

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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5 IN THE MATTER OF:

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7 PROPORTIONATE SHARE LIABILITY No. R97-16

8 (35 ILL. ADM. CODE 741) (Rulemaking-Land)

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14 Proceedings held on May 4, 1998 at 10:00 a.m., at

15 the County Building, County Board Chambers, 2nd Floor,

16 200 South Ninth Street, Springfield, Illinois, before

17 the Honorable Cynthia Ervin, Hearing Officer.

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3 Board Member G. Tanner Girard

4 Board Member Kathleen M. Hennessey

5 Board Member Marili McFawn

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24 On behalf of IERG.

25

1 E X H I B I T S

2 NUMBER ENTERED

3 Hearing Exhibits 1 through 6 17

4 Hearing Exhibit 7 67

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1 PROCEEDINGS

2 (May 4, 1998; 10:00 a.m.)

3 HEARING OFFICER ERVIN: Good morning. I am

4 Cynthia Ervin, and I am the Hearing Officer in this

5 proceeding originally entitled, In the Matter of:

6 Proportionate Share Liability, 35 Illinois

7 Administrative Code, Part 741, docketed as R97-016.

8 Present today on behalf of the Illinois Pollution

9 Control Board is presiding Board Member in this

10 rulemaking, Chairman Claire Manning.

11 CHAIRMAN MANNING: Good morning.

12 HEARING OFFICER ERVIN: To her right is Board

13 Member Kathleen Hennessey.

14 BOARD MEMBER HENNESSEY: Good morning.

15 HEARING OFFICER ERVIN: To my immediate left is

16 Board Member Marili McFawn.

17 BOARD MEMBER McFAWN: Good morning.

18 HEARING OFFICER ERVIN: To her left is Board

19 Member Tanner Girard.

20 BOARD MEMBER GIRARD: Good morning.

21 HEARING OFFICER ERVIN: With us also today from

22 the Board is Amy Hoogasian, Chairman Manning's

23 attorney assistant from Chicago; and Chuck King, Board

24 Member McFawn's attorney assistant.

25 As background, on February 2nd, 1998, the Illinois

1 Environmental Protection Agency filed a rulemaking
2 proposal with the Board to add a new Part 741 to the
3 Board's waste disposal regulations. These proposed
4 rules would establish procedures for the
5 implementation of a Proportionate Share Liability
6 scheme established by Public Act 89-443. This
7 amendatory legislation repealed joint and several
8 liability in environmental actions and replaced it
9 with Proportionate Share Liability.

10 In addition to establishing Proportionate Share
11 Liability, Section 58.9 of the Act directed the Board
12 to adopt rules implementing Section 58.9 by December
13 31st, 1997. A statutory deadline was later extended
14 until January 1st, 1999. According to Section 58.9,
15 such rules shall provide criteria for the
16 determination of apportioned responsibility based upon
17 the degree to which a person directly caused or
18 contributed to a release of regulated substances on,
19 in, or under the site identified and addressed in the
20 remedial action; procedures to establish how and when
21 such persons may file a petition for determination of
22 such apportionment; and any other standards or
23 procedures which the Board may adopt.

24 On December 5th, 1996, the Board opened a docket
25 to solicit proposals to assist the Board in the

1 promulgation of rules and procedures implementing the
2 proportionate share provisions of Section 58.9. The
3 proposal filed by the Agency is in response to that
4 request. The purpose of today's hearing is to allow
5 the Agency to present its testimony in support of this
6 proposal and to allow questioning of the Agency.

7 Procedurally, this is how I would like to
8 proceed. We will take the Agency's two pre-filed
9 testimonies as if read and mark each as an exhibit.
10 We will then allow the Agency to present a summary of
11 each testimony. We will then proceed to the pre-filed
12 questions submitted by the Illinois Environmental
13 Regulatory Group and the Illinois Steel Group, and the
14 Chemical Industry Council of Illinois. Following
15 completion of the pre-filed questions we will then
16 open it up for other questions to the Agency.

17 This hearing will be governed by the Board's
18 procedural rules for regulatory proceedings. All
19 information which is relevant and not repetitious or
20 privileged will be admitted. All witnesses will be
21 sworn and subject to cross questioning. Please note
22 that any questions asked by a board member or staff
23 member are intended to help build a complete record
24 and do not express any perceived opinion.

25 Are there any questions regarding the procedure we

1 will be following today?

2 Seeing none, there are two housekeeping matters I
3 would like to get to before we go to the Agency.

4 There are two motions pending before the Board. The
5 first is a motion by the Chemical Industry of Illinois
6 requesting leave to file the testimony of David Rieser
7 which was filed one day after the April 20th deadline
8 for filing pre-filed testimony.

9 Seeing as no prejudice will result, I am granting
10 the motion. This motion is hereby granted.

11 The second motion is also a motion by the Chemical
12 Industry of Illinois requesting leave to file Exhibits
13 A and B to the testimony of Mr. Rieser. These
14 documents were inadvertently not included when the
15 testimony was filed.

16 Again, seeing as no prejudice will result, those
17 motions will be granted.

18 Having ruled on these motions, I will now ask if
19 Chairman Manning or any of the other Board Members
20 would like to make any comments.

21 CHAIRMAN MANNING: Thank you, Madam Hearing
22 Officer. I do. Welcome on behalf of the Board to
23 this very important proceeding.

24 The Board appreciates, first of all, the
25 discussion of all of the participants and the work

1 that has gone into the proposal that the Agency has
2 brought forward to us today. Specifically, I would
3 like to, on behalf of the Board, thank the Agency for
4 coming forward with the proposal. I realize it was a
5 lot of work and a lot of discussion went into it and
6 that sort of thing. The Board is very happy to be in
7 the position of receiving the proposal and being in
8 the position of having all of the input from all of
9 the parties this morning.

10 The Board realizes that there are some very large
11 looming legal issues in this proceeding, and that this
12 proceeding is little different than our normal Board
13 proceeding in that economic issues and technical
14 issues really are not the focus of our discussion or
15 the focus of any burden of the Agency presenting this
16 proposal. But, rather, we really need to make a
17 determination on some serious legal issues and
18 legislative issues.

19 The Board fully intends to develop a full record
20 on those issues and create a dialog with the
21 participants so that we have a full understanding of
22 the proposal and the issues that are before us. I
23 think what we have to do here is do what was
24 envisioned by the legislature in their crafting of the
25 Proportionate Share Liability, and I realize there is

1 a dispute as to what they did, and we have to sort of
2 resolve that to the best of our ability, to the best
3 of the party's ability.

4 I think what we have to do is do really what is
5 right for the State of Illinois and what is workable
6 for the environmental remediation process and how all
7 of you relate to that process. So that is kind of
8 what we are going to be doing in these proceedings.

9 We welcome all of you here, and we welcome an
10 interchange toward those ends. Thank you.

11 Does anybody else have anything they wanted to
12 say? Marili? Tanner?

13 BOARD MEMBER McFAWN: No thank you.

14 BOARD MEMBER GIRARD: No.

15 HEARING OFFICER ERVIN: Mr. Wight, would you like
16 to make an opening statement?

17 MR. WIGHT: Yes, I would.

18 Thank you and good morning. My name is Mark
19 Wight. I am Assistant Counsel with the Illinois
20 Environmental Protection Agency. With me today are
21 four witnesses, three from the Bureau of Land and one
22 from the Division of Legal Counsel.

23 On my immediate right we have Gary King from the
24 Bureau of Land. He is the manager of the Division of
25 Remediation Management.

1 Behind me, in the blue shirt, is Larry Eastep who
2 is the manager of the Remedial Project Management
3 Section in the Bureau of Land.

4 To my immediate left is John Sherrill who is a
5 Unit Supervisor under the Remedial Project Management
6 Section.

7 From the Division of Legal Counsel, behind me, is
8 Bill Ingersoll who is Associate Counsel in the
9 Division of Legal Counsel and manages an enforcement
10 unit for the Bureau of Land.

11 Also with us today is Vicky VonLanken who is a
12 legal assistant. Vicky is helping with document
13 distribution and providing other support as
14 necessary.

15 We are here to explain our proposal for the
16 implementation of Proportionate Share Liability as
17 passed by the legislature in 1995. Just to summarize
18 how we will be approaching our testimony, two of our
19 witnesses submitted pre-filed testimony, and those two
20 witnesses will be speaking today. We will changeup
21 the order a little bit in that Gary King will be
22 starting and providing some introductory remarks as
23 well as some background on the negotiation and
24 regulatory development as it has taken place over the
25 last year.

1 We will then switch to John Sherrill who will talk
2 a little bit about the 4(q) process, the Agency notice
3 process, and how that has worked over the years, and
4 the types of sites and how they are likely to find
5 their way into a proportionate share proceeding.

6 Then we will switch back to Gary King. Gary will
7 then go into more detail on a section-by-section
8 approach to the proposal explaining how the proposal
9 works and spending a little bit more time with some of
10 the more key positions of the proposal.

11 Then we will return to John Sherrill for some
12 brief remarks about the allocation factors. Following
13 that, we will be done with our presentation and then
14 we will be ready for the questions.

15 I think that the testimony today will demonstrate
16 several important points about the Agency's proposal
17 including the following: The proposal is entirely
18 consistent with Title 17 and Section 58.9 of the Act.
19 The proposal anticipates some of the difficulties of
20 proportionate share allocation, such as information
21 collection and dealing with indivisible harms, and
22 provides tools to help address those difficulties.

23 The proposal makes good economic policy or is good
24 economic policy because it supports Brownfields
25 redevelopment by eliminating liability for persons who

1 have not caused or contributed in some way to
2 contamination problems.

3 And, finally, the proposal also is good public
4 policy because within the proportionate share context,
5 it attempts to maximize the multiplier affect on the
6 public resources available for remediation. It is a
7 good proposal. It deserves full consideration by the
8 Board and adoption of all of its key elements.

9 Last, but not least, I would like to thank the
10 members of the Site Remediation Advisory Committee,
11 the Attorney General's office, and the other
12 participants who have been involved in this for
13 approximately the last year.

14 We haven't or were not able to reach an agreement
15 on all of the key elements of the proposal. However,
16 a lot of people have given a lot of thought to this
17 and they have worked long and hard, and I am sure that
18 they all will contribute to a full hearing and
19 discussion of the issues today.

20 With that, we would be ready to swear in the
21 witnesses and introduce the exhibits.

22 HEARING OFFICER ERVIN: Thank you. Just to
23 clarify, the two witnesses will be testifying, but all
24 four members will be ready to answer questions in the
25 panel?

1 MR. WIGHT: That's correct.

2 HEARING OFFICER ERVIN: All right. Would the
3 court reporter then please swear in the witnesses.

4 (Whereupon Gary King, John Sherrill, Larry Eastep
5 and Bill Ingersoll were sworn by the Notary
6 Public).

7 MR. WIGHT: We have six exhibits here. We will be
8 starting with the introduction of the photographic
9 exhibits because those were marked as pre-filed
10 submittals so, therefore, I think it will be
11 consistent and a little less confusing if we stay with
12 the numbers as we have previously marked them rather
13 than change them.

14 Our first exhibit actually encompasses two of the
15 photographs. They have been marked Exhibit Number 1
16 on the left and Exhibit Number 2 on the right. So I
17 will be handing this one panel to John for
18 identification of both exhibits.

19 John, would you please take a look at the photo on
20 your left marked Exhibit 1 for identification.

21 (Witness complied.)

22 MR. WIGHT: Do you recognize the photo?

23 MR. SHERRILL: Yes.

24 MR. WIGHT: Would you please explain what that
25 photo is?

1 MR. SHERRILL: It is a photograph that the Agency
2 took on November 6, 1985, at a case example that I
3 will be discussing today, the Steagall Landfill.

4 MR. WIGHT: Okay. The photograph on the right
5 marked Exhibit 2 for identification, would you please
6 take a look at that.

7 (Witness complied.)

8 MR. WIGHT: Do you recognize it?

9 MR. SHERRILL: Yes, this also is a photograph
10 taken on November 6, 1985, at the Steagall Landfill as
11 well. It is a picture of some hogs.

12 MR. WIGHT: Okay. Thank you very much. Next we
13 have marked as Exhibit 3 for identification an
14 enlarged photograph. Would you please take a look at
15 that?

16 (Witness complied.)

17 MR. WIGHT: Do you recognize that photo?

18 MR. SHERRILL: This was a photograph collected by
19 Agency personnel at another case example that I will
20 be giving today. It is a picture of open refuse,
21 uncovered landfill. And it was taken in August of
22 1996.

23 MR. WIGHT: And is this enlargement identical with
24 the versions that were submitted along with your
25 pre-filed testimony to the Board?

1 MR. SHERRILL: Yes, this is the same picture. It
2 has just been enlarged.

3 MR. WIGHT: Okay. Finally, another enlarged
4 photograph marked Exhibit 4 for identification. Would
5 you please take a look at that?

6 (Witness complied.)

7 MR. WIGHT: Do you recognize that photo?

8 MR. SHERRILL: This is a picture of this Logan
9 Landfill after an Agency directed remedial action. It
10 is an after picture. The other one was before
11 remedial action.

12 MR. WIGHT: By "the other one," you mean Exhibit
13 3?

14 MR. SHERRILL: Exhibit 3, yes. This picture was
15 also taken by Agency personnel in September of 1997.

16 MR. WIGHT: Is the enlargement identical with the
17 smaller version that was submitted to the Board along
18 with the pre-filed testimony?

19 MR. SHERRILL: Yes.

20 MR. WIGHT: Okay. Thank you very much.

21 There are two additional documents that we also
22 would like to take the time to identify. Marked as
23 Exhibit 5 is the testimony of Gary King.

24 Mr. King, would you please take a look at this
25 document?

1 (Witness complied.)

2 MR. WIGHT: Do you recognize the document?

3 MR. GARY KING: Yes, I do.

4 MR. WIGHT: Would you explain for us what it is,
5 please?

6 MR. GARY KING: This is a photocopy of the written
7 testimony that I submitted for purposes of this
8 proceeding.

9 MR. WIGHT: This document is a true and correct
10 copy of that testimony?

11 MR. GARY KING: Yes, I believe so.

12 MR. WIGHT: Okay. Thank you.

13 Mr. Sherrill, I am handing you a document marked
14 Exhibit 6 for identification. Would you please take a
15 look at that document?

16 (Witness complied.)

17 MR. WIGHT: Do you recognize the document?

18 MR. SHERRILL: Yes, this is a photocopy of the
19 written testimony that I submitted to the Board.

20 MR. WIGHT: This is identical to the testimony as
21 pre-filed with the Board?

22 MR. SHERRILL: Yes, I believe so.

23 MR. WIGHT: Okay. Thank you very much.

24 At this time I would move to have Exhibits 1
25 through 5 admitted into the record.

1 HEARING OFFICER ERVIN: 1 through 6.

2 MR. WIGHT: 1 through 6. Excuse me. We would
3 like to use the photographs in our presentation.

4 HEARING OFFICER ERVIN: Are there any objections
5 to the admittance of these exhibits?

6 Seeing none, these six exhibits will be entered
7 into the record.

8 (Whereupon said documents were entered into
9 evidence as Hearing Exhibits 1 through 6 as of
10 this date.)

11 MR. WIGHT: Okay. I think with that we are ready
12 to begin our presentation. Again, Mr. King will
13 start. We will then switch to Mr. Sherrill for some
14 remarks about the 4(q) process, and then back to Mr.
15 King, and then close with Mr. Sherrill. So if you are
16 ready to begin we are.

17 HEARING OFFICER ERVIN: All right. Please
18 proceed.

19 MR. GARY KING: Okay.

20 MR. WIGHT: Excuse me. I am sorry. Before we
21 start, do you all have copies of the testimony and the
22 photographs? I have additional copies if you need
23 them. Okay. And for all of you who are watching
24 today, we have copies of all of our documents on the
25 back table, so feel free to help yourselves.

1 MR. GARY KING: Thank you. My name is Gary King,
2 and I am manager, as Mark was saying, of the Division
3 of Remediation Management within the Bureau of Land.
4 I have testified before the Board on a number of other
5 occasions including the other proceedings we have had
6 related to Title 17.

7 What I wanted to do is start off by -- we are
8 going to take some time to go through our proposal
9 this morning. I have committed that I am not going to
10 read word for word, and John is not going to read word
11 for word. But we wanted to take -- rather than do a
12 short summary, we wanted to spend some time talking
13 about the proposal and talking about what kind of the
14 history has been and some of the case studies.

15 One of the reasons why we wanted to do this is
16 because I don't think -- as far as I can recall, I
17 don't think the Agency has ever had an opportunity to
18 sit down in a formal proceeding and really go through
19 what our process is all about for the Board. So we
20 have really taken that occasion, and we think it fits
21 into the context of this proceeding. And hopefully
22 the Board won't find it over lengthy or
23 uninteresting. We felt it was important to provide
24 that background.

25 The legislation that really formed the basis for

1 this proceeding -- of course, it occurred in two
2 parts. There was a piece that was passed and became
3 law on December 15th of 1995, and then there was an
4 amendment that became effective shortly thereafter.
5 It was signed into law on December 21st and then
6 became effective on July 1st of 1996.

7 As I see it, Title 17 is -- both of these were
8 affecting Title 17, of course. Title 17 is a complex
9 piece of legislation. And as we have seen it, it
10 really addresses three distinct sets of issues. The
11 first set of issues which was contained in the rules
12 that are incorporated in Part 742 was a set of rules
13 dealing with the concept of risk based remediation
14 objectives.

15 The second set of rules that was necessitated by
16 Title 17 was a set of rules dealing with how private
17 parties proceeded with site remediation either under a
18 voluntary program or pursuant to State enforcement
19 action. Those were laid out in Part 740 and, of
20 course, the Board adopted those rules.

21 The third set of rules necessitated by Title 17
22 addresses the whole concept of how to apply
23 Proportionate Share Liability to the State Hazardous
24 Substance Cleanup Program as it applies outside of
25 RCRA or LUST or the Federal Superfund sites. That's

1 really the focus of Section 58.9. It is the focus of
2 the proceeding that we have here today.

3 I would note that if you look at the objectives
4 that are set forth in Title 17 as to what kind of the
5 purpose of the title is, the first four of those were
6 addressed with the first two sets of rules. Those
7 were laid out in the first piece of legislation that
8 was passed and became law December 15th, 1995. It is
9 the fifth objective that is really the -- kind of the
10 objective that underlies what 58.9 is about.

11 I will just read that for you just to refresh you
12 about it. It says, these objectives are, and then it
13 goes down to number five, to assure that the resources
14 of the Hazardous Waste Fund are used in a manner that
15 is protective of human health and environment relative
16 to the present and future uses of the site and the
17 surrounding area.

18 And I think that it really is a real strong
19 underpinning within that objective that what we are
20 doing has to be done in a way that is protective of
21 human health and the environment, and has to be in a
22 way that is meaningful relative to the resources of
23 the Hazardous Waste Fund.

24 We have proposed that the PSL rule go into Part
25 741. It seemed to us that was kind of a natural fit

1 between Part 740, which applies to the Site
2 Remediation Program and 742, which is the TACO rules.
3 The rulemaking efforts in this, although it became
4 law back in December of 1995, we really didn't start
5 the rulemaking efforts on this until last May. That,
6 I think, was a result of the Agency being very
7 involved in the TACO and SRP program, and the industry
8 side as well. It really was until we got that process
9 kind of out of the way that we really didn't have the
10 time for anybody to work on the PSL rule.
11 After that we did -- both groups were very
12 active. As I noted in the testimony, we met no less
13 than nine times. Starting last October the Attorney
14 General's office became very closely involved and
15 continued so throughout the fall and winter. And as
16 Mark was saying, we are certainly very appreciative of
17 the efforts of the Attorney General's office and the
18 people from SRAC and the private sector in assisting
19 in putting together a meaningful proposal here.
20 As far as the rulemaking efforts, and the three
21 rulemaking efforts that I have been involved with
22 under Title 17, this was the most difficult. And for
23 me it was probably the most difficult rulemaking I
24 have ever been involved with. And the difficulties
25 don't -- they certainly were not because of the people

1 involved. Sometimes, yes, you get in a situation
2 where there is animosity and that kind of thing. That
3 wasn't the case. I think everybody worked very
4 professionally and with a great deal of consideration
5 on issues and on proposals. And I think the process
6 was very good in that context. It is just that we
7 ended up with critical differences of opinions on some
8 important issues.

9 But what made it very difficult, and I described
10 three important factors in my testimony:

11 First, there is no model for what we are doing.
12 You know, we really don't have anything else in
13 Illinois similar to this. Other states, they have
14 adopted some things related to the PSL rules in their
15 states, but they have not gone very far or very well
16 in some cases. On a national level, we still have all
17 those major efforts to change joint and several
18 liability under the Federal Superfund a few years
19 back. That failed. And joint and several liability
20 still continues to be the national standard, the
21 national liability standard under federal law. And
22 then, finally, we really don't find much in the way of
23 support from the Illinois common laws as to how
24 directly to handle this.

25 The second big issue for us is kind of the limited

1 number of sites to which this rule is even going to
2 apply. It is not like you can take the historical
3 experience and use it in a statistical kind of way.
4 It is much more of an anecdotal kind of approach. To
5 compare this to TACO, with TACO we have got thousands
6 of sites being impacted. With the SRP rule you are
7 talking about hundreds of sites impacted annually.
8 With the PSL rule, you know, we are a finger
9 counting activity. We have issued, as John will go
10 into the statistics on that later -- our use of the
11 4(q) notice process has been fairly infrequent because
12 of funding shortages. The Attorney General, the
13 number of cases that they file on an annual basis, you
14 know, is in the range of five to ten per year on new
15 sites. Even not all of those are really -- on those
16 cleanup or cost recovery cases not all of those would
17 be subject to a proportionate share allocation. So we
18 have to factor all of these things into the context
19 that we are really talking about applying this rule to
20 a limited number of sites. And it has a much more
21 limited history than some of the other concepts that
22 we have dealt with in Title 17.
23 Then, finally, I think for me the most important
24 part as to what made this rule difficult to develop a
25 proposal for, was the difficulties in interpreting

1 what Section 58.9 actually means. As I have stated in
2 my testimony, I found it to be vague and ambiguous.
3 It has internal inconsistencies. It has
4 inconsistencies with other parts of the Environmental
5 Protection Act. It provides just the barest guidance
6 as to what really needs to occur. I don't think the
7 legislative history provides very much help either.

8 But as I have looked at Section 58.9 I have seen
9 four basic principles involved. I have laid those out
10 in my testimony. And I will just go over those
11 briefly.

12 First, where you are talking about cleanup and
13 cost recovery actions, under Title 17 liability is to
14 be based on cause or contribution. That is a definite
15 change from where things were at before.

16 Second, for such cases liability is to be
17 allocated amongst the parties based upon proportionate
18 share. It is not to be a joint and several type of
19 situation.

20 Third, existing delegation and authorization
21 programs that the Agency operates should not be
22 disturbed by what is going on under 58.9.

23 And fourth, the Board has broad discretion to
24 promulgate a workable procedure. This last point I
25 really don't want to -- I can't underestimate that as

1 far as the importance of that for us. We think that
2 it is critical for the Board to see its authority as
3 one of crafting and adopting a workable rule.
4 If the Board thinks it is just supposed to recite
5 the existing words of the statute and not resolve
6 those ambiguities and inconsistencies, you know, then
7 they should just do that and we can be done with it.
8 I don't think it is -- that is not our view of the
9 legislation. That is not our view of the legislative
10 history, that the Board is to have that type of
11 function.
12 There are, of course, several places in the
13 legislative history where the sponsors of the bill
14 were asked questions and they really deferred to the
15 nature of the Board rulemaking to provide answers to
16 that. So it is really fundamental, from our
17 perspective, to view this as the -- to view this
18 process as the Board having one of developing a
19 workable proposal.
20 Now, given all these difficulties for us that have
21 been putting this together has been, and I use the
22 analogy in my testimony of walking a tightrope over a
23 deep chasm. If you interpret the statute too
24 narrowly, that is disaster on one side. But if you
25 interpret it too broadly on the other, you have a

1 disaster on the other side.

2 I will give you a couple of examples. One is the
3 definition of a remedial action. It would be possible
4 to interpret that definition consistent with Section
5 58.9 and consistent with Title 17 in a way that this
6 whole process would apply to almost zero sites. We
7 didn't think that was really what was intended. So we
8 tried to strike a middle ground with that issue. So
9 that is one side, how you can end up with a disaster.

10 On the other side, you can interpret 58.9 so
11 broadly, without any -- without respect to any
12 limitations under the applicability criteria, that it
13 would disrupt all of the Agency's authorization and
14 delegations under RCRA under Subtitle C, D and I.
15 Again, we don't think that is what was really
16 intended.

