BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PROPORTIONATE SHARE LIABILITY No. R97-16
(35 ILL. ADM. CODE 741) (Rulemaking-Land)

Proceedings held on May 27, 1998 at 10:00 a.m., at the County Building, County Board Chambers, 2nd Floor, 200 South Ninth Street, Springfield, Illinois, before the Honorable Cynthia Ervin, Hearing Officer.

Reported by: Darlene M. Niemeyer, CSR, RPR
CSR License No.: 084-003677

KEEFE REPORTING COMPANY
11 North 44th Street
Belleville, IL 62226
(618) 277-0190

KEEFE REPORTING COMPANY
Belleville, Illinois

A P P E A R A N C E S

Claire A. Manning, Chairman

Board Member Ronald Flemal

Board Member G. Tanner Girard

Board Member Kathleen M. Hennessey

Board Member Marili McFawn

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
BY: Mark Wight
Assistant Counsel
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
On behalf of the Illinois EPA.

ROSS & HARDIES
BY: David L. Rieser
Attorney at Law
150 North Michigan Avenue
Chicago, Illinois 60601-7567
On behalf of the Illinois Steel Group and
the Chemical Industry Council of Illinois.

CATERPILLAR, INC.
BY: David E. Howe
Senior Attorney
100 N.E. Adams Street
Peoria, Illinois 61629-7310
On behalf of Caterpillar, Inc.

ILLINOIS ENVIRONMENTAL REGULATORY GROUP
BY: Whitney Wagner Rosen
Legal Counsel
215 East Adams Street
Springfield, Illinois 62701
On behalf of IERG.

E X H I B I T S

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P R O C E E D I N G S

(May 27, 1998; 10:00 a.m.)

HEARING OFFICER ERVIN: Good morning and welcome. My name is Cynthia Ervin, and I am the named Hearing Officer in this proceeding entitled, In the Matter of: Proportionate Share Liability, 35 Illinois Administrative Code, Part 741, docketed as R97-016.

Present today on behalf of the Board is presiding Board Member and Chairman of the Board, Chairman Claire Manning.

CHAIRMAN MANNING: Good morning.

HEARING OFFICER ERVIN: To her right is Board Member Kathleen Hennessey.

BOARD MEMBER HENNESSEY: Good morning.

HEARING OFFICER ERVIN: To her right is Board Member Marili McFawn.

BOARD MEMBER McFAWN: Good morning.

HEARING OFFICER ERVIN: To my immediate left is Board Member Ron Flemal.

BOARD MEMBER FLEMAL: Good morning.

HEARING OFFICER ERVIN: And to his left Board Member Tanner Girard.

BOARD MEMBER GIRARD: Good morning.

HEARING OFFICER ERVIN: Also with us on behalf of the Board is John Knittle, Joseph Yi's attorney

assistant in Chicago, and Chuck King, Board Member McFawn's attorney assistant.

In the back of the room I have placed a list for those who would like to be added to the service or notice lists. Please note that if your name is on the service list you will receive only copies of the Board's opinions and orders and all hearing officer orders. If your name is on the notice list you will receive not only those items but also copies of documents filed by all persons on the service list in this proceeding. Please keep in mind that if your name is on the service list you are required to serve all persons on the service list with all documents that you file with the Board.

As background, on February 2nd, 1998, the Illinois Environmental Protection Agency filed a rulemaking proposal with the Board to add a new Part 741 to the Board's waste disposal regulations. These proposed rules would establish procedures for the implementation of proportionate share provisions of Public Act 89-443. This amendatory legislation repealed joint and several liability in environmental actions and replaced it with Proportionate Share Liability. In addition to establishing Proportionate Share Liability, Section 58.9 of the Act directed the

Board to adopt rules implementing Section 58.9 by December 31st, 1997. The statutory deadline was later extended until January 1st, 1999.

On December 5th, 1996, the Board opened a docket to solicit proposals to assist the Board in the promulgation of rules and procedures implementing the proportionate share provisions of Section 58.9. The proposal filed by the Agency is in response to that request.

The first hearing was held in this matter on May 4th in Springfield, and the second hearing was held in Chicago on May 12th. The purpose of today's hearing is to hear testimony from the remaining people who have prefiled testimony in this matter, and for the Agency to address any issues remaining from the previous hearings. The order that the prefiled testimony will be presented is as follows: The testimony of Mr. Marder, followed by the testimony of Mr. Rieser, followed by the testimony of Mr. Howe.

