons, but we're not going to deal with
22 the lead but we are going to have deed restrictions
23 both for that condition to make sure it's not used as
24 a residential property and for whatever else, whatever

1 issues might be there.

2 If they decide not to seek an NFR letter, if they
3 decide that the health on the property is a problem,
4 then they would seek to address it themselves or
5 they'd seek to have you address it. And so I think
6 that's the answer out of the dilemma.

7 If the owner of the property decided the
8 conditions were acceptable, was willing to accept the
9 restrictions on the use of the property that made
10 those conditions acceptable, then it would be
11 acceptable, and it may be that there's no cost for
12 cleanup off of that property based on those decisions
13 that the property owner has made.

14 Another property might be handled differently
15 because of how the property owner wants to use it, and
16 certainly the residential property owners are probably
17 not going to come to you saying we want an NFR letter
18 by the way. I think that's the way out of that
19 situation.

20 MR. KING: I think Mr. Rieser's given a good
21 analysis which indicates -- I mean you can't just look
22 at this kind of thing and just look at it real cold
23 and say well, it's going this way or it's going to be
24 that way, without considering the totality of the

1 circumstance and what's being addressed. And I think
2 he's correct, there's going to be a different way of
3 addressing it, depending upon the type of site
4 involved, so --

5 HEARING OFFICER DESHARNAIS: Mr. Reott, did
6 you have a question?

7 MR. REOTT: Yeah, somewhat of an observation
8 on this dialogue. Because of the way the statute is
9 worded, that the language in the area background
10 portion of the statute about it being solely from the
11 site, I think there's a moral component, there's a
12 responsibility kind of component in the area
13 background.

14 In your example from the Metro East area, the
15 property owner whose, you know, sat there and had
16 nothing to do with being the source of the lead, I
17 think qualifies as having that be the area background,
18 that is certainly the area condition for a very
19 widespread part of that, that part of the state.

20 That doesn't mean you can't draw your NFR letter
21 to preserve your ability to pursue somebody else who
22 is the source of the material. And so the NFR letter
23 becomes one that is tailored to allowing this person
24 to go out and get money or refinance their property or

1 do whatever it is they need to do that they want to
2 get the NFR letter for. Because you use language to
3 make it clear that only applies to them, because for
4 them the remediation objectives are X, which is area
5 background. But for the source of the material
6 remediation objectives are going to be different. And
7 that you have your rights to still go after that
8 person.

9 MR. KING: Yeah, I just don't want to take --
10 I'm not disagreeing with the logic of what you said.
11 I just don't think that we can take that logic to an
12 extreme which gets us into problems with specific
13 sites.

14 I mean, you know, again, I guess we were thinking
15 of kind of the ultimate example where you actually
16 have a single family home that is contaminated with
17 lead that's come from off-site, it's above the
18 numbers, and that owner of that site wants to come in
19 and get an NFR letter from the Agency so he can sell
20 it to the next guy down the chain of title. And yet
21 the levels are still extremely high and he wants us to
22 say well, it's clean.

23 You know, and we would not want to be in that --
24 in the position of making that kind of representation.

1 So I think it's just a matter -- I think in the logic
2 of these as we've said it has been good. I think what
3 Mr. Rieser and Mr. Reott have said is good. It's just
4 we want to make sure we don't take the logic to an
5 extreme that we have really untenable situations.

6 MS. McFAWN: Anything more, Mr. Rieser?

7 MR. RIESER: I have nothing further.

8 HEARING OFFICER DESHARNAIS: Thank you, Mr.
9 Rieser.

10 MR. RIESER: Thank you.

11 HEARING OFFICER DESHARNAIS: Moving on to the
12 next issue, we asked -- the Agency has indicated that
13 they wish to present a summary of their position on
14 the risk issue.

15 MS. ROBINSON: That's correct, Mr. King is
16 going to do that for the Agency.

17 MR. KING: I wanted to clarify a couple
18 things from yesterday, and both these points are on
19 the risk level issue. And the first one I think is it
20 becomes an issue because of something that I
21 inadvertently caused, so I guess I take responsibility
22 to try to correct it.

23 In referring to procedures under Tier 3 as far as
24 revising the risk level, I think I used the term at

1 least once, more than once, full blown risk
2 assessment. When I said that I think I sent some
3 people into a panic and eyes glazed over and the
4 dollar signs popped up and everybody thought that now
5 it's to get a change in the risk level we were going
6 to have to spend 250,000 dollars on a risk assessment,
7 and that wasn't our intent.

8 On the other hand -- so we don't want to require
9 this mega project just to look at the changes in the
10 potential. On the other hand, we only want to
11 consider changes in risk level where we've had a
12 carefully characterized site, there's been a well
13 thought out analysis, and the analysis is consistent
14 with nationally recognized methodologies.

15 And that's why when we did the change in the rule
16 here or did this amendatory language we referenced
17 into 742.915, instead of referencing either 910 or
18 905.

19 T.A.C.O. provides a great deal of flexibility and
20 options as far as the developing objectives. And what
21 we don't want is for somebody having gone through that
22 process, get to the end and then just come in and say
23 well, the statute says I can have ten to the minus
24 fourth, so just multiply my numbers by a hundred.

1 We would deny that, and then there would be an
2 appeal to the Board, and than the Board would be left
3 to make a decision without any firm guidance on how to
4 handle that kind of situation. So that's why we
5 wanted to have a more concrete process on this issue
6 which we think is laid out in 915.

7 The concept that we have is that you're -- you're
8 characterizing the site, you're exploring the
9 feasibility of different remediations, you're
10 annualizing cost effectiveness of options, you're
11 balancing any interest, for instance what community
12 acceptability, you're looking at comparative risk
13 issues, and based on all that you select a remediation
14 option.