17 So I was saying that we really have tried to walk
18 a tightrope as far as having a middle ground as far as
19 interpretations between these difficult issues. We
20 think it is the Board's authority and it is the
21 Board's job to kind of fix that tightrope to the other
22 side of the chasm.

23 And we have divided our proposal into three
24 subparts:

25 Subpart A deals with the applicability provisions,

1 definitions, and other general information and
2 procedures.

3 Subpart B, as we will talk about later on, is
4 really the crux of things, as far as we are
5 concerned. And that contains the procedures for
6 determining liability and proportionate share.

7 And then Subpart C is a procedure available to
8 PRPs who are not the subject of a State filed
9 complaint, where they can go in and get a formal
10 determination from the Board.

11 Now, as we have developed this, we have had two
12 real important goals we worked through:

13 One is consistency. We have to be consistent with
14 Section 58.9, Title 17, and the rest of the Act.

15 Then second, in addition to being consistent it
16 has to be workable. It has to be workable for the
17 State, for both the Agency and the Illinois Attorney
18 General, and it has to be workable for responsible
19 parties, both that are private and public. That's
20 what we have really tried to focus on. If we are
21 going to have a rule that is just going to be
22 consistent without resolving those ambiguities and
23 inconsistencies, we really haven't resolved anything.

24 We think -- as Mark was saying, we think our
25 proposal is, in fact, consistent, and we think that

1 the people who are opposed to what we have put
2 together are going to be hard-pressed to find that it
3 is inconsistent with the legislation. I think they
4 are going to be even more hard-pressed to argue that
5 the system that they favor is more favorable to PRPs
6 and is going to be workable for the State, given our
7 legitimate responsibility to effectuate cleanups with
8 the finite resources that protect public health and
9 the environment.

10 In my testimony I put together a brief chart.
11 This is on page 11. It really kind of focuses, and I
12 hope it will focus the Board's attention, that the
13 concerns with cross recovery are not just idle
14 concerns for us. If you look back in the early 1980s
15 when there was a Build Illinois Fund available and
16 there was a Clean Illinois Fund available, cost
17 recovery really did not play a real significant aspect
18 as far as the money that was used to do cleanups. It
19 does now.

20 I just kind of put as an example what happened in
21 1997 as far as the amount of money recovered compared
22 to where we received from other areas. Cost recovery
23 dollars tend to be variable from year-to-year. The
24 Solid Waste Transfer money, fortunately, that is a
25 consistent amount and we should be seeing that 2

1 million dollars a year on a consistent basis.

2 The hazardous waste disposal fees, they have been
3 dropping and have dropped significantly since the
4 early 1990s. And then the payments by voluntary
5 sites, obviously, we can't really use those to do
6 these types of cleanups.

7 What makes these dollars important on the cross
8 recovery aspect, from our perspective, is two things.
9 One, it helps the leverage. It obviously helps the
10 leverage of private dollars to be spent on cleanups.
11 That is a very important factor. And, secondly, there
12 is a -- we can use these dollars multiple times. As
13 we recover dollars we then can spend those same
14 dollars and hopefully recover them again. From our
15 standpoint that tends to cut down on the needs to find
16 other sources of revenue to do cleanups.

17 With that discussion, I guess I would like to --
18 that kind of concludes my general discussion of the
19 background of things. I would like to turn it over to
20 John Sherrill.

21 MR. SHERRILL: Good morning. My name is John
22 Sherrill. I have worked for the Illinois EPA since
23 May of 1992. I have been involved in land
24 environmental issues in the State of Illinois for the
25 past 17 years. I have previously testified before the

1 Board in the Title 17 Rulemaking, the Tiered Approach
2 to Corrective Action Objectives.

3 Today I am testifying on behalf of the Agency in
4 support of the proposed 741 rules. I am going to be
5 providing background information and the framework of
6 the existing Agency's 4(q) notice process. I am going
7 to be -- I will briefly discuss cost recovery, and I
8 am going to briefly discuss two case studies. And
9 then lastly I will discuss allocation factors.

10 I believe this background information is
11 important, because it will show the type of Agency
12 activities that proceed and follow the issuance of a
13 4(q) notice, and it will note the very small number,
14 as Gary King has said, of sites affected by the 4(q)
15 notice and this subsequent 58.9(b) notice of the Act.
16 And it will also explain that the Agency always tries
17 to obtain cooperation from parties before expending
18 State funds for a site or before referring a site to
19 the Illinois Attorney General's office.

20 If you are following in my written testimony, I am
21 going to jump around a little bit here. I am going to
22 go to page nine and just jump to these two case
23 studies, two site examples. The first site example, I
24 am going to be discussing the Steagall Landfill.

25 These examples will demonstrate the difficulty of

1 identifying PRPs prior to taking a State action.
2 It will demonstrate the cost to the State if no
3 viable PRPs are identified, and the frequent
4 unwillingness of PRPs to respond until State resources
5 are committed to a project. Even though there is very
6 few sites that have historically been in this process,
7 this 4(q) notice process, the magnitude of the
8 environmental problem at these sites is traditionally
9 very great.

10 The Steagall site is an 80 acre waste disposal
11 site located near Galesburg, Illinois, in Knox
12 County. It accepted waste from the early 1960s to
13 1975. It was not an Illinois EPA permitted landfill.
14 This site accepted hazardous and nonhazardous waste.
15 A State funded remedial action was performed in 1986,
16 and the investigation determined contamination from
17 the site affected groundwater and surface water.

18 Leachate flowed freely from this landfill onto
19 adjacent properties, and that was the -- attached to
20 my written testimony I had some exhibits. And it is
21 kind of hard to see within these pictures, but this is
22 just leachate flowing from this particular site, in
23 this Exhibit 1 that I have. This Exhibit 2, you know,
24 it is, like, what are hogs doing here in this hearing
25 before the Board again.

1 It wasn't uncommon to see these hogs be completely
2 orange-stained at this particular site. As you can
3 see here, this hog here is drinking leachate from this
4 site. We had two different hogs slaughtered and
5 studied by the U of I for contaminate levels. And it
6 was determined that these hogs, if they were to be fed
7 to the -- as a sole source of food, it would have been
8 an unhealthy situation. As it was, at this farrowing
9 operation that was adjacent to the site, since the hog
10 was being slaughtered and then distributed, per se, to
11 the mass public, there was a lower level of a health
12 risk.

13 So in Gary's office several months ago when we
14 were talking about which sites do we want to show
15 pictures of, it was, like, do we want to show sites
16 with drums or sites with -- you know, because they see
17 as many pictures of these kinds of sites. And the
18 point of bringing these pictures is that we are
19 dealing with sites that do have significant
20 environmental impact, such as this, hogs drinking
21 leachate contaminated water.

22 Also at this site, this -- the leachate was going
23 downstream into what was called Brush Creek and Lake
24 Bracken. This Lake Bracken was a privately owned lake
25 by 140 permanent homes. There was sediment

1 contamination consisting primarily of PNAs and PCBs.
2 PNAs mean polynuclear aromatic hydrocarbons, and PCBs
3 being polychlorinated biphenyls.

4 The Illinois Department of Public Health and the
5 Illinois Department of Conservation had issued
6 warnings about eating catfish from Lake Bracken and
7 coming into contact. And when I say coming into
8 contact, just wading into this creek. So there was
9 health advisories out that you were not even supposed
10 to get into the creek that this leachate eventually
11 flowed into.

12 At Steagall, as is typical of most 4(q) sites,
13 numerous inspections by Agency field inspectors had
14 documented violations for several years prior to the
15 issuance of the initial 4(q) notice. The first 4(q)
16 notice was issued to four PRPs in November of 1985.
17 If was only issued to four because the Agency could
18 only identify four PRPs. The four PRPs were the
19 lessee, the sub-lessee, the site owner, and the City
20 of Galesburg.

21 The PRPs did not perform the investigation and the
22 Agency initiated the State funded investigation. So
23 the first PRP was asking for an investigation. After
24 the issuance of the first 4(q) notice the site
25 operator and a local waste hauler provided information

1 as to the identification of other PRPs. The second
2 4(q) was issued to the original four PRPs and to
3 additional PRPs for what is called a feasibility study
4 and preliminary design. So at this point we had
5 performed an investigation and we were looking into
6 what needed to be done to correct the problem here.
7 A third 4(q) was issued April 7, 1989, for
8 remedial work, and seven additional PRPs were
9 identified. A fourth 4(q) was issued for additional
10 work located at and downstream from this site. And
11 ultimately in the summer of 1990, and still without
12 PRP cooperation, the Agency initiated a State funded
13 remedial activity that included an impermeable cap and
14 it enclosed a creek that ran through this site in a
15 culvert. That way the creek would not be in contact
16 with the leachate anymore. This stopped the flow of
17 additional contamination into Brush Creek and to Lake
18 Bracken. The remedial work was completed during 1991.
19 So the point of this site was even after five
20 years and the identification of 13 PRPs and these
21 multiple 4(q) notices, the State still had to take the
22 lead and conduct the cleanup.
23 In December of 1990, 13 of these PRPs entered into
24 12 separate consent decrees. The State investigation
25 and remedial activities cost approximately 8.8 million

1 at this site, and as Gary King was saying, this was
2 funded primarily by what was known then as Clean
3 Illinois and Build Illinois monies.

4 As a footnote to this site, this was one of our
5 largest sites, instead of -- as far as State funded
6 remedial efforts. So every State funded site we get
7 into is not of this magnitude.

8 Of this approximately 8.8 million that the State
9 had expended, approximately 5.4 million was recovered
10 through these consent decrees during 1991. An
11 additional \$497,000.00 was recovered during 1997. And
12 today long-term remedial efforts include operation of
13 a leachate and collection and treatment system that is
14 being funded by the Hazardous Waste Fund. And the
15 Illinois Attorney General continues to pursue two PRPs
16 who did not enter into consent decrees. Today the
17 State spends about \$90,000.00 a year on this
18 particular site to run this leachate collection
19 system.

20 The most -- so that is one of our case examples.
21 That was one of the, you could say, historical in the
22 mid 1980s up through 1990. It shows that we are still
23 dealing with this site today.

24 Then my other case example is this Logan
25 Landfill. It was the most recent State funded

1 remedial action completed prior to these hearings.
2 This was an inactive 22 acre landfill that had
3 received waste from 1968 until 1992 at which time it
4 was abandoned. The site conditions deteriorated
5 rapidly until refuse was exposed on the land surface.

6 Attached to my written testimony -- I had this
7 picture blown up. It just shows exposed refuse at a
8 landfill. What you don't see at this picture is there
9 is 22 acres of this just open refuse. Landfills, when
10 they are not capped properly, the integrity increases
11 at an increasing rate. So if you don't correct it
12 within the first few years you start getting all kinds
13 of disease, flies, rats, just uncontrollable leachate
14 and so forth.

15 There is a creek that you don't see that is behind
16 this landfill. So here we have exposed refuse at this
17 particular site. These -- this site was permanently
18 corrected during 1997 when we had properly capped the
19 landfill. So this one -- I brought these two
20 pictures. It is kind of like a before and after. So
21 you don't have the exposed refuse. When you don't
22 have the exposed refuse and you put on a proper cap,
23 you don't have the uncontrollable leachate
24 generation.

25 Also, just as a point of reference, if you look in

1 this, the closed landfill type cap, you see this house
2 here in the background, and you can barely see the
3 house. It kind of gets faded out. It is in the back
4 middle here. So the picture was taken from the same
5 reference point. Like I said, you know, I could come
6 in here, and I don't think -- I could come in here and
7 bring all kinds of pictures saying how bad some of
8 these sites are, and these just happen to be the ones
9 that we picked. This ends my two little site
10 examples. But I just wanted to show kind of how bad
11 these sites are.

12 Now I am going to flip back to page two of my
13 testimony, if you are following in my testimony. I am
14 just trying to summarize. I am not going to read word
15 for word, as Gary said. I am on page two now of my
16 written testimony.

17 The 4(q) notice is widely recognized as the, and I
18 will use the term trigger mechanism, utilized by the
19 Illinois EPA before initiating a State funded remedial
20 response. Section 58.9(b) of the Act also contains a
21 notice requirement that the Agency proposes in the
22 Section 741 rules to combine with the 4(q) notice
23 where appropriate.

24 So I am going to be providing this background
25 notice on the 4(q) notice, and the Agency believes

1 that it will be used kind of at the same type of sites
2 that we have traditionally used the 4(q) notice at.
3 To put the numbers of all 4(q) notices in perspective
4 with all releases and remedial actions in Illinois,
5 from 1984 to 1998, from 1984 to 1998, more than 15,000
6 releases from underground storage tanks were
7 reported. That is what we know of as the LUST type
8 rules and the LUST requirements there. During the
9 last 12 years over 1,000 sites have entered the Site
10 Remediation Program or its predecessor also known as
11 the Voluntary Program. And there has been an average
12 of 2,700 reportable releases per year during the last
13 five years. I am talking about the big global picture
14 of all type remedial releases and responses in
15 Illinois.

16 On the other hand, during the last 15 years only
17 85 individual sites have been issued 4(q) notices.
18 And then Attachment 1 of my testimony reflects the
19 number of sites issued a 4(q) notice each year. I am
20 going to reference -- this was kind of a helpful
21 exercise that we had done and then we attached it to
22 this testimony. I am looking now at Attachment 1 to
23 my testimony. You will see it is a chart graph. I
24 will kind of give everybody an opportunity to turn to
25 it. I am going to reference it.

1 So just looking at this, it is called Attachment
2 1, Number of Sites with 4(q) Notices, it says a total
3 of 85 sites. On the left-hand side, number of sites,
4 and as you can see I started in 1984 when we first
5 started issuing 4(q)s. We had two in 1984. We had
6 nine in 1985. In 1986 we had 13. We had 13 in 1986
7 and so forth. As can be seen, the most number of
8 sites in any one year was 16 in 1989. And since 1991
9 the number of sites with a 4(q) is just a handful, as
10 you can see.

11 So I just wanted to -- you know, I was throwing
12 out these numbers of thousands of releases. Well, how
13 many actually receive a 4(q) notice, well, this is how
14 many sites have traditionally received a 4(q) notice
15 up through 1997, just to give that in perspective.

16 As a follow-up, and I think there was some
17 questions that we will be following up on this later
18 on. On these 4(q) notices several of these 4(q)
19 notices in regard to cost recovery, there is also a
20 differentiation between multiple PRPs and single
21 PRPs. So we issue these 4(q) notices also at sites
22 that only have clearly one PRP, and that graph that I
23 have there is reflecting all the Agency 4(q) notices.

24 But still keep in mind that although there is
25 relatively few of these sites that are warranted 4(q),

1 they are some of the worse in terms of health
2 endangerment and environmental damage, because
3 frequently these sites have free product in the
4 groundwater, abandoned drums of waste, known hazardous
5 waste, or open leachate seeps.

6 I am going to talk now -- I am going to kind of
7 change my -- I am on page three of my testimony, but I
8 am going to change the focus now to, like, how do we
9 hear about these sites or, you know, how do we decide
10 which of these sites within Illinois get a 4(q)
11 notice.

12 The decision whether to issue a 4(q) notice is
13 made only after consideration of many factors. These
14 factors include site history, human health risks,
15 ecological concerns, spreading environmental damage,
16 expected benefits to human health and the
17 environment. Secondary, yet important, concerns
18 include expected project costs, competition for Agency
19 resources among other problem sites, and carry-over
20 expenses of other Illinois EPA projects from previous
21 years, and public acceptance of the project.

22 So during the 4(q) decision process several of
23 these factors may be considered simultaneously and
24 many are revisited and revised during the review
25 process. In my written testimony the 4(q) process is

1 presented almost like it is a start to finish. But
2 actually the progression from the Agency evaluation of
3 a site to the actual decision is site-specific and
4 difficult to describe and impossible to flow chart.

5 In other words, I couldn't -- we tried to do it
6 internally and we couldn't. You can't describe how
7 does a site warrant a 4(q) process. There are many
8 factors that go into that decision making.

9 It may be a good point here to say that it is
10 actually the Director of the Illinois EPA that issues
11 the 4(q) notice. It is initiated and there is many
12 factors that are considered from various parties from
13 within the Agency, but it is actually the decision of
14 the Director of the Illinois EPA.

15 This decision process whether to issue a 4(q) to a
16 site may appear to happen in a matter of days. In
17 other words, the Agency finds out about a bad site, do
18 we issue a 4(q) notice. Well, in reality it is
19 usually measured in times of months or years because
20 traditionally we know about a bad site because of all
21 these other factors and other sites. We don't just
22 automatically overnight issue a 4(q) notice.

23 You know, how do we hear about these sites to
24 issue a 4(q). Potential 4(q) sites are initially
25 referred to the Illinois EPA by various sources

1 including local citizens, through reportable releases,
2 other government entities and Agency field
3 inspectors. Once the Agency becomes aware of a
4 problem, the site's owners and operators, if there are
5 any, are contacted to discuss the situation. This
6 contact may clarify any misunderstandings or explain
7 the environmental concern as a non-issue so that no
8 future Agency investigation or response action is
9 required.

10 The Agency may conduct an on-site visual
11 inspection to assess the site and evaluate whether
12 there is an imminent hazard constituting an emergency
13 situation, such as a truck or rail accident, serious
14 spills, and the like. And it was my understanding
15 that Title 17 of the Act nor these proposed 741 rules
16 or TACO really was not designed to address what we
17 would call in the media an emergency response. And,
18 actually, TACO actually states that in 742.105(c).

19 So, you know, when there is a truck accident, an
20 emergency situation, we did not think this process,
21 and when I say this process, the 4(q) where the State
22 would be issuing an -- expending State funds to
23 cleanup a site, we did not think it was really
24 relevant to this type of rulemaking.

25 Emergency situations are generally handled by what

1 is called the Office of Chemical Safety, the Emergency
2 Response Unit, and the ERU oversees the emergency
3 response until the emergency is abated.

4 Getting back to the context of all remedial
5 responses in Illinois, most emergencies are remediated
6 by a PRP in a timely manner and don't warrant a 4(q)
7 notice. So if we read about every day, you know, a
8 truck accident in Chicago, a pipeline type release,
9 PRPs, it is our experience, that they, especially in
10 the 1990s, they respond to those immediately and we
11 don't have these -- the Agency is not even really
12 involved. In other words, the ERU, or Emergency
13 Response Unit, is involved, but as far as the State
14 having to expend funds and go clean up, the
15 responsible party does that.

16 Sites that do not constitute what I would call an
17 emergency still may be considered time critical or
18 immediate. If a site appears to present an immediate
19 risk to human health or the environment and the PRPs
20 are not responding, the Illinois EPA typically refers
21 the site to the U.S. Environmental Protection Agency,
22 Region 5, Emergency Response Branch, for consideration
23 as a time critical removal.

24 The Illinois EPA typically refers 15 to 20 sites
25 per year to the U.S. EPA. It is not unusual that the

1 U.S. EPA will perform only the immediate removal
2 action at a site and then the Illinois EPA is left to
3 perform a planned long-term remedial response.

4 By definition, time critical removals include, but
5 are not limited to, excavating obviously contaminated
6 surficial soils, staging and removing drums, and
7 emptying above ground storage tanks; all with the goal
8 of reducing immediate threats.

9 During the federal fiscal year October 1996
10 through September of 1997, the U.S. EPA spent more
11 than 9.5 million at 11 sites doing these what I call
12 immediate removals in Illinois. This is a substantial
13 asset, I guess you could say, to Illinois' overall
14 environmental health. Because we, and when I say
15 "we," the Illinois EPA and the Hazardous Waste Fund,
16 we don't have the resources to respond to many sites
17 that the U.S. EPA responds to. I am not talking about
18 the Superfund type sites. I am talking about sites
19 that the U.S. EPA does an immediate removal. We call
20 them up on the phone and say, we have discovered a
21 site that has open drums and it is an abandoned site,
22 can you respond to it. So, fortunately, the U.S. EPA
23 has a lot of resources to be able to address many of
24 those.

25 However, I would like to say that that changes

1 from year-to-year. On the bottom of page five of my
2 testimony I have a little case example that the U.S.
3 EPA has been responding to an unusually large incident
4 that involves methyl parathion. Over 500 residences
5 in the Chicago area were sprayed by a termite
6 exterminator, and more than 150 of these homes
7 required a substantial cleanup. The Illinois EPA
8 contributed considerable State personnel resources to
9 this. We didn't really have any funds to provide in
10 this effort.

11 But during this period, and actually, they are
12 still doing some of this cleanup, we were in contact
13 with the U.S. EPA and we have kind of known by them
14 that some of these other sites that we have referred
15 they have put on the back burner. They said we can't
16 respond to it now because they have limited resources
17 and personnel, too. So they have been addressing this
18 one particular, you could call it a site, but it is
19 multiple sites, but this one particular problem for
20 over a year now, and it has kind of put on delay some
21 of these immediate responses that they have
22 traditionally been able to help us with.

23 So if a site is not referred or if it is referred
24 but not completely remediated by the U.S. EPA, the
25 Illinois EPA's assessment, if we believe that it

1 warrants an additional investigation, the site becomes
2 a candidate for a 4(q) notice. The 4(q) is issued as
3 an opportunity for the PRPs to respond and signals a
4 commitment to expend State funds at a site for the
5 purposes of environmental remediation. It also serves
6 as notice to PRPs that the State will seek cost
7 recovery for the expenses of the cleanup.

8 The Agency does not issue 4(q) notices unless it
9 intends to commit State monies to address a site. So
10 that was kind of tying in what I said earlier about
11 when we issue the 4(q), the PRPs know that we are
12 committed to using State funds to address the
13 cleanup. The regulated community and the general
14 public often presume the State has readily available
15 resources to just clean up a site or go sue somebody.
16 That is a typical response we get on the phone. You
17 know, I see contamination, so go sue somebody or go
18 clean it up. I kind of went through this little
19 litany here because to show that it is a process that,
20 you know, that we have limited resources and we will
21 try to get the U.S. EPA to do it and if they can't do
22 it, we try to go after the PRPs.

23 State funded cleanups are administered by the
24 Agency Remedial Project Management Section. These
25 began June 1984 funded by these Clean Illinois monies

1 and later there was additional Build Illinois monies.
2 Both of these funding sources have dried up and State
3 initiated cleanups are now funded through the
4 Hazardous Waste Fund. That is what Gary mentioned
5 earlier.

6 There has to be someone to issue the 4(q) notices
7 to, and identifying the PRPs is usually difficult
8 despite the steps the Agency employs to locate the
9 PRPs. The steps that the Agency employs to identify
10 PRPs includes reviewing company records, manifests,
11 courthouse records, tax records, property titles,
12 Secretary of State records, interviewing former
13 employees, interviewing local neighbors of the sites
14 and reviewing business publications that may list
15 corporate ownership.

16 In other words, we do -- because of our limited
17 resources, we try to -- it is in our best interest to
18 have the PRPs work on the site before we would expend
19 State funds on a site. Included in a 4(q) notice when
20 we actually do issue a 4(q) notice is a section called
21 the identified response. And often, not all the time,
22 but often the 4(q) notice will identify an
23 investigation as the initial response. And on our
24 Steagall Landfill site that I went through earlier
25 that had the open leachate and so forth, our initial

1 response that we were wanting the PRPs to do was to
2 perform an investigation.

3 Even after a site investigation, the Agency must
4 continue to compare the contaminated site competing
5 for other Agency resources and determine if, how, and
6 where to utilize our Hazardous Waste Fund monies and
7 Agency resources. This scarcity of dollars combined
8 with the problems of identifying PRPs creates a
9 situation that limits the Agency's ability to respond
10 but just to a few sites per year. That was depicted
11 in the graph that I was going over earlier.

12 Therefore, it is in the best interest to conserve
13 resources and before issuing a 4(q) notice the Agency
14 does identify, to the extent that it can, all the PRPs
15 with the hope that one or more will respond. If the
16 Agency must proceed, it uses a combination of in-house
17 expertise and contractual technical assistance to
18 develop and conduct the identified response action.
19 And today all of our remediations at this type of
20 sites are consistent with the TACO, so everything is
21 reviewed in the light of TACO today.

22 I am going to jump to page 11 and just briefly
23 talk about the cost recovery. When the Agency
24 utilizes resources, and when I say resources it could
25 mean Hazardous Waste Fund monies or personnel time at

1 a site, the State does seek to recover those
2 resources. When PRPs are requested to reimburse the
3 Hazardous Waste Fund they often ask, you know, what
4 did this money go for. You know, you are coming after
5 me for cost recovery, what did you spend this money
6 for.

7 By far the largest percentage of total site costs
8 are directly attributable to the investigation and
9 cleanup. These include costs incurred by the
10 engineering and corrective action firms contracted by
11 the Agency. In fact, from discussions -- this is
12 anecdotal, but from discussions with several PRPs at
13 some of these sites, the State cleanup efforts are
14 actually very efficient in comparison to cleanups
15 overseen with multiple PRPs.