After hearing this testimony the Agency will then address any matters that remain from the previous two hearings. Following the Agency's presentation, anyone else who would like to testify will be given the opportunity as time allows.

This hearing will be governed by the Board's

procedural rules for regulatory proceedings. All information which is relevant and not repetitious or privileged will be admitted. All witnesses will be sworn and subject to cross-questioning. Please note that any questions asked by a Board Member or staff member are intended to help build a complete record for the Board's decision and does not express any preconceived opinion on the matter.

Are there any questions regarding the procedures we will be following today?

Seeing none, then I will ask Chairman Manning and the rest of the Board Members if they have any additional comments that they would like to make.

CHAIRMAN MANNING: No. Just good morning, and this is a very important proceeding and we look forward to the testimony today.

HEARING OFFICER ERVIN: Thank you. We will begin with the prefiled testimony that remains to be heard.

Ms. Rosen, do you have an opening statement or any introductory remarks you would like to make?

MS. ROSEN: Yes. Thank you. My name is Whitney Rosen. I am Legal Counsel for the Illinois Environmental Regulatory Group.

With me today are Mr. Sidney Marder, Executive Director of the Illinois Environmental Regulatory

Group; David Rieser of Ross & Hardies; and Mr. David Howe from Caterpillar Company. They are going to be presenting summaries of their testimony. We would like to have their prefiled testimony admitted into the record, so I am going to take that time now.

HEARING OFFICER ERVIN: Okay.

MS. ROSEN: Mr. Marder, I am handing you a document. Could you please look at it and identify it for the record?

MR. MARDER: This is a copy of my prefiled testimony.

HEARING OFFICER ERVIN: They need to be sworn. Would the court reporter please swear in the witnesses.

(Whereupon Sidney Marder, David Rieser and David Howe were sworn by the Notary Public.)

MR. MARDER: This is a copy of my prefiled testimony.

MS. ROSEN: Okay. Could you please -- are there also other documents attached to this prefiled testimony?

MR. MARDER: Attached to the prefiled testimony is one document that is entitled, The Issue of Proportional Share Liability, a White Paper from the Illinois Chamber to Howard Peters, who was then Deputy

Chief of Staff. Also attached to my testimony is copies of the Governor's amendatory veto message in two pieces of legislation, one the House Bill 544 and the other being Senate Bill 46.

MS. ROSEN: Okay. Are these true and exact copies of your testimony and exhibits as were filed with the Board?

MR. MARDER: Yes.

MS. ROSEN: Thank you. We would like to admit these as Exhibit 10, please.

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

MS. ROSEN: Do you need to look at it, Mark?

MR. WIGHT: No.

HEARING OFFICER ERVIN: Seeing none, the prefiled testimony of Sidney M. Marder, with accompanying attachments will be entered into the record as Exhibit Number 10.

(Whereupon said document was entered into evidence as Hearing Exhibit 10 as of this date.)

MS. ROSEN: Mr. Rieser, I am handing you a document. Could you please identify it?

MR. RIESER: Yes, this is a copy of my testimony.

MS. ROSEN: Are there other documents attached to your testimony?

MR. RIESER: Yes, there is an attached Exhibit A, which is Proposed Language Re: Applicability, and Exhibit B, Revised Liability Provisions.

MS. ROSEN: And is that a true and accurate copy of your testimony and your exhibits as they were filed with the Board?

MR. RIESER: It is.

MS. ROSEN: Okay. Thank you. I would like to move to admit this exhibit as Exhibit Number 11.

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

Seeing none, the testimony of David L. Rieser will be in entered into the record as Exhibit Number 11.

(Whereupon said document was entered into evidence as Hearing Exhibit 11 as of this date.)

MS. ROSEN: Okay. And, Mr. Howe, I am handing you a document. Could you please identify it?

MR. HOWE: Yes. This is a copy of my prefiled testimony in this case.

MS. ROSEN: Okay. Is that a true and accurate copy of your testimony as was filed with the Board?

MR. HOWE: Yes, it is.

MS. ROSEN: Thank you. I would like to move to admit the testimony of David Howe as Exhibit 12.

HEARING OFFICER ERVIN: Any objections to the

admittance of this document?