15 If it turns out after all that that you've done
16 this methodical approach and that the risk level is
17 greater than ten to the minus sixth, but less than ten
18 to the minus fourth, that could be acceptable. But
19 from our perspective, that kind of approach is much
20 different from going into a project and just selecting
21 a less stringent risk level and then picking out a
22 remediation method to reach that risk level. That
23 would not be an acceptable approach as far as we're
24 concerned. That's the first point.

1 The second point I wanted to go back to was the
2 use of material from other states, particularly as it
3 involves the ten to the minus fifth risk level. We
4 stated a number of reasons why we don't think that's a
5 good idea, and those are still -- those still stand as
6 far as we're concerned, but I wanted to give a little
7 more context to our conclusions on that matter.

8 When I gave our opening statement back on December
9 2nd, I described what -- described the proposal that
10 we were putting together as what I call the Cadillac
11 approach. And I think it is, I think it is more
12 progressive, more comprehensive, more flexible, it's
13 more well thought out than any remediation objective
14 system that's been adopted or proposed in any other
15 state in this country.

16 I think it is going to be the loan star against
17 which all other programs are going to be measured
18 against, and the people who have been involved in the
19 development have a right to be proud of their work in
20 defining it.

21 We've got -- we have concepts, the concepts in the
22 way we've used the notion of ten to the minus sixth
23 risk with institutional controls and point of human
24 exposure is way ahead as far as what other states are

1 doing. And for me the idea of just taking that ten to
2 the minus fifth risk level, because one of these other
3 states are -- has done that, for me it's kind of like
4 taking the parts off of a Yugo and putting them on
5 this Cadillac and then expecting the Cadillac to run
6 right. It's not going to run right.

7 You know, one of the examples was Indiana, and
8 Indiana, it's a wonderful state, my wife's from there.
9 But the thought of just taking ten to the minus fifth
10 out because Indiana has it, you know, kind of makes my
11 stomach turn. I mean Indiana's years behind where
12 we're at in Illinois. Michigan has been going through
13 a process of flopping back and forth on cleanup
14 objectives for years.

15 I mean we have -- in Illinois, Illinois has been
16 the leader on these issues both within the region and
17 across the country, and I think it's going to be years
18 before the other states have caught up to the concepts
19 of risk point of human exposure and institutional
20 controls as they've been set out here. And I really
21 caution the Board on just taking things blindly out of
22 what other state programs have been presented.

23 That concludes my summary. Thank you.

24 HEARING OFFICER DESHARNAIS: Are there any

1 questions for the Agency specifically related to the
2 issue of risk levels? Miss Rosen?

3 MS. ROSEN: Yes, this goes to Mr. King's
4 first point. Assume that through the use of Tier 1
5 and Tier 2 I have only one constituent and one pathway
6 which remains to be addressed, in terms of
7 constituents to be addressed, pathways to be
8 addressed, consideration to contaminants which have
9 been addressed under Tier 1 and Tier 2. What will the
10 scope of my Tier 3 assessment be?

11 DR. HORNSHAW: If that situation holds at a
12 site, what we would expect would be done would be a
13 focused risk assessment on the one pathway that still
14 is of concern. That document would look at
15 site-specific factors, take into account whatever is
16 appropriate for that site, whether that be concerns of
17 by availability or reduced exposure potential,
18 whatever is appropriate for the site, develop that
19 pathway so that you know what the risk is from that
20 pathway.

21 And then at the end of the submission to the
22 Agency we would probably expect that you would go back
23 into whatever chemicals had been eliminated earlier
24 and make sure that some of the risks from all the

1 chemicals in that pathway are still within the
2 acceptable range, not exceeding ten to the minus
3 fourth for example, that would be a simple paragraph
4 or two discussing what had already gone before, plus
5 what was the outcome of the risk assessment for that
6 pathway.

7 And then we would probably say yes, the risk is
8 acceptable, and even -- and the site doesn't require
9 further remediation or whatever. If it truly does
10 come out to be ten to the minus fourth something may
11 need to be done.

12 But that's what I -- would be an appropriate way
13 of developing the risk assessment for that one
14 additional path or one remaining pathway.

15 MS. ROSEN: And then the data that I would
16 utilize in this document is -- it would have
17 previously been generated in my site investigation at
18 that stage and development of my remediation
19 objectives?

20 DR. HORNSHAW: Certainly.

21 MS. ROSEN: Thank you.

22 HEARING OFFICER DESHARNAIS: Are there any
23 additional questions on the issue of risk level? Mr.
24 Rieser?

1 MR. RIESER: No, no questions, thank you.

2 HEARING OFFICER DESHARNAIS: Are there any
3 other questions?

4 MR. WATSON: Could I ask one question?

5 HEARING OFFICER DESHARNAIS: Mr. Watson.

6 MR. WATSON: In the hypothetical that was
7 presented, how would issues of cost of remediation be
8 considered as part of that process? I mean say --

9 DR. HORNSHAW: The issues of cost
10 effectiveness would be just one of the many issues
11 that could be -- maybe should be addressed in the
12 focused risk assessment. If the cumulative risk is
13 greater than ten to the minus sixth and the
14 remediation technology that would -- is available or
15 may not even be available to reduce the contamination
16 to below ten to the minus sixth level would be
17 exceedingly expensive and not worth the overall effort
18 given site-specific conditions, you know, maybe only a
19 few people are exposed to the risks and there would be
20 great cost of bringing that down, that would be
21 something that would be put into a section of the
22 focused risk assessment and discussed as one of the
23 reasons why the remaining risk above ten to the minus
24 sixth should be acceptable to the Agency.