16 The reason, from what the PRPs tell me, is because
17 we know exactly what we want done at the site and we
18 don't have to have a PRP meeting and clients and
19 consultants and attorneys from all over the United
20 States. We already have a consultant and engineering
21 firm ready to do exactly what the Agency wants. So we
22 are -- it is a quick process there once we know what
23 we want done at a site to do that.

24 Cost recovery has traditionally occurred by one of
25 three methods: Billing, and I mean by that invoices.

1 Litigation, which includes consent orders. And
2 environmental reclamation liens. These three methods
3 may be used in combination. And actually it would be
4 stronger than may be. Traditionally they are used in
5 combination at most sites.

6 We see -- I had a site just the other day, to tell
7 you the truth, that we asked them -- we said, we can
8 either refer this to the Attorney General's office or
9 do you wish us to send you a bill. They said, we
10 prefer you to send us bill. We sent them a bill and
11 they paid it in a couple days. But a lot of times it
12 happens in combination.

13 It is not unusual that the PRPs prefer to pay an
14 Agency invoice. If, however, the PRPs fail to pay,
15 the Agency's Division of Legal Counsel will prepare
16 what is called a Cost Recovery Referral to the
17 Attorney General's office.

18 This ends the first part of my testimony, and I
19 will discuss allocation factors later in these
20 hearings. Thank you.

21 MR. WIGHT: All right. Next we go back to Gary
22 King for a more specific presentation on the proposal
23 itself.

24 MR. GARY KING: I am going to pick up my
25 discussion on the bottom of page 11 going to the top

1 of page 12, and as part of this we will start talking
2 about some of the fundamental issues that really the
3 Board is going to face. Much of the hearing so far, I
4 think, is background for what these issues are all
5 about.

6 Again, the way we have divided 741, there are
7 three subparts. First is Subpart A as the general
8 subpart. Subpart B is the subpart that deals with
9 State initiated complaints. And then Subpart C is the
10 area that deals with proceedings started by a private
11 party where there has not been a State initiated
12 complaint. 741.105(a), that describes how Subpart B,
13 the complaint process is triggered. That is pretty
14 straightforward, I think. Subsection B describes how
15 Subpart C provisions are triggered. The discussion
16 there, I think, is fairly straightforward in the
17 testimony. We won't spend very much time, I think, at
18 all talking about Subpart C, just a few discussion
19 points.

20 Part of that is, I think, when we first started in
21 talking about the whole PSL rule a year ago, SRAC, at
22 least, thought that this was going to be a significant
23 issue. And the more that we got into it I think they
24 understood kind of the nature of our 4(q) process as
25 we described it. They saw that that Subpart C process

1 was really going to be -- involved far fewer sites
2 than they initially thought it would involve.

3 I think Subpart C is going to play a role in only
4 a very tiny number of sites. Actually, we would not
5 even have proposed this Subpart C if it were not for
6 the fact that there is a specific obligation in
7 Section 58.9(d) for the Board to come up with a
8 procedure for private parties to come forward on a
9 voluntary basis to do that.

10 Okay. So subsection A talks about when the
11 Subpart B is invoked. Subsection B talks about when
12 Subsection C is invoked. And then Subsection C limits
13 the applicability for both Subsections B and C. This
14 is kind of the -- this is really the first point of
15 real controversy related to our proposal.

16 We proposed in our rule that the limitations that
17 are set forth in Section 58.1(a)(2) that they applied
18 to when Section 58.9 is applicable. Those four items
19 are listed in my testimony. I will just go over those
20 briefly. This is not a complete statement of what
21 those cover. It is just a summary. One is the sites
22 that are on the NPL list. The second item -- the
23 second one is sites that are subject to RCRA Subtitle
24 C or D. The third one is sites that are subject to
25 RCRA Subtitle I. Then, finally, sites that are under

1 some kind of specific federal court or administrative
2 order from the U.S. EPA.

3 Sites that -- the way we have it proposed is that
4 sites falling within one of those four categories
5 would fall outside of Part 741. We took this approach
6 for a number of reasons. One, we certainly thought it
7 was consistent with the structure of Title 17 of the
8 Act in terms of what sites the -- what sites Title 17
9 was applied to.

10 We had a very strong policy concern relative to
11 this, and in terms of how those RCRA Subtitle C, D,
12 and I programs operate. They are all based on a
13 strict joint and several liability concept. And if we
14 were to impose a liability standard based upon cause
15 or contribution and proportional share requirements,
16 as we proposed here, we believe that that would cause
17 us some difficulties with our authorization approvals
18 from the U.S. EPA.

19 One of the questions we will respond to later on
20 talks about, you know, have you talked to the U.S. EPA
21 about that issue, you know. And to be frank, no, we
22 haven't. We didn't want to raise an issue before
23 there was a final resolution on the matter. We have
24 had some -- a couple of circuit court decisions, a
25 lower court, that really we felt badly misconstrued

1 how Title 17 works.

2 If those, however, don't represent a generally
3 applicable determination, we think the Board's
4 decision here is what is generally applicable for the
5 State. If the Board disagrees with the interpretation
6 that we have announced here relative to the
7 applicability limitations, how they interact with
8 58.9, if the Board disagrees with that as part of the
9 final rule we would certainly take that to the U.S.
10 EPA and inform them of that, and then we would have to
11 go through what will be a horrendous process relative
12 to seeking to get that whole process corrected, at
13 least from our views.

14 Certainly, based on our history of how things have
15 happened in the past, the Board may recall that in
16 1993 there were certain amendments to the Underground
17 Storage Tank Program which were inconsistent with
18 federal law, and we went through a very complex and
19 painful process of having approval withdrawn and then
20 doing steps to get it back and then additional
21 legislation. That all resulted in another rulemaking
22 before the Board. So we have tried to structure
23 things to avoid that problem here for that public
24 policy reason, again, because it is supported by the
25 legislation and its history.

1 Now, SRAC does not -- has not disagreed with that
2 position. However, they have indicated that they
3 think our position is too broadly stated. And we
4 would agree that it would be possible to state the
5 position a little more narrowly than what we have.
6 However, we were concerned going into this proceeding
7 as to where the Board would stand on this issue and we
8 wanted to present what we think is the most direct
9 positive argument relative to the interrelationship
10 between 58.1(a)(2) and 58.9.

11 If there is -- we also were not sure what other
12 parties would be involved in this proceeding as well.
13 If there is a general -- you know, if there is a
14 general consensus that 58.9 is limited by 58.1(a)(2)
15 then it seems to me that it could be appropriate to
16 draw a little more narrow confinement to the way we
17 have structured 741.105(c).

18 The next major issue to be looked at is under
19 741.115. That's the issue of information orders. My
20 discussion on that begins at the bottom of page 16.
21 What we have drafted there is an information order
22 provision that is -- it has taken as its source, as
23 far as the type of language that we have used, we have
24 used the -- we have modeled it based on what is in
25 Section 104(e) of the Federal Superfund Law. We

1 thought it is important to do that, and we have -- we
2 have modeled it on it, but we have not done it in
3 quite the same way that 104(e) works.

4 Under 104(e) the U.S. EPA simply has the authority
5 to issue those orders. We did not conceive that as
6 something that would be appropriate for us to do. We
7 have cast it in terms of that would be an order that
8 would be issued by the Board rather than issued by the
9 Agency. We think that this order process, although
10 there is no -- you can't look at 58.9 and see the
11 words information order in there anywhere, but we
12 think it is clearly consistent with the Board's broad
13 rulemaking authority under Section 58.9, and it is
14 important to assure that there is a workable
15 implementation of that section.

16 As John was saying, in the past we have had -- you
17 know, there has always been difficulties in locating
18 PRPs and creating the proper incentives for people
19 with information to present that information. Even
20 under a joint and several liability concept, it
21 becomes, from our perspective, even more important
22 under principles of Proportionate Share Liability for
23 the State if we are going to assure that there is a
24 complete remediation to identify as many PRPs as we
25 can as soon as the problem site is involved.

1 With the proportional share process, again, there
2 is a reduction in the incentive for -- particularly
3 for somewhat marginal PRPs to come forward. We think
4 it is an important tool to make sure that as much
5 information is generated early on to create the model
6 of what site operations were. That is going to be the
7 best way to make sure that allocations in the long run
8 are fairly performed. It is not a magic answer to the
9 problem of finding and addressing PRPs, but we think
10 it is a modest tool and we think it is consistent with
11 the Board's authority under Section 58.9.

12 Turning to the discussion on Subpart B, my
13 discussion here begins on page 19. As we see it,
14 Subpart B is really the crux of Part 741. It sets
15 forth the cause or contribution requirements that the
16 State must establish to prove liability, and it sets
17 forth the procedures for determining and allocating
18 the proportionate shares of liability where the State
19 has proven that liability exists.

20 It does represent, in our view, a significant
21 departure from the principles of strict joint and
22 several liabilities as they are used under federal
23 law, but we think it also proposes a procedure that is
24 both workable and fair for both complainants and
25 respondents.

1 The first real significant departure from the
2 CERCLA liability system relates to the cause or
3 contribution requirement. One of the things under
4 Federal Superfund Law that I think has really caused a
5 lot of difficulties for a lot of people and has ended
6 up being what I think is the most disruptive element,
7 particularly as to how properties relate to the
8 transaction process, the whole notion of cleaning up
9 and redeveloping Brownfields, is the idea of liability
10 simply based on owner status.

11 Under Federal Superfund Law if you are an owner of
12 a site where there has been a release, regardless of
13 when your ownership occurred relative to that release,
14 you are liable. And that, in my mind, has caused more
15 problems relative to the whole Brownfields
16 redevelopment process than anything else in Superfund
17 Law. I think that is one of the things that the
18 legislature -- in the legislative history they really
19 were -- the legislature was really focused on. You
20 know, we need to make sure that our liability system
21 is not getting in the way of Brownfields
22 redevelopment. I think this is the most important
23 provision relative to that.

24 We have gone away from that CERCLA system.
25 22.2(f)(1) incorporates the same CERCLA liability

1 provision, but in our -- as we have laid out, in 741,
2 Subpart B, we don't have a status based provision for
3 owners and operators. There has to be proof of
4 liability based on actions or inactions or omissions,
5 not just status.

6 The other significant difference under Subpart B
7 is that we do not incorporate joint and several
8 liability. Although some people may think that we
9 have, we don't. The way things work under -- just in
10 a short sort of way, under Superfund Law, in general,
11 if the government establishes liability then the
12 respondent, unless it proves that the harm is
13 divisible is responsible as to the government to
14 perform or pay for the entire remediation.

15 That is not the way we have it structured under
16 our proposal. Under Subpart B, once liability is
17 established, the burden of establishing proportionate
18 share is properly placed on those who have been
19 demonstrated to be liable and there are consequences
20 related to that. But there is not this requirement of
21 proving divisibility. That's a key difference. Under
22 Federal Superfund Law there is a requirement to prove
23 divisibility. Under our proposal there is not.

24 There is another, I think, extreme difference, and
25 that is the notion of -- under our system, and John

1 will talk a little bit more about this later on, is
2 that we have -- we allow the whole process of
3 allocation to be developed using risk based
4 remediation objectives under TACO. I am not aware of
5 anything that remotely resembles that under the
6 Federal CERCLA liability system, perhaps because they
7 don't have anything that even remotely resembles the
8 kind of flexible cleanup objectives process that we
9 have under TACO.

10 Looking at the specifics, I guess focusing on
11 Section 741.210, that sets forth the burden and
12 standard of proof for a State filed complaint under
13 Section 741.105, one of the things that I would point
14 out, because the Board is going to be receiving
15 testimony from Browning & Ferris relative to the
16 liability standard for transporters that we have
17 included in Section 741.210(b)(5).

18 They commented that the version that we have is
19 different from the Federal Superfund Law. We agree
20 that it is different from the Federal Superfund Law.
21 And that is because the version that we put into
22 741.210 is modeled on the language that appears in the
23 Environmental Protection Act which, again, is
24 different from the Superfund Law as to the transporter
25 liability. You know, I think it is really kind of up

1 to the Board as to which one they now include in this
2 proceeding. We simply included the transporter
3 liability provision as it was already set forth in the
4 Environmental Protection Act.

5 As I was saying, under 741.210(b) the burden of
6 proof for the threshold issue of liability is placed
7 on the State. There is a requirement that the State
8 prove their liability by the preponderance of the
9 evidence, and liability is based on the degree to
10 which the PRP caused or contributed to the release or
11 the substantial threat of a release. Again, we have
12 set forth five ways that a person can be held liable.
13 I commented (b)(5), and I am sure as we have questions
14 come up during the hearing process we can comment on
15 some of the other issues as to the cause or
16 contribution elements.

17 Subsection C, what we have done there is we have
18 shifted the burden. We said that you can raise
19 defenses and we have included within those defenses
20 those stated in 58.9, and we have included those
21 stated in 22.2(j). Those are not -- 58.9 does not
22 require Section 22.2(j) defenses to be included within
23 this provision, but we thought that made sense. That
24 made sense to do that.

25 Also, that is a -- as I was saying, that is a

1 shifting of the burden. We consider the provisions in
2 58.9 in Subsection B, there is the -- SRAC has
3 contended that those are limitations as opposed to
4 defenses. We really don't see how -- if those are
5 limitations, in our view those become conditions
6 precedent to our ability to establish liability. That
7 would be certainly inconsistent with the way
8 everything has worked up to this time. And we think
9 if you look at what all those provisions entail, it
10 would require the Agency to introduce proof on a whole
11 series of items that could be very extraneous to what
12 the case is really about. We think that those -- what
13 they contend are limitations really should be viewed
14 as defenses similar to the way that the defenses in
15 22.2(j) are laid out.

16 Subsection D -- and, again, we are still in
17 741.210(b) -- has said that the liability is on the
18 State as far as proving -- the responsibility is on
19 the State to prove liability by a preponderance of the
20 evidence, and Subsection C says here is the defenses
21 to those liability provisions. Now Subsection D deals
22 with what happens once a party's liability has been
23 demonstrated, who has the burden of demonstrating
24 proportionate share. In our proposal we have shifted
25 that burden to the liable party. SRAC does not agree

1 with that.

2 We did that, and I think there is key reasons for
3 doing that. And I think we have cited the Restatement
4 of Torts as providing some of the jurisprudence
5 underpinnings as to why and when you shift the burden
6 of proof as to the allocation issues. We think that
7 discussion makes sense in the context of these cases.
8 It also makes sense in terms of who should have -- who
9 has the information to be brought forward as to what
10 allocation percentages should be involved.

11 That provision carries through, that concept
12 carries through down into Subsection (d)(3) which
13 perhaps is the most controversial point of what we
14 had, and it talks about what happens when there is
15 inadequate information, what is the Board to do in
16 those situations. Under joint liability provisions,
17 where there was liability established and somebody
18 couldn't make any kind of proof as to the allocation,
19 they simply would be assigned 100 percent
20 responsibility. That is not the way we have organized
21 this rule. We will talk a little bit more about how
22 we have organized that later on.

23 But we think it is important that it be organized
24 in that kind of way, first of all, to make sure that
25 we are motivating the production of complete and

1 accurate information. And, secondly, to prevent
2 clearly liable parties from entirely escaping
3 responsibility in cases where there is insufficient
4 information to apportion harm.

5 One of the issues that has been discussed is what
6 happens to the orphan share, you know, who is going to
7 absorb that. Well, we think it is one thing for the
8 State to absorb an orphan share where a party is
9 bankrupt or cannot be found, and we think that is
10 appropriate under this provision for the Agency to
11 absorb that orphan share.

12 It is another thing for the State to be absorbing
13 a share of a party that has been found to be liable,
14 has been found to be viable, and just because the
15 evidence is not conclusive in the State's favor as to
16 what that share should be, we think that goes beyond
17 proportionate share. I am not sure what it is, but it
18 is something beyond it. I think that's the position
19 that SRAC favors and we don't.

20 One of the things that I think the Board will hear
21 argued in the context of this proceeding is that we
22 have had -- what we have is a return to joint and
23 several liability. And we don't think that is true
24 and, actually, I think as we have looked at this issue
25 we think there is more -- perhaps it is our not

1 following through and explaining our proposal enough
2 to persons involved.

3 So really through seeing the testimony and the
4 questions come in over the last week or so we thought
5 it would be appropriate to develop some scenarios that
6 kind of illustrate the approach that we are taking to
7 apportionment and also illustrate how it is different
8 from Federal Superfund Law and illustrate how it is
9 different from what SRAC is proposing.

10 HEARING OFFICER ERVIN: Could I interrupt? Why
11 don't we take a short five or ten minute break to let
12 people stretch their legs, if this is an appropriate
13 time to take a break.

14 MR. WIGHT: Yes, sure.

15 (Whereupon a short recess was taken.)

16 HEARING OFFICER ERVIN: Back on the record.
17 Whenever you are ready. I thank you for the
18 indulgence for the break.

19 MR. WIGHT: Just to pick up where Mr. King left
20 off, he was talking about pre-filed testimony that we
21 received over the last week or ten days, and it
22 becoming apparent to us that part of what we proposed
23 in 741.210 is greatly misunderstood. So we were
24 trying to think of ways that we could illustrate that
25 better than what we have been able to do in narrative

1 testimony.

2 As a result of that, we have put together what we
3 are calling some allocation scenarios. Really, it is
4 just three pages of tables which contain no
5 explanation. But Mr. King will be providing the
6 explanation and then we will be passing out the copies
7 so that everyone will have these once this is admitted
8 as an exhibit, and you can all follow along with the
9 explanation. To start that process I will have Mr.
10 King identify the exhibit.

11 Mr. King, I am handing you a document that has
12 been marked Exhibit 7 for identification. Would you
13 please take a look at it?

14 (Witness complied.)

15 MR. WIGHT: Do you recognize the document?

16 MR. GARY KING: Yes, I do.

17 MR. WIGHT: Would you please explain what it is?

18 MR. GARY KING: It is a document entitled,
19 Allocation Scenarios Illustrating Approaches to
20 Apportionment for Liable Parties.

21 MR. WIGHT: That document consists of three
22 pages?

23 MR. GARY KING: That's correct.

24 MR. WIGHT: Okay. Is that a correct copy of the
25 examples worked up by the work group for presentation

1 at the hearing today?

2 MR. GARY KING: Yes, it is.

3 MR. WIGHT: Okay. This exhibit was not
4 pre-filed. As I said, it was prepared just within the
5 last few days. However, I would request permission to
6 have the exhibit entered into the record.

7 HEARING OFFICER ERVIN: Are there any objections
8 to the admittance of this document?

9 All right. Seeing none, then we will enter this
10 into evidence as Exhibit Number 7 entitled, Allocation
11 Scenarios Illustrating Approaches to Apportionment for
12 Liable Parties.

13 (Whereupon said document was entered into evidence
14 as Hearing Exhibit 7 as of this date.)

15 MR. WIGHT: We will distribute copies to
16 everyone. We will be coming around so everybody will
17 have a copy and may follow along.

18 MR. GARY KING: As we are passing those out, let
19 me explain why we decided to do this. As I was saying
20 before and Mark was saying before, one of the things
21 that we saw as the testimony was coming in was to us
22 there seemed like there was some confusion as to what
23 we were proposing as to 710.210(d) and in particular
24 (d)(3). So we developed these scenarios, and we have
25 done this for three purposes.

1 One, we wanted to show how 210(d)(3) of our
2 proposal works. Second, we wanted to compare it to
3 the way joint and several liability works under
4 Federal Superfund. And then, third, we wanted to
5 compare it to the way we see the SRAC proposal
6 working.

7 I am just going to -- I would like to just go
8 through these on a scenario-by-scenario basis and kind
9 of explain these. You have to look at these with a
10 couple assumptions, though. The first assumption is
11 that we are talking about liable parties. Okay. In
12 the scenario that we had lined out, there is the --
13 the State has a burden of proof to establish that a
14 party is liable for purposes of this example. We are
15 assuming that the parties named are liable parties.

16 Okay. The second thing, the second assumption is
17 that for each example we have -- for purposes of that
18 example, all the PRPs have been identified. There are
19 no other PRPs for purposes of the example. And with
20 that I would kind of like to walk through it.

21 If you look at Scenario 1, Example 1, this assumes
22 that there is three parties that have been found to be
23 liable, Parties A, B, and C, and there are no other
24 parties involved. And that each of them is contending
25 that the share is 25 percent. And then the case goes

1 to hearing and the proof shows that for party A he
2 does have a 25 percent share, as he contended. For
3 party B, party B has a 35 percent share based on the
4 proof, not 25 percent as he contended. And then party
5 C has a 40 percent share.

6 Well, under the way 210(d) would work, party A
7 would -- his proportionate share would be 25 percent.
8 Party B would be 35 percent. And party C would be 40
9 percent. That is true because that is what the proof
10 showed. What the proof showed is what the party
11 gets.

12 Okay. Going down to Example 2, in this example,
13 we have got four responsible parties, again, all four
14 have been found to be liable under one of the
15 standards of liability, and these are the four and
16 there are no others. And in this hypothetical A
17 contends he is 20 percent responsible. B contends he
18 is 20 percent responsible. And C contends he is 20
19 percent responsible. And then D is a bankrupt
20 person. He doesn't participate.

21 Okay. At the hearing -- the case goes to hearing
22 and the proof shows under that column that party A is
23 20 percent liable and so is party B, who thought
24 that -- he contended he was 20 percent liable. It
25 shows that he is 25 percent liable. The same is true

1 for party C. And then the bankrupt, the orphan share,
2 that is determined -- the proof shows that that person
3 has a 30 percent allocation.

4 Well, then under 210(d), party A gets a 20 percent
5 responsibility, because that is what the proof shows.
6 Party B gets 25 percent, because that is what the
7 proof showed. Party C also 25. And then party D gets
8 30 percent, because that is what the proof shows.

9 Now, in that scenario for a cleanup to proceed,
10 that would mean that the State would have to be coming
11 up with 30 percent of the funding in order for the
12 remediation to be complete.

13 Okay. Flip to the next scenario, Scenario 2 and
14 Example 1. Again, we are assuming that the parties
15 are -- have been determined to be liable, and that
16 there are no other parties involved. We have added
17 another column to show how this would work vis-a-vis
18 the Superfund liability and how this compares to what
19 we proposed.

20 Again, each of the responsible parties in Example
21 1, A, B and C, contend they have a 25 percent share.
22 Well, looking at -- the case goes to hearing and party
23 A, the proof shows that he has got 25 percent
24 responsibility. But for B and C, the evidence didn't
25 complete as to what the allocation should be. Well,

1 under proportionate share, as we have proposed it,
2 party A would get a 25 percent share because that's
3 what the proof showed. And then for parties B and C
4 there would be an allocation of the total of 75
5 percent between those two.

6 Now, if you compare that to Superfund, where,
7 again, our example here, you know, there is no proof
8 of divisibility, each of those parties, because they
9 were liable, would be joint and several up to 100
10 percent. Okay. Again, I think that shows one of the
11 key differences between what we proposed in 210(d) and
12 how CERCLA liability works.

13 Again, this is a -- another point I probably
14 should have brought up before about how (d)(3) works,
15 it is -- the way we phrase it, it is not the Board
16 shall allocate between all these, it is a
17 discretionary point. So this total is a total of 75
18 percent to be allocated by the Board as it is making
19 the decision. It is not mandated that the Board
20 allocate that 75 percent in any specific way or in
21 total.

22 The Example 2, this assumes four parties. There
23 are only four parties identified. They are all,
24 again, liable. Parties A, B, and C contend that they
25 have a 20 percent share each. The fourth party, party

1 D, he is bankrupt. He doesn't participate.

2 The proof shows at hearing that party A has a 25
3 percent share. For B and C it is incomplete. And for
4 party D it is an orphan share. It is 30 percent
5 there. Under 210(d), the way that would work is party
6 A would get a 20 percent share. Dropping down to D, D
7 gets a 30 percent share which because it is orphan it
8 would, in essence, become the State's responsibility
9 to pay for the remediation to be complete. And then
10 between B and C the Board would, as a matter of
11 discretion, allocate a total of 50 percent.

12 Again, comparing that to CERCLA or joint and
13 several liability, under CERCLA you are liable unless
14 you prove indivisibility, which is not a requirement
15 under 741, you get 100 percent under joint and
16 several.

17 Now, turning to Scenario 3, it is basically the
18 same as Scenario 2 except here we have added a column
19 which we believe represents what SRAC is proposing.
20 We tried to do this in a way that I think that it
21 should demonstrate to the Board the kind of middle
22 ground that the Agency has taken with its proposal
23 between the extreme of joint and several liability
24 under CERCLA, and also we think is an extreme position
25 going the other way.