Seeing none, the testimony of David E. Howe will be admitted into the record as Exhibit Number 12.

MS. ROSEN: Thank you.

(Whereupon said document was entered into evidence as Hearing Exhibit 12 as of this date.)

HEARING OFFICER ERVIN: Just to clarify, these three gentlemen will be testifying as a panel, and they will also be answering questions as a panel. So we will hold questioning until all three have testified.

Mr. Marder, you may proceed whenever you are ready.

MR. MARDER: Thank you. Good morning. My name is Sidney Marder. I am Executive Director of the Illinois Environmental Regulatory Group, known as IERG, and I am also Environmental Consultant to the Illinois State Chamber of Commerce. I appreciate this opportunity to testify, and I will be just paraphrasing some of my testimony and adding a few comments.

Not in my testimony is my concurrence with the statements made at prior hearings by Mr. King and Mr. Wight about the cooperative effort that really did exist between the regulated community and the EPA. It

is unfortunate that we were not able to come to a complete agreement. But that's the process, and that's probably a healthy part of the process.

So, in essence, my testimony is intended to provide some background and statement of intent, at least from the regulated community's point of view, having lived through the process, as well as to articulate some points of view on the few narrow but important differences of opinion we have with the Agency.

The reason I have been asked to testify is because both IERG and the Illinois Chamber were among the primary drafters and negotiators of the so-called Brownfields legislation. My testimony that was prefiled was intended to discuss the rationale supporting the shift to Proportionate Share Liability and the issue of orphan share funding, which was a major issue of discussion. Additionally, I will briefly address two issues as they relate to the Agency's proposal. These are the two areas of disagreement, applicability of the Proportionate Share Liability and the assignment of liability for unapportioned shares.

By way of background, this process generally started in 1995 when IERG staff attended a

presentation on what was billed Brownfields legislation, and throughout my prefiled testimony I have used the term Brownfields. I want the Board to be aware that in using that term it is basically being used as a surrogate for a much broader category of land. It is sort of a shorthand used in explaining the most typical type or a typical type of site that would be involved in a real estate transaction. The intent of the legislation was to cover much -- a much broader applicability of different types of sites and the different type of cleanups. I think everybody agrees with that.

As the meetings unfolded, we went back to our members on numerous occasions to ask them the rhetorical question, do you want us to get involved in this. Our members expressed a great deal of support for legislation, and they were interested in the use of a risk-based approach to remediation. They were interested in some sort of a privatized review of cleanups, and they were interested in a provision which has become known -- well, I guess was known but was articulated by the members in a way that persons would no longer be held liable for contamination beyond that portion which they actually caused or contributed to in the first place, or proportionate

share. As the process unfolded, the privatized review went through a number of changes, and resulted in the concept of a RELPE, as the Board is aware.

Quite frankly, while there was a great deal of preliminary negotiations between the IEPA and the business community and SRAC, which is S-R-A-C, which is the legislative mandated advisory committee, those negotiations eventually led to a request from the Governor's office that the business community, the Agency, and the Attorney General's office hold a series of negotiating sessions in an effort to reach consensus on the Brownfields initiative. As is usually the case, when it looks like legislation has a real chance of passing and it is a major piece of legislation, the Governor's office involves themselves, as appropriately they should, to try to pull together the parties. Those discussions and negotiations went on for quite awhile.

Following those discussions, the Chamber submitted a detailed White Paper which outlined the business community's views in support of Proportionate Share Liability, and that document is attached to my testimony, my prefiled testimony. And we tried to address the concerns that had been expressed by the parties to those discussions.

Our basic rationale or a rationale for supporting the shift to Proportionate Share Liability was that the business community is concerned and was concerned that under a joint and several liability scheme a perception of liability accompanied every transaction, every remediation project and, in fact, that acted as a barrier to voluntary remediation of properties. We felt that the existing owner or purchaser of real property who voluntarily agreed to conduct remediation in order to rehabilitate or expand the beneficial use of the property needed a degree of certainty that in exchange for the commitment, the cleanup commitment or the purchase of the property, that upon completing remediation of its proportionate share, of that person's proportion share, that person would possess a level of protection from future actions by the State and/or third parties attempting to impose additional environmental liability on it.