1 MR. WATSON: Does the Agency have any
2 guidelines under how they would determine whether a
3 cost would be, quote, exceedingly expensive?

4 HEARING OFFICER DESHARNAIS: Mr. Eastep?

5 MR. EASTEP: If a private party were doing
6 that we typically don't say through the site
7 remediation program, we don't typically pay very close
8 attention to the costs, because most of time they
9 don't tell us what the cost is.

10 If the State was conducting a remediation and
11 using T.A.C.O. to develop our objectives, then we
12 would probably generally follow USEPA guidelines that
13 they would use for how they develop feasibility
14 studies. I don't think we'd follow them exactly,
15 because they're not NPL sites, but typically we would
16 tend to follow the guidelines USEPA's established.

17 MR. WATSON: So if a private party is
18 conducting a remediation, are you saying that costs
19 would not be a consideration?

20 MR. EASTEP: I think if somebody wanted to
21 come in and make an argument, we would probably sit
22 down and listen to them. But most of the time we
23 don't know what the private party costs are, they
24 don't tell us.

1 MR. WATSON: But I guess -- what I think
2 we've talked about a fair amount in these hearings has
3 been the fact that a lot of these sites are going to
4 be the small sites where you have the conditions that
5 Miss Rosen talked about in her hypothetical, and
6 you're going to have a -- you know, maybe there's a
7 remediation cost, you're going to get your risk number
8 of ten to the minus fifth, and you're going to be able
9 to say that well, for a hundred thousand dollars we
10 can get to ten to the minus sixth. And I guess the
11 question that I have is, you know, how is that going
12 to be handled from a consideration standpoint with the
13 Agency?

14 MR. EASTEP: And I'm saying right now we
15 don't see that information. We don't have any
16 institutional experience so to speak dealing with that
17 type of situation on site remediations. I'm not sure
18 that I'm charged under the Act with using that to make
19 a decision. Although like I say, if somebody came in
20 and made that argument we would certainly listen to
21 them.

22 MR. WATSON: So you would at least consider
23 the economics of remediation in determining whether or
24 not --

1 MR. EASTEP: Only if that was under the Site
2 Remediation Program and it was brought to our
3 attention. I indicated in state funded cleanups we'd
4 look at it more along the lines of how we do a Super
5 Fund evaluation.

6 DR. HORNSHAW: And as I said in my original
7 answer, that's only one of the things that we would
8 look at. You have to look at each site individually,
9 you have to look at short term risk versus long term
10 risk, you have to look at practicality of removing the
11 remaining contamination, a bunch of things, all enter
12 into the final decision. It's not just cost.

13 MR. WATSON: Is it fair from this discussion
14 then that the Agency's position is that there's a
15 presumption that you have to meet ten to the minus
16 sixth unless you show otherwise through this process
17 of consideration?

18 DR. HORNSHAW: That's correct.

19 HEARING OFFICER DESHARNAIS: Mr. Rieser?

20 MR. WATSON: And one more question, and that
21 would be true even if you had the -- even if you had a
22 risk level that fell within the range set forth in the
23 statute of ten to the minus fourth to ten to the minus
24 sixth.

1 DR. HORNSHAW: Correct.

2 MR. O'BRIEN: I'd like to point out though
3 that the way that T.A.C.O. is structured, that we
4 already account for cumulative risks for instance in
5 the soil cleanup, because we're looking at ten to the
6 minus sixth for each constituent. And so that in Tier
7 1 and Tier 2, you -- if you have more than one
8 constituent that's a carcinogen, you're going to be in
9 that range anyway, it's not just one times ten to the
10 minus sixth.

11 HEARING OFFICER DESHARNAIS: Any additional
12 questions, Mr. Watson?

13 MR. WATSON: No, thank you.

14 HEARING OFFICER DESHARNAIS: Mr. Rieser.

15 MR. RIESER: Just to follow up on the cost
16 issue, Mr. Eastep, when you said that people don't
17 usually submit cost data to you, that's because people
18 usually submit a single remediation and ask you to
19 comment on it, whether it's an appropriate remediation
20 plan given site circumstances, correct?

21 MR. EASTEP: That's correct.

22 MR. RIESER: So in the circumstance that
23 we're talking about and that Dr. Hornshaw is talking
24 about, one, a valid way to approach the issue of the

1 change in the target risk is if people did a -- I'm
2 going to use the term feasibility study, but I don't
3 want to imply the full blown feasibility study, but
4 certainly a valuation of different remediation
5 approaches and had cost values associated with that,
6 and if the cost value associated with the remediation
7 approach achieved ten to the minus sixth target risk
8 was astronomical and the remediation that was
9 associated with the target cost of ten to the minus
10 fifth was in more reasonable range, that would be a
11 valid factor for people to present to the Agency?

12 MR. EASTEP: Certainly.

13 MR. RAO: Can I just ask a question relating
14 to what Mr. Rieser was asking just now? Can a cost
15 analysis be -- can it be one of the criteria under
16 Section 742.915 of the formal risk assessment?

17 MR. SHERRILL: 742.915?

18 MR. RAO: Yes, that as Mr. Eastep was saying
19 cost can be one of the factors that can be considered.

20 MR. EASTEP: Part of what I was actually
21 thinking about in the back of my mind, Mr. Rao, was on
22 some it's impractical. You know, I would deal with a
23 lot of situations, my experience under Super Fund you
24 can find some situations where with different

1 feasibilities, they're almost an order of magnitude
2 given in the cost, and that starts looking like
3 impractical considerations.