1 Under the SRAC allocation, again, looking at
2 Example 1, you have got three parties, A, B and C.
3 They are each contending they are 25 percent, their
4 allocation share is 25 percent. For A the proof shows
5 he is 25 percent responsible. Under either our system
6 or the SRAC system that guy would get 25 percent.
7 Now, where the information is incomplete, however,
8 there becomes then a major difference between what the
9 Agency is suggesting happen and what SRAC is proposing
10 to happen. In our proposal we are suggesting that the
11 Board, because these are the only three parties there,
12 that it falls within the Board's discretion to
13 allocate that 75 percent between B and C.
14 SRAC would propose, as we understand the proposal,
15 that they would escape responsibility because it was
16 an incomplete, the evidence was incomplete. So
17 although they were reliable, they would pay no share.
18 Again, you can see the contrasting difference with the
19 CERCLA process.
20 Under that, as you see there is a Footnote 1 there
21 that talks about, you know, under that allocation
22 system because those two parties escape liability,
23 then for the -- escape paying a share, then the State
24 would have to pay 75 percent of the remedial costs for
25 the project to be completed.

1 Moving down to Example 2, it is the same as
2 Scenario 2, Example 2, now under Scenario 3, just
3 going back over that, we have got four parties, A B,
4 C, and D. Those are the only four liable parties. A,
5 B, and C contend they are 20 percent liable. Party D
6 does not participate.

7 Now, the information on all of these is -- on A it
8 shows 20 percent. But on B, C, and D, the information
9 is incomplete. So under our -- the way we have viewed
10 proportionate share, that 20 percent would go to party
11 A, and then amongst B, C, and D there would be
12 allocated 80 percent. And under our proceeding then
13 whatever the State determines the orphan share to be,
14 then, you know, the State would have to be providing
15 funding for that for the remediation to be complete.

16 Contrast that with the CERCLA, again 100 percent
17 down the line, and then under SRAC's proposal, party A
18 would get a 20 percent share. And then the rest of
19 the parties, because the evidence was incomplete, they
20 would escape allocation, even though they were liable
21 parties. Under that scenario now the State, instead
22 of providing an orphan share, would have to be paying
23 80 percent of the remedial costs.

24 So that's the way we tried to -- at least that's
25 our analysis of dealing with these kind of short

1 hypotheticals to show how our proposal works
2 contrasting that with showing the differences from
3 CERCLA, joint and several liability, and then
4 contrasting it with what we believe that SRAC is
5 proposing.

6 MR. RIESER: Excuse me, Mr. King, Mrs. Hearing
7 Officer, I was out of the room when the hearing
8 started and Mr. Wight presented this evidence and I
9 didn't hear how it was described when he introduced
10 it. We should have reserved our objections to this
11 until we had a chance to actually see it and hear the
12 description of it.

13 I would like to, if I may, interpose at least a
14 reservation of objection until we can ask Mr. King
15 some questions about this. A, it is something that we
16 have not seen. But I think more to the point, B, is
17 that it is a -- it reminds me of sort of the old
18 laundry ads where they hold a dirty towel up and that
19 was brand X and then Tide, of course, got the towel
20 incredibly clean. We have no idea what the
21 definitions of the terms that are used are and how the
22 conclusions were drawn that support any of the numbers
23 that are used. Just off the top of my head, I think
24 it totally misrepresents what our position would be.

25 I would like to reserve an objection to the

1 introduction of his exhibit until at least after we
2 have had a chance to question Mr. King regarding some
3 of the definitions and the assumptions that went into
4 this exhibit.

5 HEARING OFFICER ERVIN: Mr. Wight, would you like
6 to respond?

7 MR. WIGHT: Well, I think the exhibit was
8 presented -- I think the exhibit was presented. It
9 has been admitted. I am not sure -- again, the
10 numbers are more or less arbitrary, but they are
11 picked for purposes of the example. They are not
12 picked to represent any particular site.

13 The interpretation of the SRAC allocations are
14 from provisions in the testimony of Mr. Rieser and Mr.
15 Marder. Although they have not been formally given to
16 the Board at this point, they have been pre-filed and
17 we were able to glean this interpretation from those.
18 They will certainly have their opportunity to correct
19 it if this is a misinterpretation, and I think the
20 exhibit should remain in the record.

21 HEARING OFFICER ERVIN: I have already admitted
22 this into the record, so I am going to have to allow
23 it to remain in. However, we will give you ample time
24 this afternoon to question the Agency on this
25 exhibit.

1 MR. RIESER: Thank you.

2 HEARING OFFICER ERVIN: Mr. Wight, would you like
3 to continue?

4 MR. WIGHT: Yes, just back to Mr. King's
5 presentation.

6 MR. GARY KING: Okay. With that, that concludes
7 the discussion on 741.210. I would like to briefly
8 talk about 741.215. That provides a short list of
9 allocation factors. We did not intend that to be --
10 those to be totally exclusive factors. But, you know,
11 we have tried to develop factors that we thought were
12 as objective as possible. We were familiar with
13 the -- what are termed the Gore factors under the
14 Federal Superfund Law, and we didn't want to track
15 those directly because we thought those had more
16 subjectivity to them, and we thought it was
17 appropriate for purposes of this proceeding. And so
18 you see a much more limited list.

19 One of the things that we did include, and this is
20 something that SRAC strongly argued for, and we
21 thought was appropriate, and that was that you allow
22 the risk based remediation objectives. How you derive
23 that and how that affects the actual cleanup to --
24 that's a factor in how you look at the allocation.
25 They put an example, a brief hypothetical, in the

1 testimony, if you could have an exposure route which
2 is driving the cost of a response action and how you
3 respond to that exposure route may vary with the
4 remediation objectives methodology used and different
5 PRPs could be more or less responsible depending on
6 the remediation response that was taken.

7 That pretty much concludes my discussion. As I
8 was saying earlier, there is another subpart, Subpart
9 C. We think that is fairly straightforward. There
10 was no real controversies relevant to that. As I said
11 early on in testimony, I don't think it is going to be
12 used very frequently at all. I think that the rule in
13 the testimony kind of speaks for itself.

14 So with that I will let John finish up his
15 presentation.

16 MR. WIGHT: Mr. Sherrill has just a few remarks on
17 the allocation factors themselves.

18 MR. SHERRILL: This picks up on page 13 of my
19 pre-filed testimony regarding allocation factors. And
20 to reiterate what Mr. King said, these were not all of
21 the factors, but they were objective factors that we
22 identified. And I am just going to summarize, and
23 this will probably just take less than ten minutes or
24 so.

25 Proposed Section 741.215 includes three factors

1 for allocating cost among PRPs:

2 The volume of regulated substance for which each
3 liable party is responsible;

4 Risk and hazard potential of contaminants;

5 And then the third factor would be the degree of
6 involvement of a party in the generation,

7 transportation, treatment, storage, or disposal of

8 this contaminant -- excuse me -- of this regulated

9 substance or pesticide.

10 Parties that can show that their contribution to
11 environmental damage is relatively small stand in a
12 better position to be allocated a smaller portion of
13 responsibility.

14 To go into a little bit more on the volume of
15 regulated substance or pesticide for which each party
16 is responsible, indicates the waste volume as a
17 portion of the contamination at a site. All other
18 factors being equal, the greater the waste volume for
19 which a party is responsible, the greater the
20 proportion of responsibility allocated.

21 In certain circumstances, where records depict
22 that the amount of waste contributed by an individual
23 party is not available, the length of time an owner or
24 operator owned or operated the site may be considered
25 as a surrogate measure for volume. For example, in an

1 allocation proceeding where the precise amount of
2 waste contributed by each owner or operator is
3 unknown, the volume estimate could equal the number of
4 years each party owned or operated the site divided by
5 the total years the site was in operation. And I
6 provide a little example of that on page 14.

7 And in this part of my testimony when I use the
8 term waste, I am just doing that as a -- it could also
9 mean regulated substance or pesticide.

10 Time, we believe, as a surrogate value is
11 reasonable and should provide consistency among all
12 other allocation factors. Therefore, if there is
13 little or no accurate knowledge of the waste volumes
14 released, the number of years each party owned or
15 operated the contributing site as a percentage of the
16 total years the site has been in operation should be
17 considered for that party's degree of responsibility.

18 The second allocation factor, risk and hazard
19 potential, should be based upon a waste's toxicity and
20 persistence in the environment. All other factors
21 being equal, the more toxic and persistent the waste,
22 the greater the percentage of responsibility
23 allocated.

24 Together with the toxicity and persistence
25 potential of the waste, site-specific remediation

1 objectives are to be developed consistent with TACO to
2 derive the risk and hazard potential.

3 The third allocation factor, the degree of a
4 party's involvement in generating, transporting,
5 treating, storing, disposing, or otherwise improperly
6 managing waste is meaningful to determine
7 apportionment when volume and toxicity are less
8 relevant. For example, this allocation factor is
9 applicable to a site owner who may not have originated
10 the wastes, but instead received them from off-site
11 generators. If the site owner improperly manages the
12 wastes, resulting in the release, then some share of
13 the responsibility must be allocated based on those
14 improper actions, or inactions or omissions.

15 That ends my testimony. I will turn it back over
16 to Mark.

17 MR. WIGHT: That concludes our presentation for
18 this morning. So whenever the Board is ready, we will
19 be prepared to begin to answer questions.

20 HEARING OFFICER ERVIN: Thank you. As I said at
21 the beginning of this proceedings, following the
22 Agency's testimony we will begin with the pre-filed
23 questions. Given the time that it is around lunch, I
24 think we will wait for the pre-filed questions until
25 after lunch.

1 I will give Mr. Rieser the opportunity if you
2 would like to question the Agency regarding the
3 scenarios now or if you would like to wait and work
4 them into the pre-filed questions after lunch.

5 MR. RIESER: Why don't we work it into the whole
6 discussion.

7 HEARING OFFICER ERVIN: All right. Then we will
8 adjourn for lunch for an hour. We will reconvene at
9 1:15.

10 (Whereupon a lunch recess was taken from
11 12:15 p.m. to 1:15 p.m.)

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1 AFTERNOON SESSION

2 (May 4, 1998; 1:15 p.m.)

3 (Board Member G. Tanner Girard was not present for
4 the afternoon session.)

5 HEARING OFFICER ERVIN: We will now proceed with
6 the pre-filed questions for the Agency. We had two
7 sets of pre-filed questions. One set was by the
8 Illinois Environmental Regulatory Group and the second
9 set from the Illinois Steel Group and the Chemical
10 Industry Council of Illinois.

11 To have a more orderly record, I have asked that
12 the questions be asked by sections. So if you are
13 following along with the pre-filed questions, it will
14 be out of order. All right. We will begin.

15 I think, Mr. Rieser, you had a question, a general
16 question regarding Mr. King's testimony? Or would you
17 like to start with the --

18 MR. RIESER: It all applies to the cost recovery
19 issues, and let's just take that all at one shot.

20 HEARING OFFICER ERVIN: All right.

21 MR. RIESER: I am sorry. The question number
22 one?

23 HEARING OFFICER ERVIN: Do you want to start with
24 the scenarios or do you --

25 MR. RIESER: I am sorry. I misunderstood. I

1 thought you were asking whether I wanted to ask
2 questions about the scenarios. If you are asking that
3 I ask number one, I will be happy to do that. Excuse
4 me.

5 HEARING OFFICER ERVIN: Yes, it was my
6 understanding that you wanted to ask about the
7 scenarios within the section.

8 MR. RIESER: That is fine. Fine. I am sorry. I
9 misunderstood.

10 This is a question directed to Mr. King. With
11 respect to the cost recovery litigation described on
12 page 11 of Gary King's testimony, what types of sites
13 were these? Were these consent orders or litigated
14 actions? How many separate actions were involved?
15 How do these figures compare with prior years?

16 MR. GARY KING: We appreciate the appropriateness
17 of the question. However, we just -- it does request
18 a lot of specific information, and in the short time
19 between us receiving the question and this hearing
20 today, we were not able to get all of the facts that
21 this question really would require us to have in order
22 to answer it. So we would like to defer that further
23 response to this question to a subsequent hearing and
24 answer it at that point.

25 MR. RIESER: And that's fine as long as I have a

1 chance to follow-up. And as long as you are going to
2 get information, I guess another question filled in on
3 something Mr. Sherrill testified to today, is how much
4 of this cost recovery litigation amounts to, of the
5 5.4 million, how much of that represents voluntary
6 payments where the Agency sent an invoice out and they
7 said fine, and paid it.

8 HEARING OFFICER ERVIN: If you would like to bring
9 that information to the next hearing.

10 MS. ROSEN: Could I ask one additional question
11 then?

12 HEARING OFFICER ERVIN: Certainly.

13 MS. ROSEN: The penalties category that you have
14 on the chart, are those penalties that in all cases
15 were received as part of a filed consent order or does
16 that encompass like an administrative citation process
17 that the Agency might have used?

18 MR. GARY KING: I can answer that. Those are all
19 consent orders.

20 MS. ROSEN: Okay.

21 HEARING OFFICER ERVIN: Now we can move to the
22 questions regarding the specific sections. I believe
23 there were questions on Section 741.105.

24 MS. ROSEN: Question number two. Question number
25 two of the Board's compiled questions.

1 Page five of the Agency's Statement of Reasons
2 states that the applicability of Part 741 is limited
3 in the case of treatment, storage, disposal sites for
4 which a current permit has been issued or that are
5 subject to closure requirements under Federal or State
6 solid or hazardous waste laws, end quote, emphasis
7 added.

8 Does this exemption encompass sites where, due to
9 the applicability of regulatory exemptions or based on
10 the Agency's discretion, closure under applicable
11 Federal and State laws will not be required?

12 MR. GARY KING: We were -- we have two responses
13 on that. First we were a little confused about the
14 nature of the question. And then, secondly, and this
15 will apply to -- there is, I think, probably two or
16 three other questions that deal with the applicability
17 of RCRA Subtitle C and D requirements. And we did not
18 have the opportunity to consult with our RCRA people
19 before today. And I would like to make sure that we
20 are consulting with them before we provide any answer
21 on this question and the other ones that kind of imply
22 some kind of RCRA hypothetical, so we have to make
23 sure that we have a consistent answer there.

24 As far as maybe if you could give us a little more
25 explanation as to what you are asking for when you

1 say, does this exemption encompass sites? Or due to
2 the applicability of regulatory exemptions. I guess
3 we are getting a little confused as to what the thrust
4 of the question was.

5 MS. ROSEN: Okay. Let me see if I can better
6 clarify, if you want to stop for a second.

7 MR. RIESER: I think what they are talking about
8 is given that there are sites that could
9 conceivably -- it is a question that kind of comes up
10 in different categories. Sites where there were
11 releases of material that could be characterized --
12 and I am using that term in a broad sense --
13 characterized as a hazardous waste, so that
14 theoretically at least the RCRA Subtitle C regulations
15 would apply the remediation, but typically for a
16 variety of reasons it is not the Agency's practice to
17 handle those sites the Agency will allow those types
18 of sites to be handled under the Site Remediation
19 Program or just some sort of quick and effective means
20 of remediating those sites. The question is whether
21 those types of sites would be excluded from coverage
22 under the Proportionate Share Liability regulations?

23 MR. GARY KING: Okay. I think that helps out.
24 That will allow us to formulate a better answer then.

25 HEARING OFFICER ERVIN: Okay. So they are

1 bringing back information to the next hearing. Do you
2 have a follow-up question?

3 MR. RIESER: Go ahead.

4 MS. ROSEN: Question number three, what concerns,
5 if any, has the U.S. EPA expressed to the Agency
6 regarding any perceived deficiencies and/or
7 inconsistencies in the State's administration of
8 programs under the Solid Waste Disposal Act due to the
9 enactment of the Proportionate Share Liability
10 provisions?

11 MR. GARY KING: As I was saying this morning, they
12 have not expressed any concerns to us because we
13 really have not brought to their attention that there
14 may be a deficiency. And the reason why we have not
15 done that is because we felt that it is really the --
16 that this rulemaking will define whether there is an
17 inconsistency or not. So we don't know of any that
18 they have raised because of the fact that we have not
19 presented the issue to them yet.

20 MS. ROSEN: At the time of the passage of the
21 legislation, were these concerns expressed by the U.S.
22 EPA?

23 MR. GARY KING: There were concerns expressed when
24 the -- I am going to check my -- let me make sure I
25 have the right bill number here. When Public Act

1 89-431 was being debated, there was a concern raised
2 by the U.S. EPA as to whether -- if that were enacted
3 as it was originally proposed whether that would be --
4 whether it would be an inconsistency with the
5 Memorandum of Agreement that the State of Illinois has
6 with the U.S. EPA relative to our Volunteer Cleanup
7 Program. The legislation changed and so that resolved
8 that concern. Then 89-433 which added 58.9, I am not
9 aware of any U.S. EPA comments being raised during the
10 legislative debate, as to the RCRA applicability
11 rules.

12 MR. RIESER: And since the passage of this
13 legislation in December of 1995, did you have further
14 discussions with the EPA to update the Memorandum of
15 Agreement regarding the Superfund liability?

16 MR. GARY KING: We have, but it -- the Superfund
17 one has not changed. There has been a long
18 outstanding discussion involving the U.S. EPA and
19 various states, regional offices, as to whether more
20 of these are going to be signed, you know, what are
21 they going to look like, how complicated are they
22 going to -- what are they going to cover. So rather
23 than raise a series of issues relative to our own
24 agreement with them, which would then -- could then
25 end up toppling the whole agreement, we have not done

1 so.

2 MR. RIESER: And they have not affirmatively come
3 back to you and said that the issue of apportionment
4 shares is an issue with them in terms of that
5 Memorandum of Agreement?

6 MR. GARY KING: No, and they would not be expected
7 to.

8 MR. RIESER: The Memorandum of Understanding with
9 respect to RCRA liability was also arrived at after
10 the passage of this legislation in December of 1995?

11 MR. GARY KING: Right.

12 MR. RIESER: Okay. Was this issue of
13 Proportionate Share Liability an issue that was
14 discussed in the RCRA MOU?

15 MR. GARY KING: No, it was not.

16 MS. ROSEN: Number four, can the Agency provide a
17 general description of the type of site which would be
18 subject to Proportionate Share Liability?

19 MR. GARY KING: I will give you -- I am not sure
20 this is necessarily helpful as to what you want, but
21 here is the way that I would describe it. I would
22 describe it as a site where there has been a release
23 of a hazardous substance or a pesticide or even a
24 threatened release of a hazardous substance or
25 pesticide, and the State has filed a complaint before

1 the Board seeking either cleanup of the site or cost
2 recovery and the complaint involves more than one
3 party.

4 MS. ROSEN: Could you maybe further define the
5 number of parties you would envision? More than one
6 but less than how many?

7 MR. GARY KING: Well, it would be more than one
8 and -- well, I am trying to think of the most number
9 of parties that we have dealt with at a site. It runs
10 into the thousands. So you certainly could have
11 thousands of responsible parties at any one site.

12 MS. ROSEN: But in terms of where the Agency views
13 that this procedure might be used, how many parties
14 might be expected to be the normal?

15 MR. SHERRILL: I am going to follow-up on this
16 question. Kind of the nature of the type of sites --
17 and this will kind of go back to historical
18 perspective of the 4(q). This touches on page eight
19 of my testimony, but I will be providing a little bit
20 maybe more detail than that.

21 From 1984 to 1997, 85 sites have received a 4(q).
22 Of these 85, I believe 50 are of a single entity
23 responsible party. So of the 85 that we have issued
24 over the last 15 years, 50 of these are what we would
25 think of as a single entity PRP. That would leave us

1 with 35 of these sites that have received a 4(q) over
2 the last 15 years that have what we would call
3 multiple party PRPs, multiple party such as, you know,
4 would have Proportionate Share Liability.

5 Of these 35, 14 are landfills. Six of these
6 landfills received what we would call industrial waste
7 only. In other words, they were landfills operated by
8 a few local industries that did not receive municipal
9 refuse. And so you would not think of them as the
10 traditional municipal solid waste landfill.

11 During the last 15 years, we identified 21
12 manufacturing type concerns that have received a
13 4(q). And of those only four were of the multiple
14 party type PRP scenario. So, there again, only four
15 sites of a manufacturing type. You could say that --
16 as multiple PRP type manufacturing sites, you could
17 say they received a 4(q) notice approximately every
18 four years.

19 That kind of gets back to what Gary and I were
20 saying, you know, the nature of these types of sites
21 there may not be that many of them. There were 12
22 multiple PRP type sites of what I would characterize
23 as a drum and/or waste oil recycler. And so just to
24 kind of follow-up on your question, that is kind of
25 the nature of -- that we would envision that this

1 future process, the 58 -- the proportionate share of
2 Section 58 of the Act, we would think to see these
3 same types of sites.

4 MR. RIESER: Just to follow-up, you got 35 sites
5 with multiple party sites. Then 14 of those are
6 landfills, and 21 you characterized as manufacturing
7 facilities; is that correct?

8 MR. SHERRILL: Let me rephrase that. 14 of the
9 multiple part PRP scenarios are landfills.

10 MR. RIESER: Okay.

11 MR. SHERRILL: Of the manufacturing type there are
12 only four. There were 21 4(q)s issued to
13 manufacturing types, but approximately 17 of those
14 were at a single entity manufacturer. The owner --
15 all the waste was at the site, they manufactured some
16 product at the site, the waste was at the site. There
17 was not the multiple PRP scenario.

18 MR. RIESER: Okay. So it is that 21 plus that 14
19 that gives us our 35 sites?

20 MR. SHERRILL: No, the landfills were the 14.
21 Then 12 multiple PRP type sites were drum and/or waste
22 oil recyclers. We had two refineries that were
23 multiple PRPs. There was one transformer facility.
24 There was one tractor-trailer. There was one lead or
25 coal mine type facility. And that gets us up to our

1 35.

2 MR. RIESER: If we could get a table rather than
3 me trying to reconstruct all of this in my head. If
4 we can get just a table listing all of these I think
5 that would be useful.

6 MR. WIGHT: I think we could prepare that for the
7 next hearing.

8 HEARING OFFICER ERVIN: Okay.

9 MR. RIESER: Thank you very much.

10 HEARING OFFICER ERVIN: Okay. Continue with
11 question five.

12 MS. ROSEN: Would Proportionate Share Liability
13 apply at the following sites?

14 MR. GARY KING: Before you get all the way through
15 that question -- it is a long question, and I thought
16 maybe we are going to -- because of the details of the
17 hypotheticals there we needed to have more time to
18 review that than we have had up to now.

19 MS. ROSEN: Okay. Thank you.

20 MR. GARY KING: And the same thing would apply
21 with question six.

22 MS. ROSEN: Okay.

23 MR. RIESER: All right. So we are up to question
24 seven?

25 HEARING OFFICER ERVIN: Yes, question seven.

1 MR. RIESER: Does the language proposed by SRAC
2 regarding Section 741.105 precluding application of
3 the PSL regulations to certain owners and operators
4 rather than certain sites satisfy the Agency's concern
5 regarding continued enforcement of their federally
6 authorized programs? If not, why not?

7 MR. GARY KING: As I said this morning, we would
8 agree that, you know, all things being equal, that it
9 would be possible to state the principles as to the
10 applicability more narrowly than we have done so and
11 not jeopardize federally authorized programs.

12 We have been reviewing the language that Mr.
13 Rieser included as an attachment to his testimony and,
14 you know, we think -- we are still taking a look at
15 that, and I think we will have a response to that at
16 one of the later hearings.

17 MR. RIESER: When you testified this morning that
18 going to the U.S. EPA after the Board did not agree
19 with what you proposed on this issue would be a
20 horrendous experience, I think is generally how you
21 said it, but that is not your exact words, was that
22 assuming that the Board did not limit this at all? Is
23 that what you were thinking of?

24 MR. GARY KING: That's correct.

25 MR. RIESER: Okay. But if there was some -- there

1 might be a livable limitation that they would find
2 acceptable so long as it preserved the State's
3 authority to administer their programs?

4 MR. GARY KING: That's correct.

5 MS. ROSEN: Number eight, why does Section
6 741.105(c)(2) delete the requirement that a permit
7 must have been issued under Federal or State solid or
8 hazardous waste laws for a site to fall within the
9 applicability exclusion from Part 741? What is the
10 Agency's support for deleting this requirement?

11 And to clarify, I would just say that we are
12 referencing the language that is in the statute
13 Section 58.1(a)(2). It talks about for which a permit
14 has been issued.

15 MR. GARY KING: Again, that is one of those RCRA
16 corresponding ones that we would like to defer until
17 the next hearing.

18 MS. ROSEN: Okay. Question nine I will read into
19 the record, but I believe you may have addressed it
20 probably as much as you are going to.

21 On page 16 of Mr. King's testimony, he proposes
22 modifying the statutory language to fine-tune the
23 exclusions even further without jeopardizing the
24 Federal authorizations/delegations. Can you please
25 explain this statement and provide examples of such

1 modifications? I don't know if you have anything

2 further to add.