There are really two pieces, in our mind, to joint and several liability and proportionate share. One is the allocation during the process and the other is certainty at the tail end. I think a lot of the regulation before us deals with the apportionment rather than the certainty.

Quite frankly, in addition to that, the business

community felt that the concept of joint and several liability was just simply unfair and warranted change. During the discussions, and I emphasize the word discussions rather than negotiations on proportionate share, because there was very little negotiation. There was discussion. The Governor's office chose not to include the subject of proportionate share in their negotiations. They reserved that for a later date.

During these discussions one of the major concerns that was raised was that the implementation of a Proportionate Share Liability scheme would result in orphan shares being left to the State. The business community's position was that we believed strongly that a Proportionate Share Liability mechanism in the Brownfields legislation would not require the State to assume the orphan share, as was being alleged by the administration. The State would not have to assume that share. That doesn't mean there wouldn't be an orphan share, but nothing would require the State to remediate.

We did acknowledge that implementation of a Proportionate Share Liability mechanism might mean that some orphan shares would go unfunded. There was no question about that. Quite frankly, from reviewing

the testimony of Mr. King and others at the last hearings it appears that the same issue arises under joint and several liability. It appears that in the cases presented as examples under joint and several liability, there was still orphan shares generated even though in theory those orphan shares could have been assigned to a responsible party. The issue seems to become how much the orphan share will be, not whether there would be orphan shares.

As I noted a moment ago, shortly after the submittal of this White Paper to the administration, the administration communicated their opposition to the Proportionate Share Liability provisions. The rest of the history of the passage of the bill and the amendatory veto and the repassage of the bill is included in my testimony. I won't belabor that point.

The point I want to make is that all during this process there was virtually no negotiation of the language within the proportionate share portion of the bill, no discussion of what was intended. The only, if you will, negotiations centered around how to fund the orphan share. I think this is important in that the language that became law at Section 58.9 is virtually identical to that initially proposed by the

business community. We, as the business community, are well aware of what we intended in the bill and how we intended the provision to apply, and that was as broadly as possible consistent with federal law. We strongly believe that the contested portions of the proposal presented by the IEPA do not conform with that intent, and believe that the language that Mr. Rieser will present does capture that intent, and I am sure he will be explaining that.

The very same Governor who vetoed Section 58.9 mandatorily vetoed that language in Senate Bill 46 and Senate Bill 901 -- in Senate Bill 46 and 544. That Governor, Governor Edgar, then signed House Bill 901 into law with essentially identical language. The only intervening change was the negotiation over a funding package. That funding package, while important, quite frankly, had the Governor been advised that the proportionate share language would affect only a meniscal number of sites, as we have heard at past testimony, I believe that if that kind of discussions took place during the discussions we had, much of the information that was presented during those discussions as to the number of orphan shares would ring rather hollow.

During those discussions numbers were bantered

around about billions of dollars of orphan shares. That, quite frankly, doesn't reconcile very well with the five or six lawsuits that are brought a year.

Not withstanding that, that was the intent that we carried forth in the business community. And we believe that the language which will be presented by the Site Remediation Advisory Committee, on behalf of them by Dave Rieser, is a reasonable reflection of the intent of the General Assembly and of the administration, and we would urge the Board to adopt that language.

Again, I appreciate the opportunity to testify and I will be pleased to answer any questions you may have at the end of our testimony.

HEARING OFFICER ERVIN: Thank you. Mr. Rieser, whenever you are ready.

MR. RIESER: Good morning Chairman Manning and the Board Members. My name is David Rieser, partner with the law firm of Ross & Hardies. I filed my appearance on behalf of the Illinois Steel Group and the Chemical Industry Council of Illinois. I am a member of the Site Remediation Advisory Committee, and I am testifying on behalf of the Site Remediation Advisory Committee here this morning.

I participated in the early hearings and I

listened carefully to what Gary King and John Sherrill talked about in terms of the Agency's program and how they viewed the legislation, and the difficulty of putting these regulations together. As Sid says, we had a very collegial exercise in trying to come to some consensus, and in general we did achieve a consensus on the outlining of a program and on the basic procedures in the program, but we were unable to achieve consensus with some of the details.