4 MR. RAO: Earlier Mr. King stated that when
5 it comes to changing the risk levels to have it go
6 through Section 742.915, and if cost was one of the
7 factors that can be considered by the Agency, how is
8 that handled under the proposed requirements?

9 MS. McFAWN: It would seem that you could add
10 it to this list and it would still maybe sometimes be
11 triggering 920, the remediation issue.

12 MR. EASTEP: I think, and part of my answer
13 went to with the experience I've had over the last
14 three years, especially the last year or so, our
15 business has increased dramatically, is that we just
16 don't see this information. This argument doesn't
17 come to us a whole lot, you know. Only peripherally
18 do we hear about it, and a lot of times we don't see
19 budgets and breakdowns, they just don't typically
20 provide that information, which is why it might be a
21 good idea. But one of the reasons why we probably
22 didn't put it in is because we don't -- like I said,
23 we don't have any institutional --

24 MR. RAO: Because the way I see these rules,

1 cost is not, you know, addressed anywhere in the
2 rules.

3 MR. KING: It's not directly addressed in
4 915. It is one of the issues that is -- it's an
5 imbedded factor within the notion of the national
6 recognized methodologies. I mean we're a little
7 concerned with if you just look at this and you add an
8 (h) and it says you have to look at the cost issues,
9 because that may not be necessary in all cases. You
10 know, under (a) the national recognized methodologies,
11 you could proceed along and develop a risk methodology
12 without presenting that cost information. You could
13 if you wanted to, but we didn't want to mandate a case
14 to develop that information.

15 HEARING OFFICER DESHARNAIS: So, Mr. King,
16 where cost would be an issue for the remedial
17 applicant, you're saying that for example under (a)
18 that concept would be imbedded in the nationally
19 recognized methodology?

20 MR. KING: Right.

21 HEARING OFFICER DESHARNAIS: Mr. Rieser.

22 MR. RIESER: Just a real quick question, Mr.
23 King. With respect to 915(a), since we've got it out
24 to that page already, I think your testimony started

1 out with the idea that all of -- you know, any
2 applicable reference or appropriate nationally
3 recognized process for evaluating the risks at the
4 site would be acceptable, and not just the USEPA risk
5 assessment guidance, is that correct?

6 MR. KING: Yeah, that's correct.

7 HEARING OFFICER DESHARNAIS: Mr. Watson.

8 MR. WATSON: I've got one final question, and
9 that is just to follow up on what Mr. Eastep has
10 testified to. It is not the Agency's position, is it,
11 that you would have to show technical an
12 impracticability for costs to be associated -- for
13 costs to be considered as part of the risk assessment
14 process?

15 MR. EASTEP: I don't believe I said that.

16 MR. WATSON: Okay.

17 HEARING OFFICER DESHARNAIS: Any additional
18 questions concerning the risk level?

19 (No response.)

20 HEARING OFFICER DESHARNAIS: Okay, that
21 brings us to the final issue we have to address today
22 which is the -- any questions for the Agency
23 concerning its rebuttal testimony which was delivered
24 yesterday.

1 MR. REOTT: Before we start could I just have
2 a -- procedurally this thing clarified. There was
3 some discussion yesterday after we closed about
4 allowing us to simply make statements essentially to
5 offer rebuttal points without having to go through a
6 questioning process.

7 I think in some instances certain points could be
8 made more effectively just by saying them as opposed
9 to, you know, going through ten questions.

10 HEARING OFFICER DESHARNAIS: We would allow
11 that opportunity after the questioning for the Agency
12 as long as it was not merely repetitive of what had
13 previously been made a part of the record.

14 MR. REOTT: Okay. That's fine.

15 HEARING OFFICER DESHARNAIS: Are there any
16 questions for the Agency?

17 MR. RIESER: Regarding the --

18 HEARING OFFICER DESHARNAIS: Regarding
19 yesterday's rebuttal testimony.

20 MR. RIESER: I just have a couple of
21 questions.

22 MR. WATSON: So should we take it topic by
23 topic, does that make sense?

24 MS. McFAWN: Well, does anyone besides Mr.

1 Rieser have questions?

2 MR. REOTT: I have one for Mr. O'Brien. I
3 don't know what topic he's covering, but mine's on the
4 dissolved metals issue.

5 MR. RIESER: I had one on the first page and
6 one that's not mentioned at all.

7 HEARING OFFICER DESHARNAIS: Okay, I guess we
8 can go through these topic by topic. There are three
9 topics on the first page. Are there any questions
10 concerning those topics? Mr. Rieser.

11 MR. RIESER: Yes, with respect to the topic
12 entitled contaminant source valuation, I want to just
13 underline something I think Mr. King said yesterday
14 with respect to the -- what this is designed to
15 discuss.

16 I think you said yesterday that this was really --
17 and I'm focusing on the first paragraph on the top of
18 page two, if any of the criteria are exceeded and
19 T.A.C.O. cannot be used unless approved by the Agency
20 under Tier 3.

21 It's correct that it's not T.A.C.O. that can't be
22 used, but the preliminary pathway valuation of Subpart
23 C that cannot be used?

24 MR. KING: That's correct.

1 MR. RIESER: Okay, and that's true for that
2 whole discussion which follows then?

3 MR. KING: That's true.

4 MR. RIESER: Okay, thank you.

5 HEARING OFFICER DESHARNAIS: The next topic
6 is listed on page three, are there any questions?

7 MR. WATSON: I have a question on area
8 background. Has the Agency done any analysis on the
9 background numbers that have been generated to
10 determine the financial and economic implications of
11 the establishment of these background levels as it
12 relates to eliminating the use of property for
13 residential purposes?