3 MR. GARY KING: I responded to a similar question

4 with question number seven, and I think that stands,

5 that response stands for both of these questions.

6 MS. ROSEN: Okay.

7 HEARING OFFICER ERVIN: Do you have a follow-up

8 question?

9 MS. ROSEN: No.

10 BOARD MEMBER HENNESSEY: I have a general question

11 that the Agency may not be able to answer today that I

12 would like to get into the record because it deals

13 with applicability.

14 HEARING OFFICER ERVIN: Sure.

15 BOARD MEMBER HENNESSEY: My question is whether

16 you believe Section 58.9 would apply to a private cost

17 recovery action brought, for example, under Section

18 21(e) of the Act. That section covers disposal

19 treatment or storage of any waste at a site that does

20 not apply with the Act or regulations. Occasionally

21 we have had cases in which such suits have been

22 brought and the cost of cleanup has been sought as

23 part of the remedy.

24 MR. GARY KING: Our proposal applies strictly to

25 cases brought by the State and for us that was what we

1 interpreted the thrust of Section 58.9 being. The
2 concern that we had is that if you allow -- if you are
3 allowing some type of private action other than what
4 we have in Subpart C, our attempt to deal with that
5 private action is in Subpart C, but we are very
6 careful there to put it in a way that somehow the
7 State was not being dragged into some kind of private
8 actions and being required to make remedial action
9 decisions before it was ready to do so or being put in
10 a position where we were being -- if not legally
11 obligated perhaps obligated in some other way to spend
12 money at a site that was not fitting with the
13 priorities of things as we saw them. So we attempted
14 to create, to deal with the private cost recovery
15 action in terms of what is in Subpart C.

16 BOARD MEMBER HENNESSEY: Subpart C would not
17 address, then, a citizen's enforcement suit that was
18 brought under Section 31 of the Act that alleged that
19 the defendant had violated Section 21 of the Act by
20 open dumpings of hazardous substances? Am I
21 understanding you correctly?

22 MR. GARY KING: Right, that's correct.

23 BOARD MEMBER HENNESSEY: Okay.

24 MR. GARY KING: Because if you track that all the
25 way through, we are talking about proportional share

1 allocation, and we are talking about, in essence,
2 where there is an orphan share the State is going to
3 have to pick that up for remediation to be complete.
4 If a party has -- in a private cost recovery action
5 has sued these other private people, but some of them
6 are orphan shares, well, how -- is now the State
7 supposed to come in and put up that amount of money to
8 make sure that the cleanup goes forward? We saw that
9 type of action as really involving us -- requiring us
10 to be involved in litigation, which would end up
11 allocating state dollars, before we had gone through
12 the process of really deciding if that's the best use
13 of State money. So that was at least our logic
14 process with that.

15 BOARD MEMBER HENNESSEY: Okay. Thank you.

16 HEARING OFFICER ERVIN: All right. Moving on to
17 Section 741.115, information orders. Ms. Rosen, you
18 have several questions on that section.

19 MS. ROSEN: Yes. Number ten, can the Agency
20 provide any statutory authority or legislative history
21 which supports the information order concept and
22 authorizes the Agency to seek such information in such
23 a manner?

24 MR. GARY KING: Well, first of all, I should -- I
25 need to point out that the proposal, as we have

1 drafted, is not authorizing the Agency to seek such
2 information. It is authorizing the Board to issue an
3 order to seek such information. And although there is
4 not -- as I said this morning, there is not -- in 58.9
5 you will not find the specific words, "information
6 order." You will find, in Section 58.9(d), the Board
7 being authorized to come up with a proposal that is
8 comprehensive and workable relative to Proportionate
9 Share Liability.

10 MR. RIESER: Let me ask a real basic question
11 about that, just following up. How exactly do you
12 envision this process working?

13 MR. GARY KING: May I have just a couple minutes?
14 I will find my notes on that. I apologize. Just a
15 lot of papers in front of us with several sets of
16 questions. I am trying to wade through and find the
17 right set of responses.

18 What we think the way the process would work is
19 that there would be a petition for an information
20 order, which would be filed with the Board. And as we
21 see it there wouldn't be -- it wouldn't be a hearing
22 process in the terms of a formal hearing with
23 witnesses and that kind of thing. It would be more of
24 a petition being granted based on the papers filed and
25 there would be -- the papers would include affidavits

1 or other documents which would constitute the evidence
2 that would be required to meet the requirements for
3 the order. It would not be an ex parte proceeding.
4 There would need to be notice and service of the
5 petition to the party that is ordered to provide
6 information in a reasonable but short time to
7 respond.

8 Then, as we see it, this is a pre-enforcement
9 activity, so it -- there wouldn't be an appellate
10 review of it. The review would occur in terms of
11 refusing to comply and then raising any defenses
12 during a proceeding to enforce the order.

13 MR. RIESER: Were you intending to supplement the
14 regulations, the proposed regulations with some of the
15 detail on the procedures?

16 MR. GARY KING: Yes, we can certainly do that if
17 that is -- if we -- we had not gotten that far,
18 obviously, when we filed the proposal in February.
19 This was an issue that we had not reached agreement on
20 with the private party, but -- the private sector with
21 SRAC, and so we had not laid out all the specific
22 procedures. But that certainly would be something
23 that we would be willing to do if this is going to be
24 incorporated as part of the rule.

25 MR. RIESER: If a person who received notice of

1 this disagreed with your affidavits, would they be
2 entitled to submit counter affidavits?

3 MR. GARY KING: Yes.

4 MR. RIESER: The Board would be entitled to not
5 issue the order with respect to that person?

6 MR. GARY KING: Yes.

7 MR. RIESER: What would the factual issue be on
8 which this would be based?

9 MR. GARY KING: If you look at 741.115(a), what it
10 ties back to, the demonstration is how it is related
11 to whether there is a reasonable basis for belief that
12 there is a release or a substantial threat of a
13 release. That's what the criteria ties back to.

14 MR. RIESER: Isn't it two parts? There has to be
15 a reasonable basis for the belief that there is
16 release or substantial release, and the person has to
17 have information relevant to that release?

18 MR. GARY KING: Yes, that's true. Correct.

19 HEARING OFFICER ERVIN: Do you have a follow-up
20 question?

21 MR. RIESER: If a person disputed either of those
22 two points and the Board ruled against them, they
23 would have no right to appeal? They would have to
24 take enforcement action and be subject to potential
25 penalties if they are wrong?

1 MR. GARY KING: I am not sure what you mean by
2 "enforcement action," related to that.

3 MR. RIESER: I thought you said earlier that there
4 would be no appeal, but that if a person basically
5 disagreed, their avenue was to not provide the
6 information that was being ordered and then bring up
7 whatever their defenses were in the subsequent
8 enforcement action for not providing the information
9 that was ordered?

10 MR. GARY KING: Okay. That's correct. That's
11 true. That is the way it will work.

12 MR. RIESER: So they would be taking the bet that
13 they wouldn't have penalties issued against them in
14 that situation?

15 MR. GARY KING: Right.

16 MR. RIESER: Thank you.

17 MS. ROSEN: Number 11, are the criteria listed at
18 Section 741.115(a)-(c) intended to be limitations on
19 the scope of information which can be sought by the
20 Agency pursuant to an information order?

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

22 MS. ROSEN: Number 12, in light of the inspection
23 authority granted to the Agency pursuant to Section
24 4(d) of the Act, why is Section 741.115(b)(1)
25 necessary? To the extent that the inspection

1 authority granted in Section 741.115(b)(1) exceeds the
2 authorization in Section 4(d) of the Act, what
3 statutory provisions support the extension of the
4 Agency's inspection authority?

5 MR. GARY KING: The question assumes kind of a
6 mixing of things, of concepts that I guess we wouldn't
7 quite agree with. Section (4)(d) of the Act is
8 related to an Agency inspection authority. This
9 section 741.115 is not related to Agency inspections
10 but is related to the Board's authority to obtain the
11 necessary information relative to -- relative to
12 allocation and liability issues. So I guess I am not
13 quite understanding the question.

14 MS. ROSEN: Well, just on that point alone,
15 Section (4)(d) gives you the ability to inspect and
16 enter and review the premises to seek information
17 about what is going on.

18 MR. GARY KING: I would agree with that. That is
19 true.

20 MS. ROSEN: Okay. Subsection B provides for the
21 same opportunity, just dependent upon the Board
22 issuing this order?

23 MR. GARY KING: Well, the Board's authority here
24 is different than the inspection authority.

25 Obviously, the Agency's inspection authority is

1 focused on the site where the release occurs. There
2 could be information relative to those -- relative to
3 that release at the sites which are not where the
4 release occurred. That's why it is important that the
5 Board have that authority relative to those pieces of
6 information.

7 MS. ROSEN: I think the provisions that -- in
8 Section 741, though, are seeking the Board to order
9 the Agency or to perhaps provide the authorization to
10 the Agency. Doesn't the Agency have to have some sort
11 of independent authorization to take those actions on
12 their own under the Environmental Protection Act?

13 MR. GARY KING: Well, we were trying to spell out
14 an alternative under (b)(1), or (b)(2) rather, than
15 just mandating that the copies of documents be
16 furnished to the Agency which we could have just done
17 that. We allowed for the option of us to go on to --
18 go to the location of the records and have those
19 records produced and then we could copy them at that
20 point.

21 It certainly would be, I think, okay with us if
22 the person was just required to furnish those
23 documents rather than have that option for Agency
24 access. We put it as an option because, again, as I
25 said this morning, we modeled this off of the

1 Superfund Law under Section 104(e), and I believe they
2 allow either option. I would expect that in virtually
3 every case that a person who was issued one of these
4 orders would prefer just to provide the copies to the
5 Agency rather than having the Agency, you know, coming
6 to the site and review the records there.

7 MS. ROSEN: Okay. My -- the issue doesn't
8 necessarily go to whether the Agency goes to the
9 person's site or the person provides the information,
10 but it goes to the requirement that a person either
11 provide the information or allow the Agency in to
12 look. And that's where I am seeking some sort of, I
13 guess, authorization.

14 MR. GARY KING: Well, I guess I wouldn't even see
15 that the issue would come up if it is a situation
16 where the Board is just directing somebody to provide
17 copies to the Agency.

18 (Mr. Wight and Mr. King confer briefly.)

19 HEARING OFFICER ERVIN: Did you have something
20 more to add, Mr. Wight?

21 MR. WIGHT: No, we were just conferring.

22 HEARING OFFICER ERVIN: Ms. Rosen, if you want to
23 go on.

24 MR. RIESER: I have just one follow-up.

25 HEARING OFFICER ERVIN: Okay.

1 MR. RIESER: So the ability for the Board to issue
2 an order for the Agency to go on to premises was
3 solely for the purpose of obtaining documents and that
4 alone?

5 MR. GARY KING: That's correct. I mean, if we
6 were going to go on and do an inspection at a facility
7 relative to, for instance, compliance issues at that
8 facility, and that person didn't want to grant us
9 access, then we would use Section (4)(d) and we would
10 go in with the representation of the Attorney
11 General's office and go in and get a search warrant,
12 which we have done many times.

13 MS. ROSEN: Okay. Thank you. Question 13?

14 HEARING OFFICER ERVIN: Yes, number 13.

15 MS. ROSEN: Describe the information gathering
16 processes which the Agency has traditionally used in
17 State Superfund/CERCLA actions.

18 MR. GARY KING: I think this morning John Sherrill
19 was talking about how we obtained information on
20 sites, and I think one of the things you probably can
21 pick up from his discussion is that our ability to
22 gather information at the State sites under State
23 authority is -- has been pretty weak. I mean, there
24 is nothing -- there is no consistent way of doing it.

25 We have to rely on our field tools. We have to

1 rely on complaints that we get. We have to rely on
2 our own records. At times we will go ahead and try to
3 perform the field work that chases some contamination
4 source backwards. It is a pretty cumbersome and
5 difficult process.

6 Now, we have sometimes used CERCLA Section 104(e)
7 for purposes of State Superfund actions, but that has
8 not been the universal thing. We prefer to try to
9 rely on State authorities when we are dealing with
10 State cases as opposed to, you know, notifying and
11 going through the Federal government on these types of
12 cases.

13 MR. RIESER: At the manufacturing sites that you
14 talked about, don't you typically have all of the
15 records that there are? I mean, you have the site
16 itself and you have whatever operations went on at
17 that site. Wouldn't that constitute all of the
18 records that exist with respect to that particular
19 site?

20 MR. GARY KING: I would firmly disagree with that.
21 At many of the sites they have historical
22 contamination issues that go back long before the
23 Agency was even in existence. You could have prior
24 owners who may have left records at a site. You know,
25 there would be all sorts of cases where we would not

1 have information in our files in our offices that
2 could be very pertinent to identifying who was
3 responsible for a release at a site.

4 MR. RIESER: But if you have the site itself and
5 the existing ability to inspect at that site for the
6 documents at that site, wouldn't that get you to
7 almost all of the documents in existence with respect
8 to that site?

9 MR. GARY KING: No. I would see many occasions
10 where records could be held at a location not at the
11 site where the release is at.

12 HEARING OFFICER ERVIN: Do you have a follow-up
13 question?

14 MS. ROSEN: No. Thank you. Number 14, explain
15 why the proportionate share allocation process
16 requires the extension of the Agency's information
17 gathering authority?

18 You have commented on this a great deal. I don't
19 know if you want to elaborate more.

20 MR. GARY KING: I did comment on that earlier.
21 Again, if you are aware of how the CERCLA process
22 works, there is a strong incentive based on the way
23 the liability system is structured for people to
24 provide information. Under that system, all the
25 parties have the incentive to identify other PRPs and

1 to identify as much information relative to other PRPs
2 as they can. It is just a natural incentive. If you
3 have information relative to somebody else's
4 liability, you want to present that. If you have
5 information that may identify somebody else, you want
6 to present that.

7 Under the Proportionate Share Liability context,
8 as we have proposed it here, you don't have that
9 incentive. There is not an incentive for a party that
10 is liable to try to get information relative to other
11 liable parties, it seems to me anyway.

12 MS. ROSEN: Would you agree that if I -- if a site
13 owner at a facility at a site that was contaminated
14 had knowledge of contamination that had been caused by
15 others that was dissimilar from any contamination that
16 he would have caused, wouldn't he have an incentive to
17 provide that information to you in hopes that his
18 property might, in fact, be cleaned up by the dollars
19 from the person who actually caused the harm? Isn't
20 that an incentive?

21 MR. GARY KING: I am not sure I understood the
22 hypothetical.

23 MS. ROSEN: The hypothetical is there is a
24 situation where there is a site, and the current owner
25 may have caused some of the contamination. There is

1 also a lot of contamination at the site that was not
2 caused by that owner or operator, and he has knowledge
3 of that, information about that. Wouldn't he have an
4 incentive to provide that information to the Agency in
5 hopes that it might be used to be able to secure
6 funding or whatnot to get the site clean? Wouldn't
7 that be an incentive?

8 MR. GARY KING: I think that would be an incentive
9 that would operate from an economic standpoint
10 relative to the value of the property. It was -- it
11 is an incentive to get the property cleaned up. It is
12 not an incentive to bring other people forward for
13 liability purposes. I mean, his liability is kind of
14 fixed by what he did. If the fact that he wants his
15 property totally cleaned up to me it is kind of a
16 different sort of incentive. If I am confusing the
17 hypothetical I --

18 MS. ROSEN: Well, you are not --

19 MR. RIESER: Let's take a step back. If in a
20 joint and several liability system -- is information
21 regarding an individual's proportionate share relevant
22 to costs that they have to pay under joint and several
23 liability?

24 MR. GARY KING: Could you restate that again?

25 MR. RIESER: Why don't you read the question back,

1 please.

2 (Whereupon the requested portion of the record was
3 read back by the Reporter.)

4 MR. GARY KING: Are you waiting for me?

5 MR. RIESER: Yes.

6 MR. GARY KING: I am sorry. Could I have the
7 question again?

8 HEARING OFFICER ERVIN: Could the court reporter
9 read the question back again.

10 (Whereupon the requested portion of the record was
11 read back by the Reporter.)

12 MR. WIGHT: I guess we are having a hard time
13 discerning what the question is. Let's take a step
14 back, and then joint and several liability.

15 MR. RIESER: Okay. In a joint and several
16 liability system, are the -- is the information that
17 an individual brings forward regarding how much stuff
18 they sent to the site, is that relevant to how much
19 they have to pay under that system?

20 MR. GARY KING: It is not -- I think it would
21 be -- I think I am going to need to defer on this. I
22 think we are going to need to confer and take some
23 time to make sure we have the proper answer on this.
24 I don't want to jump ahead.

25 MR. RIESER: Well, in follow-up, in a

1 proportionate share system, where liability is based
2 on exactly the issue of how much they sent to the site
3 or how much they contributed, wouldn't there be a
4 larger incentive for that person to bring that
5 information forward under that system as opposed to
6 the joint and several liability system?

7 MR. GARY KING: Okay. I think I understand the
8 question. I think I would like to take some time to
9 think about that and respond.

10 MR. RIESER: Okay. Then I want to -- there is a
11 third part to that. It is that when you talk about
12 that, you talk about the incentive for the person to
13 demonstrate someone else's shares. And my question is
14 whether there is an issue, a separate issue, regarding
15 the incentive for individuals to try and bring other
16 people into the liability mix, if you will, into the
17 number of persons potentially responsible. That's a
18 different issue than demonstrating their own
19 individual shares, and whether the incentive concerned
20 has to do with bringing other people in as opposed to
21 bringing one's own information forward.

22 MR. GARY KING: I think those are all fair
23 follow-up questions, and we will address those.

24 HEARING OFFICER ERVIN: We will move on to the
25 questions regarding Subpart B. Ms. Rosen, I think you

1 have a general question, question number 15.

2 MS. ROSEN: On page 20 of Mr. King's testimony he
3 explains that, quote, for owners and operators as well
4 as other categories of PRPs, liability is established
5 based on actions, or inactions, not status, end
6 quote. Please describe the sort of inaction which
7 would result in liability.

8 MR. GARY KING: What was being described there was
9 the concept that you can have liability based on an
10 act or an omission to act. That's what I meant by the
11 term inaction there.

12 MS. ROSEN: I am going to ask you some
13 hypotheticals that would better define it. Just a
14 second.

15 MR. RIESER: Well, just to follow-up on that, if
16 an owner, a new owner of a property who had no
17 responsibility for causing a release on that property,
18 and no knowledge of that release when he bought the
19 property, whether that owner would then subsequently
20 gain knowledge of that ongoing release, and I am going
21 to make it even more defined, which is not having an
22 impact outside of the boundaries of the property,
23 whether that owner would be liable for failing to take
24 action with respect to that release?

25 MR. GARY KING: That can be a real fact-specific

1 type issue. There is, of course, always all sorts of
2 examples where somebody has purchased a piece of
3 property -- done due diligence, purchased a piece of
4 property, and then found that there was contamination
5 there. It was discovered and nobody knew about it.
6 That is not causing any direct impact, any off-site
7 users. In that case it would seem to me that, you
8 know, that is probably not a responsible person. I
9 mean, it is probably a person that is not going to be
10 liable.

11 There is also other examples where people have
12 bought pieces of property where, you know, it is at
13 the point of failure. I mean, tanks are about to have
14 releases and things like that and in that situation it
15 seems to me that is a similar but a different kind of
16 fact situation and it -- you really have to evaluate
17 that kind of issue on a case-by-case basis.

18 MR. RIESER: Okay. Looking ahead at
19 741.210(b)(3).

20 MR. GARY KING: Are we dropping down to question
21 16?

22 MR. RIESER: Well, it was not intended although it
23 may cover that, and Whitney may want to follow-up.
24 But I just wanted to follow-up on what you said real
25 quickly. You used the terms at the end of the section

1 disposal, transport, storage or treatment. And I
2 notice that you didn't use the term which is commonly
3 used in that litany of release. Was that
4 intentional?

5 MR. GARY KING: We did it intentionally the way we
6 have it set up here.

7 MR. RIESER: And what was the purpose of that?

8 MR. GARY KING: It focuses on the actions. I
9 mean, obviously, you can have a release going on over
10 a period of time, but these are more concrete -- what
11 we have there are more concrete actions that are
12 more -- I think are a little more easy to judge, more
13 objective to judge.

14 MR. RIESER: Okay. Thank you.

15 HEARING OFFICER ERVIN: Do you have an additional
16 follow-up question?

17 MS. ROSEN: No.

18 HEARING OFFICER ERVIN: Okay. Please proceed.

19 MS. ROSEN: Okay. Question 17, explain why
20 common-law principles, as set forth in the Restatement
21 (Second) of Torts, apply as a guide to interpreting
22 the proportionate share allocation provisions.

23 MR. GARY KING: Well, as I was saying this
24 morning, we saw 58.9, the language of it being -- you
25 know, there is a lot of ambiguities and

1 inconsistency. So we thought it was appropriate to
2 look at other accepted judicial -- other accepted
3 principles of jurisprudence to figure out what is the
4 best approach to handling some of the ambiguities and
5 inconsistencies within the statutory language. And in
6 looking at the Restatement of Torts, and, I mean,
7 that's a, you know, commonly accepted treatise dealing
8 with issues of jurisprudence, and we thought it was a
9 good source to look at principles that should apply to
10 these types of actions.

11 MS. ROSEN: But you did not -- there is a
12 distinction to be made between torts and causes of
13 action under the Environmental Protection Act?

14 MR. GARY KING: Well, yes, there is a difference.
15 One is if you are under common-law strictly then you
16 are not under a statutory terminology. Whereas if you
17 are under statutory terminology, you look to that.
18 However, it certainly has been true of all sorts of
19 cases where there is statutory principles involved
20 that you also go to the common-law to figure out how
21 to interpret provisions of statutory law.

22 HEARING OFFICER ERVIN: Ms. Rosen, do you have a
23 follow-up question?

24 MS. ROSEN: We are just going to go down to 18.

25 HEARING OFFICER ERVIN: You skipped over 16.

1 MS. ROSEN: Can we just go to 18?

2 HEARING OFFICER ERVIN: Sure.

3 MS. ROSEN: Is there any language in Section 58.9
4 of the Act which specifically authorizes shifting the
5 burden of proof to the defendant in an action to
6 require remediation or recover response costs?

7 MR. GARY KING: Just a second. I have to find my
8 notes on that. This is sort of the same kind of issue
9 related to the term information order. If you look at
10 Section 58.9 you won't find the words burden shifting
11 in there. However, that is a principle that is well
12 recognized under the Environmental Protection Act and
13 is one of the foundational principles that the Act is
14 based on.

15 MR. RIESER: Is there an instance in the
16 Environmental Protection Act where the burden shifts
17 where there is not a specific statutory mandate that
18 it shifts?

19 MR. GARY KING: I guess I would have to defer on
20 that. I am not sure on that. We would have to do a
21 little legal research relative to that.

22 HEARING OFFICER ERVIN: Question 19 is similar to
23 question 18. Is that answered to your satisfaction?

24 MR. RIESER: Yes.

25 HEARING OFFICER ERVIN: Okay. We will go on to

1 question 20.

2 MR. RIESER: Is there any language in Section 58.9
3 of the Act which supports the statement on page 23 of
4 Gary King's testimony that, quote, the hardship from
5 the inability or failure to produce the evidence
6 necessary to apportion harm, end quote, should fall
7 upon the defendant in an action to require remediation
8 or recover response costs?

9 MR. GARY KING: I think that is -- there was -- I
10 think that is a misstatement of the testimony in terms
11 of the not being a complete statement of the principle
12 involved. What the full sentence says is where a
13 party has been demonstrated to have caused or
14 contributed to a release, any hardship arising from
15 the inability or failure to produce the evidence
16 necessary to apportion harm shall fall upon the liable
17 party.

18 And the key is that we have got a party who has
19 been demonstrated to have caused or contributed to a
20 release and, as I was saying, I mean, that is one of
21 the founding principles within the Environmental
22 Protection Act. If you look at Section (2)(b), it
23 talks about the purpose of the Act being to assure
24 that adverse effects upon the environment are fully
25 considered and borne by those who cause them.

1 MR. RIESER: So a person who arranged for disposal
2 of materials at a given site, under your proposal,
3 would, assuming that that was shown to be accurate,
4 would be liable -- would be a liable party, correct?

5 MR. GARY KING: No. I don't think that is a
6 correct statement of the legal requirements that need
7 to go into a demonstration of proof for a generator
8 liability.

9 MR. RIESER: Okay. What else would need to be
10 shown?

11 MR. GARY KING: Our provision on generator
12 liability tracks what appears in 22.2(f) which
13 similarly then tracks what is in the Federal Superfund
14 Law. And there are a number of cases where we kind of
15 list all of the elements of proof that have to be
16 provided to prove generator liability.