I agree with a lot of what Gary King says about outlining the legislation and the difficulty of drafting these things. But he identified four principles of interpreting the statute, not all of which I agree with. And the fourth one I specifically disagree with, because his fourth principle was that the Board has broad discretion to promulgate a workable program. Not that I disagree that the Board has a broad discretion to promulgate a workable program, but that is what the Board has to do for every piece of regulation it adopts.

I think the fourth principle for interpreting this legislation is the importance of recognizing the change that was intended by the legislation. This legislation was intended to change things from what they were before. And so in looking at what the

legislation requires and preparing a regulation that meets the terms of that legislation, I think one important issue is are we doing things differently than we did before. We, obviously, have to look at workability in terms of whether that programs works. We can't adopt an unworkable program. But we also have to strive to see how we can do things differently. Because, as Sid talked about, it is very important to the business community that we go away from joint and several liability and move to a different type of program. So the legislation has to be viewed in terms of how we are going to do things differently, not how we are going to do things the same as we did before.

With respect to applicability, this was the first issue that we had. I proposed legislation, as attached as Exhibit A to my testimony, and that reflects regulations that were -- a proposal that was agreed to earlier in the negotiating process, and at the last moment was not agreed to. And I, frankly, still don't know, as I sit here today, what is wrong with what we proposed. I thought it was a good idea then. There was someone in the Agency that obviously felt it was a good idea then, and I am not sure whether they think it is good idea or not, because

they reserved the right to come back and tell the Board what they think about it.

I think what we proposed in terms of applicability does exactly what the Agency requires, and which I think is an appropriate requirement, which is so long as they are bringing an action against an individual who has regulatory responsibilities under federal programs, such as RCRA, such as the Underground Storage Tank Program, that individual must perform those responsibilities under those programs. There was no intent to change those responsibilities. We must maintain -- there is no question that we have to maintain the ability of the State to administer the federal programs for which it is responsible.

I think the language that we proposed was narrowly tailored so that you could accomplish that end but not eliminate sites from the program and from consideration of proportionate share that ought to be considered. We mentioned examples of these in the questions that we presented to the Agency, such as the underground storage tank, the site with an underground storage tank, where you don't have the owner or operator at that site. There is a very specific definition of owner or operator in the Underground Storage Tank Statute. There is a very specific

person. If that person is not there at that site, there are no responsibilities for the owner of that property under those Underground Storage Tank regulations. In those circumstances, proportionate share ought to apply. There is no longer a federal regulatory responsibility. The same is true with respect to certain types of RCRA issues.

So what we have proposed is a narrowly tailored response to address the specific concerns. It ought to be acceptable. I don't think we have heard any reasons in the hearings to date why it should be not acceptable. I believe the Board ought to adopt this change to the applicability language.

The burden of proof issue, what I call the burden of proof issue is really the heart of the discussion, the differences between proportionate share and joint and several liability. And through that discussion you hear a lot of different issues that come out in terms of how people think about Proportionate Share Liability and how people think about joint and several liability. It is safe to say that at the first meeting that we had between the Site Remediation Advisory Committee and the IEPA regarding this program, proportionate share regulations, Gary King and I argued about this very issue and we have not

stopped arguing it, and I think we will continue to argue about it until the Board makes a decision. But we are very much opposed to the Agency's proposal at several different levels, most of which I laid out in my testimony, but I want to embellish a little bit on that testimony based on some of the issues that the Agency has raised in their -- on their testimony.

First of all, I think the Agency's proposal shifting the burden of proof between liability and allocation is just contrary to the statute. The Environmental Protection Act shifts the burden of proof to a defendant to prove a particular fact. It says so. It says so in 22.2(j)(1) and 22.2(j)(6) in the context of CERCLA, State and CERCLA type actions. In those actions that defendant is required to prove its defenses. It is required to prove that it has met the definition of a contractual relationship for the purposes of asserting an innocent land owner defense. Those things are specific statutory requirements where the legislature has said this person must prove this fact to avail themselves of that defense. That is not in 58.9. 58.9 presents limitations to the authority of this State to bring certain actions in certain types of conditions. And so there is no statutory support whatsoever for this shifting of the burden.

One of the central -- one of the many criticisms of CERCLA, and by extension the State Superfund statute in 22.2(f), is that it shifts the burden of proof to the defendants, that once they are tagged as being potentially responsible parties the entire burden of proving their role in the site falls to them. Now, there is nothing in CERCLA that says that. But that is the way CERCLA has been administered. Once the Agency tags you, it is up to you to -- as a PRP it is up to you to bring forward the evidence that gets you out. Even if you do that they don't accept it nine times out of ten.