14 MR. KING: No.

15 MR. WATSON: Okay.

16 HEARING OFFICER DESHARNAIS: Are there any
17 additional questions?

18 (No response.)

19 HEARING OFFICER DESHARNAIS: I believe the
20 next topic is listed on page five of the Agency's
21 filed statement of testimony, Tier 2 data gaps. Are
22 there any questions? Mr. Reott.

23 MR. REOTT: Dr. Hornshaw, for the
24 nonvolatiles that don't have inhalation parameters, it

1 seems from your response that these are actually not
2 an issue, because this pathway is never really going
3 to be the one of concern.

4 But I couldn't find last night anywhere in the
5 proposed regulation where someone could ignore that
6 pathway in Tier 2, for example, and thereby complete
7 their evaluation at the site because they don't have
8 -- they don't have the ability to calculate a value
9 for an inhalation objective.

10 Would the Agency be willing to put in a footnote
11 to the table such that for those parameters where
12 there aren't any inhalation factors because it's not a
13 risk that you don't have to be concerned about that
14 pathway?

15 MR. O'BRIEN: Could you read back the question
16 for us?

17 (The reporter read the requested
18 material.)

19 MR. O'BRIEN: No, I don't think we want to
20 write off a pathway just because there isn't data for
21 a particular compound. If you're talking about that
22 pathway for that compound --

23 MR. REOTT: That's right.

24 MR. O'BRIEN: Yeah, I think that we could

1 clarify that. I mean our concern is that at some
2 point somebody's going to come up with some data, but
3 the NFR letters are issued based upon the information
4 available at the time that they're issued. And --

5 MR. REOTT: Just to clarify, I'm only talking
6 about that compound and that pathway.

7 MR. O'BRIEN: Right, that's what we --

8 MR. REOTT: In the current state of
9 scientific knowledge it appears that these are not an
10 inhalation risk.

11 MR. O'BRIEN: Well, we don't know whether
12 they're a risk or not. But for those in which there's
13 no data, they're still volatile.

14 HEARING OFFICER DESHARNAIS: And if the
15 Agency were to develop that change to the rules, that
16 would be included in Errata Sheet 3?

17 MR. KING: Yeah, that's correct. I think
18 we've had enough -- you know, we were kind of
19 discussing as to how to handle that, and we'll
20 evaluate that further after the close of the hearings.

21 MR. REOTT: It may mean you have to subdivide
22 that group, because in your response you state that
23 the majority of these materials are not volatile.
24 There may be some that are volatile, but for which we

1 just don't have values. Obviously you may want to
2 treat those differently, but I'm just trying to
3 encourage you to solve these problems so that Tier 2
4 becomes available for as many of these chemicals as
5 possible. Because otherwise this is a -- it makes the
6 rule a lot less effective.

7 DR. HORNSHAW: That's already being handled.
8 We've had projects come in this where the Tier 2
9 analysis is done and they use the same footnotes
10 that's in Tier 1, no tox criteria available, and they
11 don't calculate a cleanup value, and then the project
12 goes through not using cleanup values for that pathway
13 and that chemical.

14 MR. REOTT: That's encouraging, but I think
15 right now the rule as written doesn't really say that
16 you're allowed to do that.

17 DR. HORNSHAW: I understand.

18 MS. ROBINSON: I think we'll look at this
19 issue again.

20 HEARING OFFICER DESHARNAIS: Thank you. Any
21 additional questions on Tier 2 data gaps?

22 (No response.)

23 HEARING OFFICER DESHARNAIS: The next topic
24 is risk levels. Is there any further discussion on

1 this issue?

2 (No response.)

3 HEARING OFFICER DESHARNAIS: The next topic
4 is use of variable compliance distances listed on page
5 six of the Agency's prefiled testimony. Are there any
6 questions?

7 (No response.)

8 HEARING OFFICER DESHARNAIS: On page seven,
9 the next topic is restricting use of institutional
10 controls. Are there any questions?

11 (No response.)

12 HEARING OFFICER DESHARNAIS: The next topic
13 is zoning as an institutional control. Are there any
14 questions?

15 (No response.)

16 HEARING OFFICER DESHARNAIS: Are there any
17 remaining questions? Mr. Rieser.

18 MR. RIESER: I have a question on something
19 that wasn't addressed in this if I may. Although Dr.
20 Ball wasn't here to testify, and his testimony is not
21 of record yet, the Agency received it and had no
22 comments or questions on it.

23 Dr. Ball in his testimony discussed primarily
24 Section 742.225 and recommended that a change be made

1 to the description of one of the documents
2 incorporated by reference, the test methods for
3 evaluating solid waste physical chemical methods, and
4 he suggested adding field methods which would be USEPA
5 publication numbers SW-846.

6 Does the Agency have a reaction to that proposal?

7 MR. O'BRIEN: Yeah, I looked it up. The
8 bibliographic reference cited in our proposal is
9 correct, in that in the SW-846 test methods there are
10 two parts and there's like five or six volumes. Part
11 one is called laboratory methods and part two is
12 called field methods.

13 The citation that we have is intended to cover
14 both part one and part two. There's not -- from a
15 bibliographic sense there's not a need to have the
16 separate citation or to add something to the citation
17 that's there, and in fact it might be confusing as it
18 might be construed as not including the laboratory
19 methods.

20 MR. RIESER: I see. So the citation to the
21 SW-846 was intended to include the part of it in
22 addition to do with field methods?

23 MR. O'BRIEN: That's correct.

24 MR. RIESER: And the Agency would have no

1 objection to people using the field methods,
2 methodology drawn from the field methods section of
3 SW-846 to design sampling protocols under 225?