17 One of the good cases that I am familiar with is
18 The United States of America versus South Carolina
19 Recycling & Disposal, Inc. It is a case that dates
20 back to 1984, and it goes through the liability
21 requirements for proving generator liability. I can
22 read through that, if you would like.

23 MR. RIESER: Sure.

24 MR. GARY KING: Okay.

25 HEARING OFFICER ERVIN: Excuse me. Could you read

1 the cite into the record as well?

2 MR. GARY KING: Yes. It is 653, Federal
3 Supplement 984.

4 HEARING OFFICER ERVIN: Thank you.

5 MR. GARY KING: I will just read a little bit from
6 the case. It says, stripping away the excess language
7 of the statute, a generator may be held liable under
8 Section 107(a)(3) of CERCLA if the government can
9 prove that:

10 A, the generator's hazardous substances were at
11 some point in the past shipped to a facility;

12 B, the generator's hazardous substances or
13 hazardous substances like those of the generator were
14 present at the site;

15 C, there was a release or threatened release of a
16 or any hazardous substance at the site;

17 D, the release or a threatened release causes the
18 occurrence or response cause.

19 MR. RIESER: So a generator who sends solder rods
20 containing lead to a site at which there is a release
21 of TCE, which is the significant problem at the site,
22 the release of TCE into groundwater, would still be a
23 liable party with respect to that site, correct?

24 MR. GARY KING: I wouldn't think so. I mean, that
25 is not -- you are not describing the release of lead

1 in which you just described.

2 MR. RIESER: So there has to be a release of the
3 substance which the generator shipped?

4 MR. GARY KING: Or something like it. I mean,
5 what you are talking about is something totally
6 different.

7 MR. RIESER: Assume there is lead in the soil, but
8 the site -- the remediation of the site is focused
9 entirely on the TCE.

10 MR. GARY KING: Are you describing in terms of an
11 allocation factor issue or a liability issue?

12 MR. RIESER: A liability issue.

13 MR. GARY KING: So you are saying that there is
14 lead in the soil. Let's get the hypothetical straight
15 before we go too far with trying to reach a
16 conclusion. You are saying there is lead in the
17 soil?

18 MR. RIESER: Yes.

19 MR. GARY KING: And there has been lead sent
20 there, so there has been a release of lead?

21 MR. RIESER: Yes. And a person who is -- has sent
22 lead to the site and that lead has been released?

23 MR. RIESER: Right.

24 MR. GARY KING: Well, if he has sent lead to the
25 site and lead has been released, then he would be the

1 liable party.

2 MR. RIESER: Okay. The remediation to be done at
3 the site is to remediate the TCE in the groundwater.
4 That person is still liable for the costs of that
5 remediation?

6 MR. GARY KING: Well, that -- again, I think
7 that's one of the things that really makes our
8 proposal quite unique with regards to this, and that
9 is it allows somebody to look at what is causing or
10 what is driving the costs of the cleanup in terms of
11 the cleanup objectives process. So we could use TACO
12 in that context to make arguments as to what is really
13 driving the cleanup and what the problem really is,
14 and reduce their allocation accordingly.

15 MR. RIESER: Could that allocation for that party
16 be reduced to zero?

17 MR. GARY KING: It depends. To some extent -- I
18 guess I am not quite clear what you are assuming as
19 far as the lead. I mean, are you assuming that there
20 is no risk whatsoever from the lead at the site?

21 MR. RIESER: Yes.

22 MR. GARY KING: And that as a result of
23 remediating the organic materials there is no
24 additional costs related to that lead being at the
25 site?

1 MR. RIESER: Yes.

2 MR. GARY KING: Then I think the cost could go to
3 zero for the person contributing lead.

4 MR. RIESER: Okay. If this same generator did not
5 know how many drums that they sent to the site, so it
6 can't prove how much material it sent to the site, is
7 that -- does that generator now have to share in the
8 cost of the allocation because he can't prove what was
9 sent? He has to absorb all of the additional unproven
10 shares?

11 MR. GARY KING: Well, you would have to prove what
12 he sent in terms of the types of contaminants. I
13 mean, he certainly couldn't get off the hook, so to
14 speak, by just proving nothing and escaping liability
15 in that context. If he is proving that I don't know
16 how much lead I sent there; and I am never going to be
17 able to figure out how much lead I sent there; but all
18 I ever sent was lead there; and I can prove that all I
19 ever sent was lead there; and lead has nothing to do
20 with the cleanup that is going on; lead has nothing to
21 do with any of the costs related to any of the cleanup
22 that is going on; I think his allocation becomes zero
23 under our system.

24 HEARING OFFICER ERVIN: Is there a follow-up
25 question?

1 MR. RIESER: Excuse us just one moment, please.
2 (Mr. Rieser and Ms. Rosen confer briefly.)
3 MR. RIESER: No, no thank you.
4 HEARING OFFICER ERVIN: Okay. Moving on to
5 question number 21.
6 MS. ROSEN: Do we need to revisit -- didn't we
7 skip one earlier?
8 HEARING OFFICER ERVIN: Yes, you skipped question
9 number 16.
10 MR. RIESER: Is it accurate that Section
11 741.210(b)(3) is intended to impose liability on
12 owners by virtue of their status as owners of the
13 property and without respect to any actions in causing
14 the release or disposal of contaminants?
15 MR. GARY KING: No.
16 MR. RIESER: What is it in the language that
17 states that?
18 MR. GARY KING: I think this goes back to the --
19 we were just talking about the question before as to
20 what this says. There is -- it talks about if the
21 respondent owned or operated the site or facility at
22 the time of any such disposal, transfer, storage, or
23 treatment. So it is fixed on when those activities
24 occurred.
25 MR. RIESER: And it is fixed on disposal or

1 treatment and not on release, correct? Disposal,
2 transport, storage, or treatment -- excuse me -- and
3 not on --

4 MR. GARY KING: Yes, that is correct.

5 MS. ROSEN: Question 21, with respect to Section
6 741.210(d)(3), does the Agency intend that any party
7 unable to demonstrate its proportionate share should
8 be required to assume any orphan shares, even if such
9 party has made a good faith effort to produce all
10 available information?

11 MR. GARY KING: The way our process defines orphan
12 shares, and I think kind of the scenarios that we
13 talked about earlier show this, if there is an orphan
14 share then other parties are not responsible for that.

15 MS. ROSEN: On Scenario 3, Example 2, Exhibit 7,
16 under that scenario you characterize responsible party
17 named letter D, contended share, bankrupt, does not
18 participate. The proof shows incomplete. Under the
19 proportionate share, per your proposal, the Agency's
20 proposal, it would appear that that share is being
21 allocated among responsible parties B and C; is that
22 correct?

23 MR. GARY KING: Well, no, I guess I would not -- I
24 would not look at that quite that way. In fact, I
25 think the better hypothetical as to this question is

1 if you look at Scenario 2, Example 2, down at the D
2 person, bankrupt, does not participate, the proof
3 shows that it is a 30 percent orphan share. The
4 proportionate share is there of 30 percent. And as we
5 say in the footnote, for the cleanup to proceed the
6 State must pay D's demonstrated orphan share.

7 MS. ROSEN: Who is demonstrating the orphan
8 share?

9 MR. GARY KING: I think that's an issue of what
10 the evidence shows at hearing.

11 MS. ROSEN: And under your scenario, you are
12 placing the burden on the responsible parties to
13 present the evidence as to the shares, so is it
14 correct to say that the burden would be on the other
15 named parties?

16 MR. GARY KING: Well, in the example that we have
17 provided there, what the -- again, this is Scenario 2,
18 Example 2. A, B, and C are contending that they each
19 have a 20 percent share. Their burden is going to be
20 to show that they have got a 20 percent share. If
21 they are able to demonstrate that they have got a 20
22 percent share, then, you know, that's what they get.

23 MR. RIESER: But who proves the bankrupt share?

24 MR. GARY KING: I mean, that is going to be a cost
25 that is -- in essence, there is -- it is kind of a

1 different kind of scenario with a bankrupt, because
2 you have a PRP that is choosing not to participate.
3 So it is not really -- anybody has a burden as to his
4 share. Of course, from the State's perspective, we
5 are going to want to see that orphan share as low as
6 possible.

7 MR. RIESER: But if B and C, under this scenario,
8 can't demonstrate their share, then aren't they also
9 in danger of picking up the orphan share as well,
10 because that orphan share has not been isolated?
11 There is no one there to step up and say this is who
12 this is, and no one, no one, has the information to
13 make the demonstration of a differentiation between B,
14 C and D?

15 MR. GARY KING: So what's the question?

16 MR. RIESER: Well, don't B and C end up with the
17 30 percent share of D?

18 MR. GARY KING: Well, now you are jumping back to
19 Scenario 3.

20 MR. RIESER: No, under Scenario 2.

21 MR. GARY KING: Well --

22 MR. RIESER: Who proves the 30 percent share of D?

23 MR. GARY KING: I am struggling with that, because
24 the column contended share is what -- here is what
25 each of these parties is contending his share is. Now

1 you have gone to hearing and this is what the proof
2 has shown. So, I mean, this is what it has shown. It
3 has shown 30 percent responsibility. It is assuming
4 that that has been shown.

5 BOARD MEMBER McFAWN: I think what they are asking
6 is who, at hearing, would make that proof about the 30
7 percent? Do you just deduce that from the evidence
8 presented on A, B, and C, or is the State going to
9 assume a role of putting forth proof about the
10 bankrupt share, based upon perhaps what evidence they
11 can glean from the bankrupt PRP?

12 Is that correct, Mr. Rieser, that that is the
13 question that you --

14 MR. RIESER: Yes.

15 MR. GARY KING: I think it could be both. I mean,
16 there were certainly -- in this kind of context, the
17 context of this example, I think that the dynamics of
18 it would be such that it serves B's and C's interest
19 to increase that orphan share, and it would serve the
20 State's interest by trying to decrease that orphan
21 share. So you could have information from both
22 sides.

23 CHAIRMAN MANNING: I have sort of a follow-up to
24 that point, too, Mr. King. The Board would appreciate
25 any information that the State has in terms of how you

1 treat bankrupt potentially responsible parties; not
2 necessarily today. But we have sort of discussed
3 internally how it is that -- what it is that you might
4 do, as the State, to protect your interests.

5 Where you know that someone is about to go
6 bankrupt or, you know, we have had several cases
7 before the Board where someone is pending bankruptcy
8 and that sort of thing. I guess the question that we
9 have often asked each other is what is the State doing
10 out there to protect, and to go into bankruptcy court,
11 if you will, to protect whatever interests there may
12 be, environmental liability, that there may be in
13 terms of a bankruptcy.

14 MR. GARY KING: Well, we can talk about that now.
15 We have, you know, been very actively involved in
16 bankruptcy courts all over this country, as a matter
17 of fact. Bankruptcies can be filed virtually
18 anywhere, depending on where the person is
19 headquartered, or so to speak. And we have actively
20 pursued bankrupt parties to try to collect as much
21 money as we possibly could from them.

22 You know, we have a process for doing that and we
23 get involved and maybe we intervene in those cases
24 where we get notice. We have a process set up to get
25 those cases before the Attorney General's office very

1 quickly because they, obviously, have to get involved

2 in a very quick basis on those, and we do so.

3 And, you know, obviously, when you get into a

4 bankrupt situation you are not collecting 100 percent

5 on the dollar, and we try to get as much as we can.

6 We try to assert higher levels of priority relative to

7 environmental issues, and do the -- the State does the

8 best that it can as far as getting funds from a

9 bankrupt party.

10 HEARING OFFICER ERVIN: Do you have some more

11 questions on the scenarios, or do you want to go back

12 to the pre-filed questions?

13 MR. RIESER: Just to sort of step back on these

14 scenarios, when you say contended share, what do you

15 mean?

16 MR. GARY KING: Well, I think that during the

17 hearing process there is, at least for the purposes of

18 these hypotheticals, you have a person who is

19 proposing that he is 20 percent responsible but, you

20 know, certainly no more than 20 percent responsible.

21 MR. RIESER: So this is the share that the

22 individuals are putting forward and saying this is how

23 much we are responsible for?

24 MR. GARY KING: Yes.

25 MR. RIESER: When you say the proof shows, what do

1 you mean?

2 MR. GARY KING: After hearing -- you know, there
3 would be an evidentiary hearing, and then the proof
4 shows what we have delineated in that column.

5 MR. RIESER: So the proof shows is the decision
6 that the Pollution Control Board makes?

7 MR. GARY KING: Well, the proof shows is the
8 evidence at hearing. The decision that the Board
9 would make would be the next column.

10 MR. RIESER: Okay. So when you say incomplete
11 under proof shows, what do you mean?

12 MR. GARY KING: The evidence is such that you
13 really -- you couldn't make a decision as to -- again,
14 contrasting it with the first scenario where there is
15 contended shares and the proof is showing specific
16 amounts, that is how you make a decision. What
17 happens then is you really don't have any information
18 that clearly shows what responsibility is.

19 MR. RIESER: Okay. So in situations that -- these
20 are in situations where people are contending that
21 they have a certain amount. Don't they, in order to
22 contend that amount, aren't they making factual
23 allegations that support that they are -- that that is
24 the amount that should be applied to them?

25 MR. GARY KING: Well, they could be. We are just

1 trying to show as an example here. Again, you have to
2 understand -- again, the premise here is that there
3 has been causation established on all these, and that
4 they are, in fact -- they are liable parties. And now
5 it is a question of what the allocation should be for
6 them as a liable party.

7 MR. RIESER: But the liable parties that are
8 presenting allegations, evidence of a sort that
9 establishes a certain -- in their minds, at least,
10 establishes a certain amount, because that is what
11 they are contending, and the Board has to make a
12 decision based on that evidence, and under what you
13 are proposing, the fact that they can establish that
14 it is 20 percent means that they have to take a 75
15 percent, half of a 75 percent share, looking at
16 Example 1, Scenario 2.

17 MR. GARY KING: Just so it is clear here, by
18 incomplete we are not saying there is no information.
19 It is just that the information may be incomplete as
20 to, you know, establishing this firmly as what party A
21 does. And you are right, where that is incomplete,
22 when you just can't -- when the information is not
23 enough to really make a clear demonstration, then you
24 would have an allocation of a 75 percent.

25 MR. RIESER: Is there a language proposed under

1 this regulation where the Board makes a decision that
2 the evidence is incomplete?

3 MR. GARY KING: Well, we don't use the term
4 incomplete, but I think (d)(3) is as close to it as we
5 get.

6 MR. RIESER: Doesn't the Board have to make a
7 decision on whatever evidence is presented to it;
8 either decides, A, the evidence is incomplete or, B,
9 we have to make a decision here, so we are going to
10 decide it is X?

11 MR. GARY KING: Well, yes, the Board will have to
12 make a decision.

13 MR. RIESER: Are you saying the Board should make
14 a separate decision other than X? It should make a
15 decision that the information is not complete and
16 that, therefore, the person should bear a larger share
17 than what they are contending?

18 MR. GARY KING: I don't -- we were not trying to
19 suggest that the Board had to make a separate decision
20 of incompleteness. The Board would have to make a
21 determination of liability, and then after making the
22 determination of liability they would look at what the
23 evidence shows as to allocation, and then make a
24 decision based on that.

25 MR. RIESER: Is that --

1 MR. GARY KING: Recognizing that the Board -- you
2 know, there is various factors that the Board is
3 supposed to look at.

4 MR. RIESER: Is that decision anything other than
5 assigning a specific percentage to that party?

6 MR. GARY KING: Well, it could be.

7 MR. RIESER: What could it be?

8 MR. GARY KING: It could be a flat dollar amount,
9 particularly if you are in a cost recovery situation.
10 You know, there wouldn't be any real reason to do a
11 percentage. I mean, it would just be a -- dollar
12 amounts that were spent should be there, and so it
13 should just be a flat dollar amount.

14 MR. RIESER: The flat dollar amount would be a
15 percentage of the whole, as you presented in your
16 scenarios, correct?

17 MR. GARY KING: Well, yeah. You can translate a
18 flat dollar amount to a percentage, yes.

19 MR. RIESER: In situations where parties were
20 contending they had, as you have in Example 1, 25
21 percent shares, Scenario 2, Example 1, in Exhibit 7,
22 they have percentage shares.

23 MR. GARY KING: Which scenario are you on?

24 MR. RIESER: I am sorry. Scenario 2, Example 1.

25 MR. GARY KING: Okay.

1 MR. RIESER: That they had certain percentage
2 shares. Would the Agency take the position that their
3 information was not complete and, therefore, they had
4 to bear the cost of everything that was left, the
5 entire orphan share, rather than contending on what
6 the specific percentage should be?

7 MR. GARY KING: Well, these -- in this example
8 there is not an orphan share.

9 MR. RIESER: The share remaining after the
10 allocated -- the one allocated share is established?

11 MR. GARY KING: Well, I don't consider those
12 orphan shares.

13 MR. RIESER: Then call it the share remaining
14 after the one share is established.

15 MR. GARY KING: So the remaining share. What
16 about the remaining share now?

17 MR. RIESER: Would the Agency take the position
18 that in responding to a party contending that their
19 percentage was X, that the Agency would not say, no,
20 the percentage is Y but, no, you have not established
21 X, therefore, you have got whatever is left here?

22 MR. GARY KING: I think you are presuming a level
23 of knowledge as to my being able to predict how we
24 would do -- I don't know how we would predict how we
25 would handle a specific case.

1 BOARD MEMBER HENNESSEY: Can I just ask a
2 question. The standard that the respondent has to use
3 to prove how much they caused or contributed to the
4 release is a preponderance of the evidence. So in
5 Scenario 1, Example -- Scenario 2, Example 1, B and C
6 have not shown by a preponderance of the evidence that
7 their share was 25 percent?

8 MR. GARY KING: Right.

9 HEARING OFFICER ERVIN: Can I interject here? Is
10 it that they didn't show that their contended share
11 was 25 percent, or they couldn't show any share?

12 MR. GARY KING: It could be either one.

13 HEARING OFFICER ERVIN: Okay.

14 BOARD MEMBER HENNESSEY: But the Board is free to
15 find some other, that they did show by a preponderance
16 of the evidence 30 percent?

17 HEARING OFFICER ERVIN: Or 10 percent?

18 MR. GARY KING: Right.

19 CHAIRMAN MANNING: Or 90 for one of them? I mean,
20 it seems to me that we might be making this more
21 complicated, by virtue of the word incomplete on the
22 scenario, than what it may be. Is what you are trying
23 to say is that A, B, and C each come in and they each
24 contend they are 25 percent liable, but you have
25 already told us they are all the liable parties you

1 have got, and they are all liable. So, therefore, we
2 have 100 percent to divvy out between the three of
3 them.

4 It seems to me it is up to the parties to come
5 forward to say, you know, I am 30, I am 25, I am 40, I
6 am 60, and ultimately the Board is going to have to
7 make a determination based on all of the evidence that
8 is presented at the hearing. But the Board's role in
9 that second column, it seems to me, is to come up with
10 100 percent liability among the three of them. Is
11 that correct? Is that what you are saying?

12 I am getting confused when we say incomplete for B
13 and incomplete for C, and that sort of thing. It
14 seems to me our job is maybe not all that
15 complicated.

16 MR. GARY KING: I would agree with what you said.
17 We kind of struggled with how to show this in the time
18 we had it. And maybe we could have chosen a little
19 different way to describe this, but I think
20 essentially that is correct, what you said.

21 BOARD MEMBER McFAWN: Can I ask a question? In
22 this Scenario 2, Example 1, does anyone have to prove
23 that there is not an orphan?

24 MR. SHERRILL: Which one is that again?

25 BOARD MEMBER McFAWN: Scenario 2, Example 1. It

1 looks like it presumes that there is some proof here

2 that there is no orphan share.

3 MR. GARY KING: Yes, that is true. In this

4 example, just for purposes of the example there is

5 just three parties, and the three parties only.

6 BOARD MEMBER McFAWN: Do those parties bear the

7 responsibility of proving that there is no orphan?

8 Because if you don't have voluntary information, then

9 what adds up to 100 percent. Oftentimes in these

10 allocation discussions the unproven volumetric share

11 is often called the orphan share. So is it up to A,

12 B, and C to prove there were no other generators,

13 there were no other responsible parties? Is that part

14 of their proof?

15 MR. GARY KING: No.

16 BOARD MEMBER HENNESSEY: You know, I think part of

17 the confusion stems from we have been using three

18 different terms here, and you have not really defined

19 them. We have been using the term orphan share. We

20 have been using the term unallocated share. And then

21 in (d)(3) you have used the term unapportioned costs.

22 It might be useful either now or at the next

23 hearing to define for the record, to make sure we are

24 all talking about the same thing, what each of those

25 three terms mean, and do we need to be using three

1 different terms.

2 MR. GARY KING: I think that's a good point. I
3 think you are right. I think there is some
4 confusion. I think that both the SRAC and us have
5 used orphan share at times for different things. And
6 I think you are right, I think it would be helpful to
7 clarify what we mean by the term orphan shares.

8 HEARING OFFICER ERVIN: Do you have additional
9 questions on the scenarios?

10 MR. RIESER: Let me go back to something on
11 Scenario 3, Example 2. This has to do with the -- you
12 clearly know that there is a bankrupt share, but you
13 have B and C absorbing that bankrupt's share. Were
14 you saying that that was not accurate, that that was
15 drawn incorrectly?

16 MR. GARY KING: No. If you look at the footnote,
17 footnote two, it says for cleanup to proceed, the
18 State must pay D's presumptive orphan share that is
19 under that column.

20 MR. RIESER: Okay. So when you say a total of 80
21 percent is allocated by the Board for B, C and D, the
22 State is still picking up whatever the bankrupt share
23 is, and B and C are sharing whatever is left?

24 MR. GARY KING: That's correct.

25 MR. RIESER: Okay.

1 MS. ROSEN: Could we just reserve the right to ask
2 further questions on the scenarios after we have had
3 more of an opportunity to look at it?

4 HEARING OFFICER ERVIN: Certainly.

5 BOARD MEMBER McFAWN: Excuse me. I have a
6 question. I don't know if you answered this today or
7 not. The way you set these up, there is still a
8 question remaining, which is, for example, the last
9 example, Scenario 3, Example 2; it is not clear how
10 that 80 percent is divided between B, C, and D. Is
11 that something you are presuming the Board will
12 further articulate in its decision?

13 MR. GARY KING: On a case-by-case decision, yes.
14 That would be something that the Board would have to
15 make a decision on as to how that 80 percent would be
16 allocated.

17 BOARD MEMBER McFAWN: You wouldn't turn it back to
18 them and say you have an 80 percent share, and now you
19 have to allocate among yourselves, right?

20 MR. GARY KING: No, I wouldn't, no.

21 BOARD MEMBER HENNESSEY: In making that decision
22 the Board is to consider the factors in 741.215 and
23 any other relevant factors?

24 MR. GARY KING: Yes, that's correct.

25 HEARING OFFICER ERVIN: All right. I think we are

1 now on Question 21.

2 MS. ROSEN: With respect to Section 741.210(d)(3),
3 does the Agency intend that any party unable to
4 demonstrate its proportionate share should be required
5 to assume any orphan shares, even if such party has
6 made a good faith effort to produce all available
7 information?

8 MR. GARY KING: Actually, I think I answered that
9 one already before we went around on the scenarios.
10 But as we have defined orphan share, and I think Board
11 Member Hennessey made the point that we don't -- we
12 are not quite clear how orphan share is being defined.
13 As we have been defining orphan share, no, another
14 party would not be required to assume that orphan
15 share.

16 MR. RIESER: You are using the term -- but if the
17 question was are you required to assume any
18 unallocated share, even if such person had made a good
19 faith effort to produce all available information,
20 what would your answer be?

21 MR. GARY KING: The issue of whether it is an
22 unallocated share, that is going to be an issue for
23 the Board, in its discretion, relative to the facts of
24 the case.

25 MR. RIESER: But doesn't that regulation, the

1 proposed regulation, require the Board to assign those
2 unallocated shares to any party who can't demonstrate
3 what its share is?

4 MR. GARY KING: No, it does not.

5 MR. RIESER: And that's based upon the statement
6 that it may be liable for all unapportioned costs or
7 response actions?

8 MR. GARY KING: Correct.

9 MR. RIESER: What are the factors that the Board
10 is to use to decide whether they may or may not be
11 liable?

12 MR. GARY KING: Well, again, you used liable
13 there, and --

14 MR. RIESER: I am sorry. That may --

15 MR. GARY KING: Be allocated?

16 MR. RIESER: Well, you used may be liable for all
17 unapportioned costs, so I am --

18 MR. GARY KING: Okay. You are using --

19 MR. RIESER: I am tracking the language that you
20 proposed.

21 MR. GARY KING: Well, I think we were -- well, we
22 were talking about that earlier. Board Member
23 Hennessey was pointing out some of those factors. I
24 mean, if you look at -- we have listed a series of
25 allocation factors to be included for consideration

1 under A. And then under B it talks about, you know,
2 the Board is not required to determine precisely all
3 relevant factors. I mean, there could be various
4 relevant factors as to that.