So in light of the fact that this legislation was intended to change CERCLA, this is one of the most important elements that has to be changed, this idea that the defendants bear a burden of proof. Again, in the context of the regulation that is before you, what we are talking about are enforcement actions. There is a certain constitutional issue where one is innocent until proven guilty. Even in a civil action that is still an issue. The State has to prove their case. The State always has to prove their case unless the legislature presents a situation which says otherwise. So absent some very specific authority in the legislation, which I contend is not there, there

is no basis in the statute for shifting the burden of proof of the defendants to any part of this process.

Secondly, the division between liability and allocation which allows the Agency to make this burden shifting, to insert this burden shifting device, I submit is artificial on the one hand and not so easily drawn on the other. There are plenty of companies, entities, people, that are liable, quote, unquote, at a Superfund site based on their status as owners, as operators, as people who sent material to a site, even if they have not contributed one molecule of contamination to the problem that has to be resolved at the site.

Gary and I had some discussions back and forth about a person who submitted one chemical when the problem was a separate chemical, and the chemical that that person submitted was not a part of the issue. That person in that situation, I would contend, that that person did not cause costs to be incurred at that specific site. That person should not be viewed as being, quote, liable simply because of what they did, but part of that liability issue is the causation of the costs to be incurred.

Board Member Hennessey asked some questions at the last hearing that focused on that central point. I

think it is a very central point that has to be continued to be looked at in terms of whether this division between liability on the one hand and allocation on the other is really supportable. I think the central issue that has to be maintained is that the causation element needs to incorporate the concept of causing the cost to be incurred, the remediation costs to be incurred at a given site, and not just did you send chemical X to the site. It has to be broader than that.

Third, as you can tell by the discussion, we have a very specific problem with the Agency's proposal at 741.210(d)(3). It is our contention that that is purely joint and several liability, and it is an attempt to bring joint and several liability back into this process through a back door. The Agency has identified this as a, quote, safety valve, but the very purpose of this is to threaten parties without significant information at a site with absorbing some arbitrary entire share that there is no evidence for. This has been justified as -- justified based upon the party's, quote, liability, unquote. But, again, liability in this context is a very slippery issue. The liability has to be tied with the contribution, what they have actually done at the site.

Further, the Site Remediation Advisory Committee is firmly convinced that the Board will be capable of making the decisions it has to make at the site based on the evidence that is before it, and does not need a safety valve to allow it to impose additional shares on parties who don't deserve them or to allow the State to threaten parties who are in that position with having these additional shares imposed upon them. Because, again, one of the issues in all of this is trying to get away from a situation where potentially responsible parties, by virtue of the status, have no rights, have no leverage, have no ability to get themselves out of a situation based on the information that they have.

Another element I want to talk about in line with the same thing is that -- and I think David Howe is going to follow-up on -- is that the Agency excused this imposition of additional shares on these parties without information because those parties are, quote, liable and it is okay. Well, this seems to have a moral component to it, that people who are liable at certain sites deserve whatever happens to them, which is a moral component that underlies all of Superfund which is one of the things that we are trying to change.

There is a lot of different reasons that people become liable or potentially responsible parties at Superfund sites. Very rarely do those reasons have to do with conduct that people would consider bad or immoral. Many times people operated their facilities in accordance with all technical standards that were appropriate at the time, and those standards are different from what they are now. A lot of times people sent material to fully licensed landfills that eventually had problems. None of these make them bad people in the sense that we would normally consider that term even in an environmental context.

These are, by and large, business people who were doing what was appropriate at the time. So in thinking about whether it is appropriate to impose on these parties an additional share just because they are liable by virtue of their status at a given site, I think creates real problems. It is the type of thing that the legislation was adopted to avoid. People should not be charged or threatened with absorbing the entire cost of the site merely because they sent one drum of material to that site or some amount of material that is less than the entire amount at the site. That is what proportionate share has to mean.

Because Gary King had identified workability as a principle for interpreting the statute, one has to assume that the basis for the Agency's proposal here is the issue of workability. Workability is an important but slippery concept. I mean, you can't violate statutory or constitutional rights in the name of workability. The legislation is about change and in making things different, and for people in organizations or governments that are used to doing things one way, any new way that you propose is obviously going to be viewed as less workable than the one that you currently have.