4 MR. O'BRIEN: The Agency encourages it.

5 MR. RIESER: Thank you.

6 HEARING OFFICER DESHARNAIS: Are there any
7 additional questions for the Agency? Mr. Reott.

8 MR. REOTT: One for Jim O'Brien. On the
9 filtered/unfiltered issue for groundwater sampling,
10 you indicated yesterday that there might be
11 circumstances where the samples are so turbid that you
12 should filter them before you do the analysis and then
13 compare your results to the values.

14 There is in the federal drinking water program a
15 standard for turbidity that tries to measure what's a
16 palatable turbidity and what's not, which is 5 NTU's.

17 Would you be willing to consider that as an
18 objective test so that we can write a rule that tells
19 people when they should filter and when they should
20 not so that it's easier and more predictable to
21 implement?

22 MR. O'BRIEN: I know the 5 NTU's is meant for
23 public water supply and where there's a question of
24 public acceptable and the public water supply.

1 Private well users may be satisfied with a little bit
2 more turbid water. I don't know, I haven't looked
3 into it. That's why we're a little bit reluctant to
4 try to write a very specific rule and we'd like to
5 kind of look at each situation and each program to
6 determine what would be the appropriate procedure to
7 use.

8 MR. REOTT: Thank you.

9 HEARING OFFICER DESHARNAIS: Mr. Watson.

10 MR. WATSON: I have a question on the pH
11 specific soil remediation objectives, page eight and
12 nine of the response. And the question that I have is
13 could the Agency explain to me the source of the data
14 that they relied upon in concluding that, you know,
15 that showing the percentages of Illinois soils that
16 are above the pH ranges indicated in the pH tables?
17 Where did that come from?

18 MR. O'BRIEN: Where in my written testimony
19 I've referred to the U.S.D.A. National Resource
20 Conservation Service?

21 MR. WATSON: Right.

22 MR. O'BRIEN: They're from a database known
23 as the map unit interpretation records. If you'd like
24 a contact name and a phone number I'd be happy to

1 provide that.

2 MR. WATSON: Okay. Is it your understanding
3 that that covers all of the soils in Illinois?

4 MR. O'BRIEN: It's my understanding that the
5 database reflects 34,000 -- 34,045,960 acres which I
6 calculate to be roughly 75 percent of the state land
7 area. And the notation it says it includes nonsoil
8 areas, so I don't know what they really meant by that,
9 but it apparently includes -- I'm sorry, 95 percent of
10 the state land area. And so apparently that includes
11 some areas that are not agricultural, too.

12 MR. WATSON: But what's the purpose of the
13 map? I mean it has an agricultural purpose, is that
14 correct?

15 MR. O'BRIEN: That's correct.

16 MR. WATSON: Do you have an understanding as
17 to whether or not the five percent of lands that were
18 excluded from this are fundamentally
19 industrial/commercial properties, or would be at least
20 properties found in urban areas of the state?

21 MR. O'BRIEN: My supposition is that they
22 probably wouldn't have measured nonagricultural areas.

23 MR. WATSON: So this would not really provide
24 any real guidance in terms of what the pH levels are

1 for property found in Cook County for instance?

2 MR. O'BRIEN: Well, I guess it -- what it
3 provides is background information on what natural
4 background soil pH's would be around the state.

5 MR. WATSON: Do you know whether it has any
6 information regarding the pH value in fill materials
7 that would be -- that are used in --

8 MR. O'BRIEN: No, I don't know whether it
9 would include that. My supposition would be that it
10 probably wouldn't reflect very much of that.

11 MR. WATSON: And my final question I think on
12 this, is there a typographical error in here in terms
13 of the -- it talks about pH ranges at the surface and
14 then subsurface, i.e. below 60 inches in depth. Is
15 that above 60 inches? Do you know?

16 MR. O'BRIEN: No, the subsurface, that's the
17 modified subsurface, so that was a pH that was taken
18 at subsurface soils which are below 60 inches in
19 depth.

20 MR. WATSON: So this -- the facts or the
21 numbers that you're talking about here address pH at
22 the surface and then pH below five feet, is that
23 correct?

24 MR. O'BRIEN: Right.

1 MR. WATSON: So do we have -- is there
2 information available regarding the pH of soils
3 between the surface and five foot level?

4 MR. O'BRIEN: Well, that's what the -- I'm
5 assuming that's what the surface soil pH addresses.

6 MR. WATSON: Okay.

7 MR. WATSON: That's all I've got on that.

8 I have one more question on the area background
9 issue. What would the Agency do if someone came to
10 them and showed them results of samples in a
11 residential community that exceeded the background
12 levels for arsenic.

13 MR. SHERRILL: You need to be more specific
14 when you say someone. I mean through which program,
15 what kind of venue are you talking about?

16 MR. WATSON: Well --

17 MR. SHERRILL: Are you talking about a
18 resident of the state, a company or --

19 MR. WATSON: Well, if a citizen came to the
20 State and said there's a -- I have information,
21 sampling data that shows arsenic levels in soils in
22 the condominium development that is currently being
23 constructed right next to my property that exceeds the
24 background levels, and it's my understanding based on

1 my review of the regulations that that means that the
2 residential development is prohibited, and I would
3 like you to take action with respect to that.

4 MR. EASTEP: In general when we get
5 complaints of that nature, what the Agency will do
6 will follow up, and it would depend on the
7 circumstances of the complaint. A lot of times we'd
8 have our field office go out or we may research our
9 files to see if we have any information on that
10 particular site. Given the circumstances, depending
11 upon what we found we can do a number of things.