5 MR. RIESER: Isn't that CERCLA because you are
6 talking about a party that cannot demonstrate any of
7 that information that goes to any of those factors?

8 MR. GARY KING: Well, now, remember, you are
9 talking about a person who has been determined to be
10 liable for purposes of 210(d), you know. So to the
11 extent that there is a difficulty of proof, it has
12 already been shown that they are a person who is
13 liable under the criteria of 210(d). And so now if
14 there is a failure on the part of the evidence where
15 does that responsibility run to.

16 MR. RIESER: That can be a generator that
17 generated a hazardous substance that has been
18 discovered to be released at the site, but they don't
19 know how much they sent and how much anybody else
20 sent?

21 MR. GARY KING: You mean -- I am not sure. And
22 what? I mean --

23 MR. RIESER: And that could be a person who --
24 what does that person do? That person has no
25 information with respect to any of the other factors.

1 All they know is they generated something that was at
2 that site. They don't know how much they sent. They
3 don't how much anybody else sent.

4 MR. SHERRILL: I can give a couple -- you know,
5 regarding this lack of information, just to kind of
6 give some anecdotal information, it is not uncommon
7 that we will investigate a site where a PRP that
8 manufactures and then a by-product, a waste product
9 will be at a site that we 4(q). So, in other words,
10 that is the material in question and they happen to be
11 located right next door to that site.

12 And then there may be another party, let's say
13 outside the state, that was a generator for this site
14 in question, too. And the evidence would appear to be
15 that the out-of-state waste generator contributed very
16 little to the site, because of the transportation
17 costs. But the site next door contributed quite a bit
18 of material to the site. We may not know exactly how
19 much the generator next door did, contributed, but it
20 was evidence from the review of the site history. But
21 due to transportation costs the next door generator
22 was the main contributor to that site.

23 And so each little site kind of rests on its --
24 there is various little facts that go with each site
25 that add to the evidence of -- when we review these

1 sites.

2 MR. RIESER: But if that out-of-state generator
3 has no documentation anymore about what the
4 transportation costs were at the time and they can't
5 demonstrate -- they didn't send very much, but they
6 can't demonstrate how much they sent, and they don't
7 know who else demonstrated that same by-product. Are
8 they responsible for all unallocated shares based upon
9 that lack of demonstration?

10 MR. GARY KING: I thought we kind of answered
11 that. I mean, that is an issue -- under (d)(3) it is
12 an issue for the Board to decide. I mean --

13 MR. RIESER: But what if there is no information
14 to support any of the factors?

15 MR. GARY KING: I mean, I guess I am trying to
16 figure out -- you keep asking the same question and we
17 keep giving the same answer. I mean, it is a party
18 that has been determined to be liable. Now they don't
19 have any evidence as to what they did beyond that they
20 have been proven to be liable. So they come in saying
21 I don't know nothing except it has been proven that I
22 am liable. So I don't know how I am supposed to prove
23 what my allocated share is.

24 MR. RIESER: Under your proposal, that person is
25 jointly and severally liable for the entire costs, all

1 unallocated costs at that site?

2 MR. GARY KING: Well, you can say that, but that
3 is not true. That is not correct at all. I think
4 that's a gross misstatement of what we said. That is
5 what compelled us to do these scenarios to begin with
6 because you were grossly misstating what our proposal
7 was.

8 MR. RIESER: But isn't that exactly -- well, how
9 would the Board make the decision that it does not
10 make -- it does not have those costs?

11 MR. GARY KING: I just -- I can't -- it is very
12 difficult for me to come to grips with a hypothetical
13 that is based on there being no information. It is --
14 I don't know what I am being asked to respond to.

15 HEARING OFFICER ERVIN: Why don't we -- think
16 about that and maybe have a response maybe for the
17 next hearing.

18 In the meantime, let's take a ten minute break and
19 we will reconvene at 3:20.

20 (Whereupon a short recess was taken.)

21 HEARING OFFICER ERVIN: All right. Back on the
22 record, please.

23 I think we are now on question number 22. Mr.
24 Rieser?

25 MR. RIESER: On page 24 of Gary King's testimony,

1 why is it a reasonable assumption that an allocated
2 share belongs to a party which is unable to prove its
3 share of the harm at a site?

4 MR. GARY KING: The comment referenced to is part
5 of a larger sentence which begins with the phrase, if
6 a demonstrably liable party is unable to prove its
7 share of the harm. And the key there is that you have
8 got a demonstrated liable party in terms of
9 741.210(b). If that liable party does not have some
10 allocation, then the liable party escapes payment for
11 any allocation which just does not seem to be the
12 appropriate result if the person is liable to escape
13 payment for any of the damages.

14 MR. RIESER: Didn't you say earlier that there
15 could be liable parties for whom an allocation is
16 zero, because they are not responsible for any of the
17 causing of any of the costs at a site?

18 MR. GARY KING: Right. But that would be -- that
19 would be a situation where they are able to prove a
20 share of the harm which in that case was zero, in the
21 hypothetical that we discussed.

22 MR. RIESER: Or they were able to show -- maybe
23 not prove its share, but show that what they sent to
24 the site was not what caused the costs to be
25 incurred?

1 MR. GARY KING: Well, I would say that is proving
2 its share of the harm, which it is proving that it
3 didn't have any share to the harm.

4 HEARING OFFICER ERVIN: Do you have a follow-up
5 question, Mr. Rieser?

6 MR. RIESER: What do you envision is the situation
7 where you have a liable party who does not -- who
8 can't prove its share?

9 MR. GARY KING: Is there more to that?

10 MR. RIESER: No, that is it.

11 MR. GARY KING: Well, it depends on what the
12 evidence is in a proceeding.

13 MR. RIESER: What did you have in mind when you
14 wrote that?

15 MR. GARY KING: What we had in mind was that the
16 Board would have discretionary authority to make this
17 determination based on what the evidence said.

18 MR. RIESER: So the Board would decide a share
19 based on the evidence before it, correct?

20 MR. GARY KING: Right.

21 MR. RIESER: Okay. So why do you need to say what
22 is said in (d)(3) that all of an unallocated share
23 goes to someone who can't prove their share?

24 MR. GARY KING: Well, are you suggesting a
25 revision of that language?

1 MR. RIESER: I am not -- well, yes, we have
2 suggested deleting it at numerous times. If what you
3 are really saying is that the Board makes a decision
4 based on the evidence before it, why is it necessary
5 to affirmatively state that the unallocated share goes
6 to somebody who can't prove their share, or may go to
7 someone who can't prove their share?

8 MR. GARY KING: Again, we have to follow through
9 in looking at (d)(2) and (d)(3). I mean, (d)(2) talks
10 about the burden of the respondent to prove by a
11 preponderance of the evidence. And then (3) is really
12 focusing on what is the situation, what happens when
13 the evidence just isn't very clear, and what is the
14 Board to do at that point and who bears the burden of
15 those informational deficiencies.

16 MR. RIESER: Is it your testimony that if there
17 are informational deficiencies that the Board doesn't
18 make an allocation, it just assigns whatever share is
19 left to whoever can't produce evidence?

20 MR. GARY KING: No. As you perhaps can tell, I am
21 getting a little bit confused by the questions,
22 because they seem to be kind of going over the same
23 ground that we have talked about before. What I would
24 like to do is defer the response on this question
25 until the next hearing.

1 MR. RIESER: That's fine.

2 MS. ROSEN: Could we skip down to 25?

3 HEARING OFFICER ERVIN: Yes.

4 MS. ROSEN: Thank you. Question 25, explain the
5 Agency's conclusions that unallocated shares must be
6 paid by the public, on page 11 of the Statement of
7 Reasons.

8 MR. GARY KING: What we were talking about in that
9 context was unallocated. And, again, I apologize. We
10 are using the terms unallocated and orphan, and we
11 have kind of mixed those. And it is something we are
12 committed to clarify.

13 But when we used that phrase in the Statement of
14 Reasons we did so in the sense that if there is a
15 remediation to go forward and you have got a share,
16 whether you call it an orphan or an unallocated share,
17 and somebody is not going to -- somebody is not going
18 to be paying for that, then the State's -- by public
19 we mean the State's public resources will be used to
20 complete the cleanup activity.

21 MS. ROSEN: Would the -- the public resources
22 would be used, but there wouldn't be -- are you saying
23 that there is some sort of legal obligation on the
24 part of the State to fund that portion?

25 MR. GARY KING: No, we are not saying there is a

1 legal obligation.

2 MS. ROSEN: Okay. So a developer or someone else
3 who had interest in the property could agree to fund
4 it, and it is not automatic that the State would have
5 is to expend those monies?

6 MR. GARY KING: That's correct.

7 MS. ROSEN: Okay. Question 26, the pre-filed
8 testimony of Sidney Marder, Executive Director of the
9 Illinois Environmental Regulatory Group, sets forth
10 the procedural history of the enactment of Section
11 58.9, and specifically describes the agreed-to funding
12 package which established new funding for the
13 Hazardous Waste Fund to be used by the Agency to
14 address orphan shares. The pre-filed testimony of
15 Sidney M. Marder, pages 7 through 10.

16 Explain where the Agency intends to allocate this
17 extra funding, and what portion of the funding will be
18 applied to orphan shares.

19 MR. GARY KING: What we do with the funding that
20 goes into the Hazardous Waste Fund is it is not kept
21 in a segregated account. It is kept in the entire
22 fund. And what we do is make an evaluation on a
23 site-by-site basis using the type of analysis that
24 John Sherrill talked about this morning. And, again,
25 focusing -- our primary focus being on sites that

1 showed the most -- the greatest threat to public
2 health and the environment.

3 So we use those funds then to proceed to do
4 cleanup activities, and we can do mixed funding in
5 different sorts of ways. We have always done --
6 provided for doing mixed funding where we will fund
7 part of a project and a PRP will fund another part of
8 the project. And we have a major project that we are
9 going to be starting -- we are starting on this year
10 which is a combination of funding from the Agency and
11 from a non PRP, a local government, that is going to
12 be providing a substantial amount of money.

13 So, again, as I was saying, we focus -- it is a
14 site-by-site evaluation. We focus on the sites that
15 pose the greatest risk to human health and the public,
16 and we try to make conclusions based on where can we
17 extend the dollars the furthest. If you have -- if
18 you have PRPs or non PRPs that are willing to put
19 forward money, and the addition of State dollars can
20 get the project over the hump, in essence, to get it
21 completed, then that's one the factors that we would
22 strongly consider as part of doing a project.

23 MR. RIESER: Just a follow-up a little bit on the
24 Hazardous Waste Fund. It is accurate, is it not, that
25 it can be used for things in addition to actual

1 investigation and cleanup activities at hazardous
2 substance sites?

3 MR. GARY KING: I am not sure what you are
4 thinking of there.

5 MR. RIESER: Well, the statute allows it to be
6 used for a variety of activities under 22.2.

7 MR. GARY KING: Well, that's true. Yes, there is
8 a broad variety of activities.

9 MR. RIESER: Do you know what -- given that your
10 1997, which is what you reported on in your testimony,
11 what percentage of the fund in that year was used for
12 actual investigation and cleanup activities, and what
13 percentage was not?

14 MR. GARY KING: We will get that at the next
15 hearing. We don't have that right here, but we can
16 tell you what we spent on projects versus non
17 projects.

18 MR. RIESER: Okay. Thanks very much.

19 MS. ROSEN: Question 27, is Mr. King's statement
20 that there is a, quote, reasonable presumption,
21 unquote, that unallocated shares belong to parties
22 which are unable to -- excuse me. Why don't we just
23 put this question on hold.

24 HEARING OFFICER ERVIN: That's fine.

25 MS. ROSEN: Okay.

1 HEARING OFFICER ERVIN: Before we go on to the
2 next section, I think Board Member Hennessey had a
3 question.

4 BOARD MEMBER HENNESSEY: Yes, I had a question
5 about the introductory language in 741.210(b) which
6 reads, quote, to establish liability, the State shall
7 prove, by a preponderance of the evidence, that the
8 respondent caused or contributed to the release or
9 substantial threat of a release in one or more of the
10 following ways, end quote.

11 The statute uses the term proximate when it talks
12 about cause or contribution. Section 58.9(a)(1)
13 refers to a proximate cause or contribution for a
14 release. Is there a reason why you did not use the
15 same language in the introductory language in
16 741.210(b)?

17 MR. GARY KING: This is one of the things that
18 made the statute very difficult to read and try to put
19 something together because, you are right, in (a)(1)
20 it says proximately caused. But then you drop down
21 into (2)(a) and then it says neither caused nor
22 contributed in any material respect. It doesn't have
23 the proximate language there. Then if you drop down
24 into -- that was in (2)(a) of 58.9. When you drop
25 down into 58.9(d) now the phrase is directly caused or

1 contributed.

2 So there is -- we kind of struggled with how to do
3 that. So what we were trying to state here is here
4 are the five ways that we see that a person is causing
5 or contributing to a release such that they should be
6 liable for that release given everything that is in
7 the statute. So, I mean, that's why we chose not to
8 bring that proximate word through every single
9 section.

10 BOARD MEMBER HENNESSEY: Thank you.

11 HEARING OFFICER ERVIN: All right. Moving on,
12 then, to Section 741.215, allocation factors.

13 Ms. Rosen, you have a question?

14 MS. ROSEN: Yes. Just a second, please.

15 HEARING OFFICER ERVIN: Actually, I think you may
16 have already covered most of this.

17 MS. ROSEN: Yes.

18 HEARING OFFICER ERVIN: Mr. Rieser, then you have
19 several questions regarding 4(q) notice questions and
20 Mr. Sherrill's testimony.

21 MR. RIESER: Okay. Question 29, from 1991 to the
22 present, how many sites per year have been referred to
23 the U.S. EPA?

24 MR. SHERRILL: This was covered in my testimony,
25 and typically approximately 15 to 20 sites per year

1 are referred to the U.S. EPA Emergency Response
2 Branch. As a point of information, we are usually in
3 touch with the U.S. EPA, and as I -- on page five,
4 footnote five, they are dealing with or they have been
5 dealing with, the U.S. EPA, this methyl parathion
6 release. And we have known that we really couldn't
7 refer many sites up during this time period.

8 The exact numbers, if you -- so there is different
9 factors that are considered when we refer a site. If
10 they tell us over the phone that we are not really --
11 we don't have the availability to work on sites right
12 now then we don't refer. And by the context of your
13 question, when you say "refer," I took it to mean in
14 the context of my testimony, because there is
15 referrals that we may do for NPL listing, and I didn't
16 think you meant that.

17 MR. RIESER: That is correct. I was hoping,
18 however, that I could get a quantification on a
19 year-to-year basis because you use ranges for all of
20 the years, looking at your exact quantification for
21 4(q) sites. That obviously changed -- numbers that
22 were submitted in issue changed over time although you
23 could say we issued X per year on an average and, in
24 fact, in some years you didn't do any and some years
25 you issued a lot. I was hoping we could get an exact

1 count coming forward from 1991.

2 MR. SHERRILL: I can look into that for next time.

3 MR. RIESER: Thanks very much.

4 MR. EASTEP: Can we just clarify? I am not sure

5 exactly what the purpose is that you are looking for

6 those. Because some of the sites that we refer up,

7 that John mentioned, are not necessarily sites that we

8 would be looking at on the State side anyway. There

9 are different types of sites.

10 Some of them are true emergency -- well, I don't

11 want to say emergencies like train wrecks, but sites

12 where we discover a warehouse with some drums and it

13 is right next door to a school, and the EPA has the

14 ability to move in there literally within days

15 probably secure the site and start taking action to

16 remove stuff. That might be a little bit different

17 than the way we handle it.

18 So are these the types of things -- the 15 or 20

19 typically are what we call removal actions. They are

20 things that the EPA is going to move in fairly

21 quickly.

22 MR. RIESER: Okay. Obviously, John Sherrill found

23 it important to describe a certain number of sites

24 that -- the IEPA asks the U.S. EPA to handle a certain

25 number of sites for year for a variety of reasons

1 which he identified. I just want to make sure the
2 quantification is accurate on those numbers, the
3 sites, just so the Board knows.

4 MR. EASTEP: You are principally talking about
5 removal actions.

6 MR. RIESER: Talking about removal actions?

7 MR. EASTEP: Is that correct?

8 MR. RIESER: If that is what John was talking
9 about.

10 MR. SHERRILL: Yes.

11 MR. EASTEP: All right.

12 MR. RIESER: Okay. I just want to get that 15 to
13 20 nailed down.

14 MR. SHERRILL: The context of these removals is
15 that the Agency has limited resources to respond to
16 all remedial actions in Illinois, and occasionally
17 these -- if we had to respond to every immediate
18 removal, we probably wouldn't have 4(q)'d anybody
19 hardly. I mean, we would have 4(q)'d after the fact.
20 But these immediate removals would just take away more
21 funds than we currently have available.

22 MR. EASTEP: I have to follow-up a little bit.
23 This figure is going to be extremely difficult to come
24 up with. Because John mentioned something in his
25 response a few minutes ago that a lot of times we talk

1 to them over the phone. And sometimes they will tell
2 us we are real busy and we can't do anything for the
3 next six weeks, or it is the end of the year, and we
4 have spent all of our money somewhere else, and you
5 will have to wait until next year, and so --

6 MR. RIESER: They spent it on caterers.

7 (Laughter.)

8 MR. EASTEP: So some of that is literally verbal.
9 Other things we kind of come upon at the same time,
10 more or less. Some citizen files a complaint and so
11 we start talking to them and, well, is that something
12 that we referred or they discovered it and we are
13 working with them.

14 To go back to 1991, I don't think we are going to
15 find extremely accurate information, because there is
16 no formal process for all of them to go up there.

17 MR. RIESER: So what does the 15 to 20 represent?
18 What does that figure represent, just sort of a gut
19 feeling?

20 MR. EASTEP: That represents our best professional
21 judgment as to what we have been doing for the last
22 several years.

23 MR. RIESER: That is consistent with the other
24 values you have given in terms of how many 4(q) --

25 MR. EASTEP: No, no. The 4(q) stuff is

1 information that we have that is accurate.

2 MR. SHERRILL: Yes. The chart that shows the
3 number of 4(q)s issued per year, we did double-check
4 that and we believe that is accurate.

5 MR. RIESER: Whatever you can. If the information
6 is not there, it is not there. But if there is a way
7 to put a year-by-year figure on it, that would be
8 useful for the Board.

9 MR. SHERRILL: Okay.

10 MR. RIESER: Let me follow-up with something about
11 the emergency actions, which is something that came up
12 in the testimony this morning. You were -- one of you
13 discussed the -- oh, John Sherrill in his testimony
14 talked about how this works. In general the Site
15 Remediation Act, TACO, and the Site Remediation
16 Program don't apply to emergency actions. Do you
17 recall that testimony?

18 MR. SHERRILL: Yes.

19 MR. RIESER: Okay. It is not your position that
20 because costs were expended in an emergency action
21 that Proportionate Share Liability would not apply?

22 MR. SHERRILL; Correct. The reference that I made
23 to that was let's say there is a train wreck in Mt.
24 Vernon and we don't want someone to go to the Board
25 trying to determine liability before they respond, the

1 on scene response to that train wreck with chemicals
2 spewing out. We don't want them to sit there and
3 figure TACO formulas either. We want them to go and
4 immediately respond to that.

5 MR. RIESER: So you want -- the train operator is,
6 obviously, and the person who owned the material that
7 they are transporting, obviously, have a role. But
8 let me ask it this way. If the landowner adjacent to
9 the railroad is subject to this spill that came on to
10 their property, they had nothing do with it, anything
11 like that, would the Agency bring an action to get the
12 landowner to clean up their property, and take the
13 position that the proportionate share wouldn't apply?

14 MR. SHERRILL: I will let others speak on that.
15 But from our -- I will say this part. On most of the
16 emergencies such as that, as far as the Agency having
17 to get involved in a post remedial, long-term remedial
18 effort, in today's environment, the last 10 or 15
19 years, I mean, I applaud the regulated community.
20 They go out and respond in a very prompt manner and
21 address those type of -- in most circumstances address
22 those type of releases.

23 Gary, did you want to --

24 MR. GARY KING: Yes. The only problem that I
25 think the owner would run into in that situation is if

1 took a stance that he was not going to allow people on
2 to do the remediation work, in which case we would
3 have to try to do something legally with regards to
4 that owner to try to make sure that that remedial work
5 got done properly.

6 MR. RIESER: But that owner would still have the
7 protection of Proportionate Share Liability?

8 MR. GARY KING: Well, yes. I wouldn't see him
9 being liable unless somehow -- I don't know -- unless
10 he got himself into some kind of situation where he
11 was causing the problem to get worse because of his
12 failure to allow people to come on and do the
13 remediation.

14 MR. RIESER: Okay. Thank you. Question 30, with
15 respect to footnote 7 of John Sherrill's testimony, is
16 it accurate to state that the 2 million dollars per
17 year added to the Hazardous Waste Fund was as a result
18 of the passage of the House Bill 901 adopting Section
19 58.9?

20 MR. SHERRILL: Yes.

21 MR. RIESER: In his testimony, John Sherrill uses
22 two landfills as examples of the Section 4(q)
23 process. Is it accurate to state that the vast
24 majority of the sites which receive Section 4(q)
25 notices are not landfills or sites with many

1 generators? Is it accurate that the vast majority of
2 these sites or -- it should be are industrial or
3 manufacturing facilities where the PRPs are past and
4 current owners and operators?

5 MR. SHERRILL: We kind of discussed this a little
6 bit earlier. I will bring a chart to kind of explain
7 which type of sites have gotten 4(q)s and which ones
8 we believe are multiple PRP scenarios.

9 MR. RIESER: Thank you. At the Steagall site why
10 did not the owner and the lessees fund the cost of the
11 remediation?

12 MR. SHERRILL: When I read that question I was
13 thinking why did not the owner, you mean funded at the
14 time of -- well, let me just back up. I really just
15 can't speculate as to the motives of the PRPs or the
16 responsible parties.

17 MR. RIESER: Why was the Agency or the State not
18 able to require the owners or the lessees to fund,
19 completely fund the cleanup of that site based on
20 principles of joint and several liability?

21 MR. SHERRILL: I mean, I can describe what
22 happened at the site.

23 MR. GARY KING: They fought and they delayed, and
24 as they fought and delayed the problem got worse and
25 worse. We considered it to be prudent to protect, you

1 know, people's health to do something about it so that
2 the contamination situation didn't get worse.
3 Remember, this is the site where you have a
4 contaminated creek flowing into a lake where people
5 are using it for --

6 MR. SHERRILL: Recreation.

7 MR. GARY KING: -- recreation and uses, and we
8 felt the need to move before all the litigation was
9 resolved itself. Because the litigation still has not
10 resolved. We are now in 1988 and we still have
11 litigation.

12 MR. RIESER: When was the original case filed.

13 MR. GARY KING: Jim Morgan left. He has been
14 handling that case for probably a decade now. It has
15 been a long time. I mean, it was -- the original case
16 was the mid 1980s, I would say.

17 MR. RIESER: Question 33, why is there no
18 expectations of cost recovery at the Logan Landfill?

19 MR. SHERRILL: At the Logan -- actually, my
20 testimony stated I anticipate a little cost recovery,
21 not no cost recovery. And the investigation to date
22 has uncovered no viable PRPs. The landfill
23 corporation went bankrupt and the sole landfill
24 stockholder died penniless in a motel along old Route
25 66. This is the kind of information you run into when

1 we talk about incomplete information.

2 Well, there is approximately \$100,000.00 left in a
3 landfill trust account, and that we do plan on
4 utilizing that money at this site. We still have some
5 more work to do there, but most of it has been done.
6 There is some adjacent property that we can sell that
7 we will recover some of the costs. Transportation and
8 manifest records were not recovered at this particular
9 site.

10 MR. RIESER: Were any generators known at that
11 site?

12 MR. SHERRILL: Not that I know of.

13 MR. RIESER: Regarding the three methods for cost
14 recovery described by John Sherrill on page 12 of his
15 testimony, how often has each method been used and how
16 much has been recovered using each method?

17 MR. GARY KING: As you recall, when John was
18 talking about this this morning he really talked about
19 the fact that they are used in combination more often
20 than not. It will be extremely difficult to try to
21 segregate out how often each thing has been used. I
22 mean, billing, we do billing for different sorts of
23 sites. We have got cost recovery litigation. Some of
24 that is pending already. We file liens.

25 Maybe if you would be a little more specific as to

1 what you are -- what is going to be hard is to connect
2 up how much has been recovered using each method,
3 because you can't really segregate -- with some of
4 these you can't really segregate the method.

5 MR. RIESER: I was trying to identify or find out
6 whether cost recovery litigation was the way of
7 recovering all of the money or whether the invoices
8 was a way of recovering.

9 MR. SHERRILL: Just kind of as a rough
10 professional judgment, the environmental liens which
11 is where we would tack on a lien to a property, as a
12 percentage of money we do not recover much money that
13 way, because most of these -- as I said, there are
14 very few of these sites that we do initiate these type
15 of cleanups. I mean, like, this one site was 8.8
16 million. Well, the property, the whole landfill, is
17 not worth 8.8 million dollars. So for the
18 environmental liens we get a very small percentage of
19 money.

20 MR. RIESER: By the liens you get a small
21 percentage, and that means by attaching a lien to the
22 property and then foreclosing on that lien?

23 MR. GARY KING: We have never foreclosed on a
24 property.

25 MR. RIESER: Okay.

1 MR. GARY KING: The way we have attained money
2 through the lien mechanism is there has been -- in
3 some cases there has been a purchaser come along on
4 that property, the lien has been sitting on it, and so
5 in order to kind of clear the title on the property
6 they pay off the lien.

7 MR. RIESER: Okay. Thank you. Please proceed.

8 MR. SHERRILL: Then the other method, billing, to
9 me, or invoicing seems to be more of a recent
10 phenomenon because PRPs do not want to get into
11 litigation, let's say with the Attorney General, and
12 occasionally -- I can think of one site we settled
13 just recently, where we -- the PRPs performed a
14 cleanup, but they did not want to investigate the
15 groundwater. We investigated the groundwater and we
16 sustained about an \$80,000.00 or \$90,000.00 Agency
17 expenses.

18 Then the PRP said, well, if that's all you spent
19 we will just cut a check for you and, they sent it to
20 us in the mail. So that settled that particular
21 matter. And then I would say that the bulk of the
22 money, which I guess we are going to follow-up on, is
23 through cost recovery through the Attorney General's
24 office.

25 MR. GARY KING: I will just add to that that

1 historically by far the predominant source for us to
2 recover costs we have expended is for us to refer cost
3 recovery actions to the Attorney General's office and
4 then they proceed with litigation relative to those
5 cases.

6 MR. RIESER: Thank you. Then question 35,
7 Attachment 1 appears to reflect 80 sites rather than
8 85 sites. I was just looking at that, looking at the
9 numbers that appear to be reflected on the graph.

10 MR. SHERRILL: I recounted and I counted 85. It
11 could be the interpolation on the particular graph
12 just interpolating in between two numbers. And just
13 to follow-up, that is sites through -- through 1997,
14 so we are not including 1998.

15 MR. RIESER: Are there 4(q)s the Agency has issued
16 at the request of the owner?

17 MR. SHERRILL: I know there has been a couple of
18 them. Their reasons were apparently for -- I mean,
19 for insurance cost recovery. But I would say I would
20 know of only, I think, maybe two of them. I don't
21 know if Gary --

22 MR. GARY KING: Yes, it is usually not a very good
23 practice for people to ask for those things, because
24 you end up -- from their perspective they end up with
25 something that is not under their control any

1 further. And I don't usually advise people to ask for
2 those things, because they might get what they ask
3 for.

4 MR. RIESER: Would you agree with John Sherrill's
5 number, though?

6 MR. GARY KING: A couple? Yes. Maybe a couple.
7 We have gotten a request recently.

8 MR. RIESER: When did the Build Illinois, Clean
9 Illinois funds stop?

10 MR. GARY KING: They stopped in June of 1991.

11 MR. RIESER: Is there federal money available for
12 funding site remediations in Illinois?

13 MR. GARY KING: Well, I mean, we talked about
14 these sites that we refer to the federal government.
15 There are those. Is that what you mean, those sites?
16 Or stuff that we administered otherwise?

17 MR. RIESER: Yes.

18 MR. GARY KING: Well, sort of there is. I mean,
19 the relationship between the State and the federal
20 government is extremely complicated as to these kinds
21 of funding issues and the whole concept of scoring
22 sites, and then once they are proposed for NPL -- you
23 know, if they are proposed for NPL then we can get
24 some money.

25 Then if it qualifies as a Superfund Accelerated

1 Cleanup Model Site, then there is another process for
2 money to be made available to the State so that we can
3 kind of direct things along. It is a very complex
4 thing.

5 MR. SHERRILL: And kind of to follow-up on that,
6 too, I know of at least, I believe, two 4(q)s that the
7 sites eventually went NPL. So, I mean, to
8 reemphasize, these are some of are worse sites or we
9 wouldn't be issuing a 4(q) notice.

10 MR. RIESER: If I may, I just have a couple more
11 questions.

12 HEARING OFFICER ERVIN: Sure.

13 MR. RIESER: With respect to 741.120, which
14 describes the 58.9(b) notice, would the Agency
15 consider including a statement with respect to how
16 liability is based -- liability allocation is based on
17 Proportionate Share Liability that would be similar to
18 the appeal language that you see in your denial
19 letters under 740 or 732, sort of an informational
20 statement?

21 MR. GARY KING: I guess I am not sure what you are
22 referring to.

23 MR. RIESER: Well --

24 MR. GARY KING: You are talking about some blanket
25 language that we have in our NFR letters?

1 MR. RIESER: Well, I am saying it would be an
2 informational statement with respect to how liability
3 is allocated under Section 741, so that people getting
4 these notices understand the Proportionate Share
5 Liability. You don't have language like that
6 currently, but I am just saying in terms of there
7 being an informational letter language in that notice
8 that that be included.

9 MR. GARY KING: You know, I hesitate to say that
10 we would do that, but I think if we -- you know, if
11 there was perhaps a more formal kind of way it would
12 give us a chance to respond to it more directly but,
13 you know, we are not adverse to providing more
14 information in these 58.9(b) notices.

15 MR. RIESER: With respect to 741.220(a), you have
16 a specific limitation on -- the last sentence of (a)
17 says to the extent the underlying complaint was for
18 cost recovery the adjustment procedure is not
19 applicable. And the question is why not.

20 MR. GARY KING: The adjustment provision was
21 really -- we thought it was important where you had a
22 case, for instance, where we were seeking for PRPs to
23 perform a cleanup and during the course of that case
24 there would be an allocation assigned. Well, by the
25 time you got through with the case you might find out

1 that you had more information come in, and you could
2 conclude at that point that maybe the allocation that
3 was initially arrived at was not the -- as fair as it
4 should be so, therefore, you should readjust that.

5 Well, with the cost recovery case the money has
6 already been spent before the litigation is started as
7 to -- certainly, as to that phase, so there is no
8 point in adjusting the cost recovery as to that
9 because you already know what has been spent and what
10 the allocation should be at the time the case is
11 decided.

12 MR. RIESER: So when you use cost recovery in this
13 context what you are talking about is sites where the
14 removal action or the remediation for which these
15 monies had been spent has already occurred?

16 MR. GARY KING: Yes, that's correct.

17 MR. RIESER: So you have your model and site
18 conditions, for example?

19 MR. GARY KING: Right, that's correct. The key
20 factor there -- I think one of the real key factors is
21 what type of remediation needs to occur at the site,
22 and with some of these you may not know what the final
23 remediation -- the remedial action is at very early in
24 the process, at the removal stage.

25 MR. RIESER: Okay. Thank you.

1 HEARING OFFICER ERVIN: Do you have anything
2 additional?

3 MR. RIESER: I have no further questions at this
4 time. Obviously, we reserve the right to follow-up on
5 the various questions that the Agency is going to
6 follow-up on.

7 HEARING OFFICER ERVIN: Okay. Thank you.
8 Is there anyone in the audience that has any
9 questions for the Agency?

10 MR. ROSEMARIN: Yes.

11 HEARING OFFICER ERVIN: Could you please stand up
12 and identify yourself for the court reporter?

13 MR. ROSEMARIN: Yes. My name is Carey S.
14 Rosemarin. I am an attorney with Jenner & Block. I
15 represent Commonwealth Edison.

16 I have a question for the Agency on something that
17 I believe that we can all agree on, based on the
18 testimony. I would like to know whether the Agency
19 agrees, just conceptually, given all the back and
20 forth we have heard concerning the language of 58.9,
21 just conceptually, focusing on the concept of
22 Proportionate Share Liability, I would like to know
23 whether the Agency agrees that Proportionate Share
24 Liability requires that a party pay no more than the
25 cleanup costs attributable to that party's wastes?

1 MR. GARY KING: There is certainly a number of
2 issues hidden within kind of the foundations of that
3 question, but really it seems to me as to what you are
4 referring to is Scenario 1, Example 1 and, you know,
5 in that context your statement is correct.

6 MR. ROSEMARIN: I have a follow-up, please. I am
7 not referring to any particular example. Again, I
8 emphasized that my question goes to generic, and
9 whatever 58.9 says, and we can debate that, I think we
10 are all in agreement that it requires Proportionate
11 Share Liability.

12 And I am really asking the question generically
13 whether, and I believe that the Agency would have to
14 agree with this, that Proportionate Share Liability
15 requires, by definition, that a party pay no more than
16 the cleanup costs attributable to that party's waste?

17 MR. GARY KING: Well, you are just -- you are
18 assuming certain things with that. You are assuming
19 certain elements of proof, and we are -- that's why I
20 referred to Scenario 1, Example 1. If you are
21 assuming that he has proved, you know, that that is
22 what his waste was and that is what his share of
23 things is, I would agree with it.

24 But, again, if he has not proven what his share
25 is, then it becomes an issue, under the way we

1 structured it, for the Board to make a determination
2 relative to all evidentiary factors.

3 MR. SHERRILL: One other thing, too, to touch on
4 what Gary is saying, I don't want to get bogged down
5 on -- the term waste has a legal definition to us, and
6 we have used it -- I used it in my testimony kind of
7 generically because, I mean, PRPs will contend it was
8 not a waste when I last had it. Then I gave it to
9 party B and party B did something to it and now it is
10 a waste. So we are kind of meaning that generic term
11 that something -- that some hazardous substance or
12 pesticide has caused some kind of threat to human
13 health and the environment.

14 HEARING OFFICER ERVIN: Do have you a follow-up
15 question?

16 MR. ROSEMARIN: No, I don't. Thank you.

17 HEARING OFFICER ERVIN: Are there any additional
18 questions for the Agency?

19 Seeing none, the Board has several questions, but
20 given the lateness of the day, we are not going to get
21 into a lot of them. A lot of them have already been
22 asked, and you are bringing some additional
23 information on those.

24 There are a couple of questions, though, that we
25 haven't addressed that I would like to ask. I promise

1 I will get you out of here by 4:30 if you bear with
2 me.

3 The first one is regarding Section 741.105. It
4 says that Subpart C is only applicable when no
5 complaint has been filed by the State. Does that
6 preclude the State from filing an action under Subpart
7 B?

8 MR. GARY KING: No.

9 HEARING OFFICER ERVIN: So that the State could
10 then file -- while the Subpart C action is pending,
11 the State could come in and file a Subpart B action?

12 MR. GARY KING: Right. That's correct. The way
13 we have it structured is that a Subpart C proceeding
14 could begin before a Subpart B proceeding is
15 initiated. But that wouldn't mean that you could not
16 initiate a Subpart B proceeding.

17 MR. RIESER: Excuse me. If I may, if that State
18 action was filed that would mean that the Subpart C
19 proceeding would stop or disappear or what would
20 happen to it?

21 MR. GARY KING: I don't know that we have answered
22 that question in the context of the rule.

23 HEARING OFFICER ERVIN: Is it something you can
24 think about and get back to us?

25 MR. GARY KING: Yes.

1 HEARING OFFICER ERVIN: Okay. Thank you. Section
2 741.115, information orders. The way I read this is
3 that this is only a tool for the Agency. Wouldn't
4 such information orders be a useful tool for the PRPs
5 to use as well to discover other PRPs prior to a
6 Subpart C proceeding?

7 Would you like to get back to us?

8 MR. GARY KING: That's a good question. It is one
9 of those questions that we never contemplated in terms
10 of the proposal. We will have to get back to you.

11 HEARING OFFICER ERVIN: Sure. Section 741.120,
12 resolution of issues, Section 58.9(b) notice. Section
13 741.120(c) indicates that the Agency may offer the
14 person whom a Section 58.9(b) notice has been sent the
15 opportunity to meet with the Agency. Is this meeting
16 discretionary or is it mandatory?

17 MR. GARY KING: We considered that not to be
18 mandatory, and we were really using as our reference
19 for that Section 58.9(c).

20 HEARING OFFICER ERVIN: If it is discretionary,
21 what factors will the Agency take into consideration
22 in deciding whether to give an opportunity for a
23 meeting?

24 MR. GARY KING: Well, what we normally do with
25 these notices is we put a time frame in for somebody

1 to request to meet with us, and if they timely respond
2 and are willing to meet in a timely fashion, you know,
3 we would, 99 times out of 100, meet with them. I
4 don't know why we wouldn't meet with them if they were
5 proceeding in a timely way.

6 The issue would become one of where somebody is
7 asking the -- for a meeting, you know, way down the
8 road for something that happened many months or years
9 earlier, and now they are claiming a right to do
10 that. We might reject it at that point.

11 MR. SHERRILL: We totally -- I mean, I stated this
12 more than once in my testimony. We prefer the PRPs
13 initiate the remedial action and perform the cleanup.
14 I mean, it is less that we would have to do, and we
15 can get on to other sites.

16 HEARING OFFICER ERVIN: Thank you. I have a
17 question on Section 741.315, and to some extent it
18 carries over to some of the other sections.

19 If you have four PRPs that file a petition under
20 Subpart C and after discovery the parties submit a
21 joint proposal under Section 741.315 seeking to
22 dismiss one PRP where everybody has agreed them liable
23 for ten percent of the costs, under Section
24 741.320(b)(3) allows for those three other parties to
25 reach an agreement as long as the agreement results in

1 100 percent allocation of a response cost.

2 Is that really 100 percent of the response cost or
3 100 percent of the response cost minus the agreed
4 percentage for the dismissed party?

5 MR. GARY KING: Well, it would be the 100 percent
6 of the 90 percent is what we were looking at.

7 HEARING OFFICER ERVIN: I am not sure that that is
8 actually how this reads.

9 MR. GARY KING: Okay.

10 MR. WIGHT: What section is that again?

11 HEARING OFFICER ERVIN: It is 741.320(b)(3), 100
12 percent allocation of costs.

13 MR. WIGHT: Okay. Thank you.

14 HEARING OFFICER ERVIN: Another scenario I have a
15 question on is if you do have an agreed allocation and
16 a motion to dismiss one of the parties, does that
17 agreed allocation go immediately to the Board for the
18 Board to review?

19 MR. GARY KING: Yes, that was our contemplation,
20 because one of the issues with this type of hearing
21 would be to make sure that those -- that that type of
22 person was allowed out of process as early as possible
23 to reduce their transactional costs.

24 HEARING OFFICER ERVIN: Okay. If it turns out to
25 be a bifurcated proceeding where we have the one and

1 there has been an agreed allocation, that agreement
2 goes directly to the Board for approval and the other
3 three PRPs go to hearing?

4 MR. GARY KING: Right. That is the way we were
5 envisioning it, yes.

6 HEARING OFFICER ERVIN: Can the hearing occur
7 before we have proof that that allocation for that one
8 PRP is going to be dismissed?

9 MR. GARY KING: I am trying to think of a
10 circumstance where there wouldn't be the case. I
11 would think that would make sense to do that. I mean,
12 because it is an agreed allocation. So I don't know
13 why the Board would reject it.

14 HEARING OFFICER ERVIN: Can the Board reject it?

15 MR. GARY KING: Yes, I suppose -- it would
16 certainly be within the Board's authority to do so.

17 HEARING OFFICER ERVIN: If it is rejected would we
18 have to wait to have the hearing on the other three
19 until we approve the agreed allocation?

20 MR. GARY KING: I think those are very good
21 questions that I don't have a very good answer for. I
22 wonder if we could just --

23 HEARING OFFICER ERVIN: Sure. The next hearing, I
24 also have a question along the lines under Section
25 741.325(b). You talk about allocating 100 percent,

1 the Board has to allocate 100 percent. Again, is it
2 100 percent of what is left to be allocated if you
3 have a dismissed party, or do you -- or are you
4 contemplating one Board order where we allocate all
5 100 percent of the response costs?

6 MR. GARY KING: We were envisioning 100 percent of
7 the example you gave of the 90 percent of what was
8 left. But I can see it is the same issue here on
9 whether that is clear.

10 HEARING OFFICER ERVIN: Thank you. Under Section
11 741.325, if someone defaults on a payment or
12 performance, Section 741.324 provides the remaining
13 parties to allocation proceedings shall be responsible
14 for the amount in the default. How is this any
15 different than joint and several liability when you
16 are still being held responsible for more than your
17 apportioned share?

18 BOARD MEMBER HENNESSEY: I think you said 324. I
19 think you meant 325.

20 HEARING OFFICER ERVIN: Oh, I am sorry. It is
21 325.

22 MR. GARY KING: Well, the context we have here is
23 it -- it does have some kinship to a joint and several
24 concept, the way that a voluntary cleanup does for a
25 project that comes into the Site Remediation Program.

1 If a project comes into the Site Remediation Program,
2 and there is -- you know, there is three parties to do
3 the -- that are agreeing to do the cleanup, if one of
4 them drops out, well, the other two have to pick up
5 that remaining portion for that cleanup to proceed all
6 the way through.

7 It is a similar sort of context here where you
8 have a group of PRPs who want an allocation so that
9 they can perform a remediation, but then one of them
10 drops out. Well, unless the other parties pick up the
11 default amounts, then the cleanup will not proceed,
12 you know. And then what does that mean vis-a-vis the
13 Agency, you know.

14 Do we now have a situation where you have three
15 parties and two of them -- I am not saying this would
16 happen, but it could happen -- that you could have two
17 of the parties bring in somebody who is a bankrupt
18 party and, you know, give him the lion's share of
19 responsibility and then allow him to default on it,
20 and now the other two parties have a Board order that
21 shows that they have a much lower share of
22 responsibility.

23 So we were trying to avoid a straw man situation
24 where we would not be involved in the case. We don't
25 want to be involved in the cases but by the same

1 token we don't want to end up with a Board order that
2 puts us in a poor position relative to trying to get a
3 site cleaned up.

4 HEARING OFFICER ERVIN: Is this consistent with
5 58.9, though, where you say you can only be held for
6 your apportionment share?

7 MR. GARY KING: We would do this type of
8 proceeding different because, again, it is a voluntary
9 type of proceeding where the parties are agreeing up
10 front that they are going to allocate all of the costs
11 amongst themselves. You could have -- you could have
12 three parties coming in and agreeing to allocate all
13 of the costs amongst themselves, when there might be,
14 you know, 20 possible responsible parties.

15 And for them to pick up those shares, well, they
16 are picking up other people's shares, but they
17 voluntarily have chosen to initiate this proceeding.
18 So it is not the same context as 58 -- as far as the
19 Subpart B of 741. It is just a different context, the
20 way we see it.

21 HEARING OFFICER ERVIN: Thank you. Are there any
22 other questions for the Agency?

23 Okay. Seeing that there are no further questions,
24 then I would -- oh, I am sorry. Mr. King?

25 MR. CHARLES KING: Under 741.315 -- well, under
184

1 Subpart C, generally, do we want to let agreed people
2 out of the proceeding? Will that affect whether they
3 are going to be bound by an order that comes out of
4 it?

5 It looks like it comprehends that where someone
6 has agreed and everyone agrees that this party is
7 responsible for, say, ten percent but then they get
8 let out of the proceeding, but if you do that are they
9 still going to be bound by whatever order gets entered
10 then?

11 MR. GARY KING: As we were seeing this, and maybe
12 this is an issue that needs to be clarified into the
13 rule itself, but we were seeing that there would still
14 be a Board order at some point. That they would not
15 just be dismissed out without some kind of Board order
16 that would set up the allocation.

17 MR. CHARLES KING: Okay.

18 MR. GARY KING: We were thinking that 325(a) would
19 govern that.

20 MR. CHARLES KING: Okay. I guess I was kind of
21 thrown by the word "dismissal" in there then. Maybe
22 you want to use a different word for that, because I
23 don't think that you are actually going to dismiss
24 those parties out then. It would be more in the
25 nature of a summary judgment for them at the outset or

1 an agreed order that would take care of their
2 liability. But I don't think that is a dismissal.
3 They are not being dismissed as parties if you are
4 still going to include them in final allocation of
5 everything.

6 MR. WIGHT: That's 315(a)(2)?

7 MR. CHARLES KING: Yes.

8 HEARING OFFICER ERVIN: Yes, Mr. Rieser?

9 MR. RIESER: Mr. King, in situations like this
10 might the parties come to some financial undertaking
11 where the party that is being let go puts money up
12 before that happens or some other means of financial
13 assurance so that the other parties know the money is
14 there to do whatever they are going to do?

15 MR. GARY KING: Yes, there is all sorts of
16 arrangements that could be made in that context.

17 HEARING OFFICER ERVIN: All right. Are there any
18 other questions?

19 CHAIRMAN MANNING: No, I don't have anymore
20 questions. I just wanted to indicate that the Board
21 will have more questions. I think the Hearing Officer
22 said that. We just don't want to ask them yet today.

23 HEARING OFFICER ERVIN: Your panel will be
24 available for questions in the next two dates won't
25 they, Mr. Wight?

1 MR. WIGHT: Yes.

2 HEARING OFFICER ERVIN: Seeing that there are no
3 further questions, I would note that the second
4 hearing in this proceeding has been scheduled for
5 Tuesday, May 12, in Chicago at 10:00, at the State of
6 Illinois Building -- not the James R. Thompson
7 Building -- but the State of Illinois Building, across
8 the street. It will be in Room C-500, 160 North La
9 Salle Street. I think the Hearing Officer order
10 actually set this at South La Salle, but it is on
11 North La Salle.

12 I want to remind the Agency that any issues which
13 the Agency had agreed to address in this hearing shall
14 be answered in the beginning of the second hearing.
15 We will then move into the rest of the pre-filed
16 questions beginning with the -- I am sorry -- the
17 pre-filed testimony of Matthew Dunn, followed by
18 Sidney Marder, David Rieser, David Howe and, finally,
19 Browning Ferris Industries.

20 The Board has requested an expedited transcript of
21 this hearing. The transcript should be available in
22 our Board's Springfield office on Thursday. If anyone
23 would like to have a copy of the transcript from
24 today's hearing, please speak to the court reporter
25 directly.

1 Also, in the past I think some of you have
2 downloaded our transcripts from the Web. Kevin St.
3 Angel (spelled phonetically) who did all of our web
4 posting has left the Board, and we have not found a
5 replacement. So our web site will not updated with
6 this transcript.

7 If you would like a copy, however, you can contact
8 me or the Board's Chicago office and you can get one
9 transcript free of charge.

10 All right. Are there any other matters?

11 MS. ROSEN: If you could please repeat the room
12 number again for the hearing.

13 HEARING OFFICER ERVIN: Yes. It is Room C-500.

14 MS. ROSEN: Okay. Thank you.

15 HEARING OFFICER ERVIN: Okay. Are there any other
16 matters that need to be addressed at this time?

17 MR. WIGHT: I have a question with regard to the
18 series of questions that you posed here at the end of
19 proceeding. Would it be possible to get a copy of
20 those questions in writing, so that we can make sure
21 we have those for follow-up?

22 HEARING OFFICER ERVIN: No problem. I will have
23 those to you by noon tomorrow.

24 MR. WIGHT: Okay. Thank you.

25 HEARING OFFICER ERVIN: Seeing that there are no

1 further matters to be addressed, this matter is
2 adjourned. I thank you for your participation here
3 today.

4 (Hearing Exhibits 1 through 7
5 retained by Hearing Officer Ervin.)

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1 STATE OF ILLINOIS)
) SS
2 COUNTY OF MONTGOMERY)

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4 C E R T I F I C A T E

5

6 I, DARLENE M. NIEMEYER, a Notary Public in and for

7 the County of Montgomery, State of Illinois, DO HEREBY

8 CERTIFY that the foregoing 189 pages comprise a true,

9 complete and correct transcript of the proceedings

10 held on the 4th of May A.D., 1998, at 200 South Ninth

11 Street, the 2nd Floor, Springfield, Illinois, In the

12 Matter of: Proportionate Share Liability, in

13 proceedings held before the Honorable Cynthia Ervin,

14 Hearing Officer, and recorded in machine shorthand by

15 me.

16 IN WITNESS WHEREOF I have hereunto set my hand and

17 affixed my Notarial Seal this 6th day of May A.D.,

18 1998.

19

20

Notary Public and
21 Certified Shorthand Reporter and
Registered Professional Reporter

22

CSR License No. 084-003677

23 My Commission Expires: 03-02-99

24

25