12 A lot of times in situations, in residential
13 situations our Office of Chemical Safety and our staff
14 will work with the Department of Public Health or
15 perhaps the local county health department to try and
16 ascertain exactly what the situation is and what kind
17 of threat is presented to those persons in that
18 situation.

19 We usually try and -- if it looks like it's an
20 acute public health problem, we try to react as
21 quickly as we can.

22 Sometimes we'll go out and take our own samples.
23 Other times if we have data enough that's there that
24 we feel about -- enough about we can react to that.

1 So a lot of it would depend on the specifics of the
2 complaint.

3 MR. WATSON: That's obviously an extreme
4 example of problem.

5 MR. EASTEP: It might be an extreme example,
6 but it's not a situation that's entirely unusual. We
7 probably respond to several of those a year. I would
8 say half a dozen at least, maybe more.

9 MR. WATSON: But once you have that
10 information, isn't the Agency bound to prohibit the
11 resident -- to either require the remediation of the
12 arsenic to below background levels or --

13 MS. McFAWN: I think, Mr. Watson, now you're
14 getting into questions outside the scope of this
15 hearing. Those are enforcement investigative powers
16 that the Agency would use. It doesn't really have
17 anything to do with T.A.C.O.

18 MR. WATSON: Okay. I mean I guess I would
19 just say that with respect to the issue of background,
20 the distinction that's drawn between this program and
21 other programs is the final step, and that is that
22 this state has stated in the proposed regulations that
23 if you exceed the background concentrations you cannot
24 use that property for residential development

1 purposes. And I think that's an important issue for
2 people to understand as part of these regulations is
3 what are the implications for existing residential
4 property owners as it relates to the identification of
5 contaminants at their site.

6 MS. McFAWN: Well, you and I might disagree
7 on the purpose of T.A.C.O. And if you'd like to ask
8 the Agency a question as to if that is one of the
9 purposes of T.A.C.O., so that they are putting into an
10 enforcement mode you might ask that question instead.
11 Did you want to ask that?

12 MR. WATSON: No.

13 HEARING OFFICER DESHARNAIS: Are there any
14 other questions for the Agency?

15 (No response.)

16 HEARING OFFICER DESHARNAIS: Okay, we're
17 going to take a five minute break.

18 (A recess was taken.)

19 HEARING OFFICER DESHARNAIS: If we could go
20 back on the record, Mr. Reott has indicated that he
21 wants to make a final statement.

22 MR. REOTT: This is to deal with a couple
23 things that came up during the Agency's rebuttal
24 testimony and just, you know, to do sort of quick

1 highlighting of some points.

2 On the toxicity criteria that are currently in
3 Section 305, as prerequisites to use pathway
4 exclusion, I just wanted to point out that the
5 examples that Mr. Sherrill has tendered for why those
6 are appropriate all relate to the inhalation or
7 injection pathways. None of them relate to risk to
8 groundwater pathway.

9 So I think that if they're retained in the rule
10 they would be more appropriately placed in 310 or 315
11 rather than 305 where they also operate as a
12 restriction on the groundwater pathway.

13 And the only connection to the groundwater pathway
14 is the assertion that somehow these restrictions of pH
15 reactivity and toxicity affect the modeling. I still
16 cannot see in any citation where that's the case, and
17 I don't believe that is actually the case. I don't
18 think it affects any of the substance of the modeling.

19 On the risk point, Mr. King testified about the --
20 you know, my issue about how workers have certain
21 rights versus their employers, and that that may
22 provide a justification for a different risk level in
23 industrial/commercial scenario.

24 The issue isn't simply that they may have adverse

1 rights against their employees, as Mr. King testified.
2 It's that there are other regulatory programs that
3 operate to reduce risk to those people, and
4 particularly OSHA programs. So that there are other
5 avenues for them to be protected from certain types of
6 risk and exposures.

7 In dealing with the variable compliance distances
8 in the table that I had tendered, my notes don't
9 reflect who was speaking, but I think it was Dr.
10 Hornshaw said that the table that I had tendered in
11 some respects is more stringent than the Tier 1 table
12 the Agency has tendered based on the SSL's.

13 I don't see that as a flaw. The model generates
14 whatever it generates. I'm not here just to argue for
15 less stringency, I'm here to argue for the utility of
16 using the ASTM model Tier 1, and if it turns out
17 numbers that are more stringent because the distances
18 are very close, because that is simply what it does,
19 and that's what we have to look for. It does turn out
20 less stringent numbers when you have longer distances
21 to the point of exposure though.

22 And if there's a difference, if an applicant faces
23 the two tables in Tier 1, just as they based the two
24 models in Tier 2, they can choose whichever one they

1 wish as their ultimate remediation objective.

2 On two different points, and really the response
3 would be the same, zoning is an institutional control
4 on conservation properties, an institutional control.
5 The Agency's problem seems to be that they can
6 conceive of hypotheticals where this might not work,
7 that particular zoning ordinances might not work as an
8 institutional control. That in some circumstances
9 conservation property designation may not work.

10 I think you ought to look at it from the other
11 perspective, which is that leave the burden on the
12 applicant to show that it does work in a given
13 circumstance, but leave that possibility in the rule.
14 Because there's really no conventional difference
15 between a zoning ordinance that does prohibit
16 residential use and a zoning ordinance that prohibits
17 groundwater usage. They're both examples of the
18 municipalities or the local government operating to
19 eliminate a particular pathway or a particular
20 exposure scenario.

21 In the discussion of the relationship between pH
22 and soil remediation objectives there was apparently
23 some confusion about my testimony. And Mr. O'Brien
24 lumped me with Miss Huff in saying that I wanted to

1 extrapolate beyond the pH range in the table.

2 I would not do that. I think that would be
3 affirmatively wrong as a scientific matter.

4 The curves that are reflected in the pH
5 relationships are not traditional curves where they
6 rise and fall in a relatively constant way. As you
7 get beyond the normal pH ranges that are in the tables
8 the Agency's proposed, the curves actually act in some
9 very erratic ways.

10 Some of the curves are bimodal or trimodal. They
11 dip at certain pH's. And I would not extrapolate and
12 I did not suggest that in my testimony I don't
13 believe.

14 My point in my testimony was simply that instead
15 of giving just those compounds, a choice of a leachate
16 based test and total metals test for compliance,
17 because they're pH related, why don't give every metal
18 compound a choice between a leachate based and total
19 metals test.

20 My point was just that I didn't see any reason to
21 limit the availability of a total metals kind of
22 analysis just to those that are affected by pH. The
23 ones that are unaffected by pH ought to have the same
24 option.

1 On the topic of using the TCLP test versus method
2 1312, I just want to make it clear that the Board is
3 aware that, you know, as with TCLP, method 1312 is
4 widely available. This is the standard USEPA test,
5 it's run by any lab of any quality at all. It's an
6 inexpensive test. I actually think it's less
7 expensive than TCLP. And that it is designed
8 specifically to mimic acid rain as opposed to taking a
9 test that really wasn't designed for that purpose.

10 And lastly on the area background point, I think
11 the Board needs to focus on the statutory language
12 which has two factors in it which have sometimes been
13 overlooked I think in particularly Errata Number 2 and
14 some other places in the Agency's testimony. Area
15 background applies unless the source is solely from
16 the site, and the word solely is a very important word
17 that has a lot of emphasis I think in the way it was
18 constructed.

19 Also area background applies even to manmade
20 conditions like the slag we were discussing this
21 morning. So the fact that there's ubiquitous slag
22 over a wide area doesn't mean that it is not area
23 background. And if it didn't come from the site
24 that's actually under consideration, then I think it

1 does quality for area background.

2 Thank you very much.

3 MS. McFAWN: Before you leave us, Mr. Reott.

4 MR. REOTT: Sorry.

5 MS. McFAWN: Does anyone have any questions?

6 MS. ROBINSON: No questions.

7 MS. McFAWN: Thank you.

8 HEARING OFFICER DESHARNAIS: All right. Mr.
9 Reott was the only one who indicated he had a final
10 statement.

11 MS. McFAWN: We had a final question of the
12 Agency. I think it's a final question. We have been
13 reviewing T.A.C.O. in relation to the other rule
14 makings, in relation to the SRP program, and also UST.

15 And it's come to our attention that in T.A.C.O.
16 under the institutional controls you spell out the
17 filing deadlines and some other constraints or
18 requirements involving NFR letters.

19 And we're wondering if that needs to be contained
20 in the T.A.C.O. rules, or isn't it sufficient that the
21 requirements that a party must follow using an NFR
22 letter are contained in SRP and UST rules? I'm not
23 suggesting that it should be deleted in its entirety,
24 I'm just saying parts that talk about when to file and

1 other things about it, this would be at 742.1005. I'm
2 wondering if we need paragraphs (c) through (f). You
3 don't have to answer today.

4 MR. KING: I was wondering if we could
5 address that in comments.

6 MS. McFAWN: Any other -- I would appreciate
7 you addressing it in public comments, as would the
8 rest of the Board. And if you see any other glitches
9 similar to what I described where maybe there's some
10 repetition between the programs and you could point us
11 to which program you think it's appropriately spelled
12 out in, we would appreciate that, too, from the Agency
13 as well as any other of the participants.

14 We are going to try to have the rules integrated
15 as much as possible that we're currently entertaining,
16 that would be the UST rules and the Site Remediation
17 Program rules and T.A.C.O.

18 MS. ROBINSON: We can do that.

19 HEARING OFFICER DESHARNAIS: Are there any
20 final questions for the Agency?

21 (No response.)

22 HEARING OFFICER DESHARNAIS: Okay, that
23 brings us to the end of the proceeding. A few
24 housekeeping issues. We're going to accept final

1 comments in this until 35 days from today's date,
2 which would be February 20th, 1997. At that point the
3 record will close, so comments should be submitted
4 before that date.

5 Additionally the transcript from this proceeding
6 will have copies of the prefiled testimony attached.
7 Transcripts are available on the Board's Web page for
8 those who wish to review them in that fashion.
9 However, the prefiled testimony will not be attached
10 to those on the Web site.

11 If you need help in accessing the Board's Web page
12 contact Kevin St. Angel in the Board's Springfield
13 office.

14 That brings us to the close of the proceeding,
15 unless the Agency has any final issues.

16 MS. ROBINSON: I have one question. On the
17 February 20th date, does the mailbox rule apply?

18 HEARING OFFICER DESHARNAIS: Yes.

19 MS. McFAWN: I have a question. Could the
20 Agency by any chance -- you spoke of an Errata Sheet
21 Number 3 as well as possibly providing the Board with
22 a hard copy and hopefully an electronic copy of the
23 rules showing the changes. I wonder if you could get
24 us those like in two weeks or so that those would be

1 available for comments on?

2 MS. ROBINSON: We're going to do our best to
3 get those to you as quickly as possible.

4 MS. McFAWN: Thank you.

5 HEARING OFFICER DESHARNAIS: Thank you all
6 for your participation. That brings us to the close
7 of the proceeding. This hearing is adjourned.

8 (The hearing was adjourned.)

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2) SS
3 COUNTY OF SANGAMON)

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