But as Mr. Marder pointed out, I don't know that the Board has heard evidence from the Agency that their system would be unworkable if they bear the burden of proof in these situations, as they ought to. It would be different. It might be more difficult. There might be more additional shares that they can't impose on the potentially responsible parties. But as Mr. Marder has pointed out, those additional shares were funded by the legislation. In fact, the amount of funding that was represented by that legislation, approximately 2 million dollars a year, represents over a third of what the Agency identifies as its financial input into its Hazardous

Waste Fund Program for 1997. The larger amount is the 2.5 million it received in cost recovery settlements. So a lot of money got put into this process to fund the difficulty that this change will -- to the extent that there is a difficulty, that this change will engender. This new system ought to be given a chance to work.

What I heard from what the Agency testified, was that a lot of their program depended on the availability of the funding to administer. During the time when they had Clean Illinois Funding and Build Illinois Funding they issued far more 4(q)s than they did in the absence of that fund. As I said, we have provided additional funding that should represent and, in fact, probably overpays for the cost of the difficulties, any potential difficulties that this shifting of the burden will cause.

I want to follow-up on something else that Mr. Marder pointed out, which is the Agency described -- in describing how its system operated, described three different sites. It was an interesting choice of sites to bring before the Board. Because it didn't strike me that any of those sites really demonstrated the differences between joint and several liability, the problems of Proportionate Share Liability or the

need to have a shifting of burden between liability and allocation.

Two of the sites involved a landfill situation where there was no potentially responsible parties that could be identified. Well, under either system that is going to be the problem. That is what the Hazardous Waste Fund is to deal with, is to clean up those places that create imminent and substantial endangerments where there is no responsible parties to pay the freight. There are those sites and fewer now than there were before, but I am sure more will be discovered as we go on. But that is what the Hazardous Waste Fund is for. That is what government is for, to take care of these types of problems.

The Steagall landfill site, on the other hand, is really sort of a different situation. And what that seemed to demonstrate is that the current system already incorporates certain elements of proportionate share, that there are already de facto components to the current system. At Steagall, and I know nothing about Steagall except what the Agency presented at the hearing, but you had the owner, you had some of the principal PRPs, you had a very significant problem. There was a suit under federal statutes, under the Federal Superfund, which joint and several liability

should always apply, and settled with most of the PRPs for less than the entire cost that the State expended at the site.

I don't know why those settlements happened the way they did. I am sure there were a wide variety of issues, but one has to figure that at least some of the issues was that the issues of proportionality, causation, divisibility, were issues that were brought forward by the PRPs at the site and that those issues were so resonant and strong that the State decided that it was more appropriate, better use of resources, to settle those cases for less than the amount that they could obtain under a joint and several liability attack under Superfund.

So if these issues are already implicit in how the State makes these decisions in enforcement cases, then it strikes me that it is our obligation to make them explicit in the regulations adopted by the Board as they are in the statute that was issued by the legislature. They are already going to be making decisions at sites and settling cases based upon proportionality and causation, and those factors need to be brought to the Board. It should not be up to individual responsible parties and the ability of their counsel, if that is what the issue was, to be

able to use those factors in getting the State to make those types of decisions.

The final issue on this and this is, again, something that David Howe is going to address in greater detail, is that I think that the Agency and the State underestimate how much the PRPs and people who are named as PRPs in these actions really hate being involved in these things. As David will say in greater detail, they are a mess and very expensive. And as the Agency testified, there is a lot of people who would rather simply write the Agency a check than do anything further with regard to one of these sites or have any further discussions.

The Agency brings -- I am sorry -- the State brings very few of the cases. The Agency issues few 4(q)s. So it is hard to see that the shift, that a shift in burden of proof between liability and allocation is absolutely necessary to make the system work. Perhaps it is necessary to make the system work as the Agency currently does things. But as I said, that is not enough. The legislature, the State of Illinois, has mandated change, and it is up to us to implement that change here.

I attached to my testimony as Exhibit B a version of this liability language that SRAC presented, and

what this is intended to do is basically take the statute and put it into regulatory form. I thought that this had some virtue because it was simple. It followed and tracked the statute as closely as possible while preserving some of the issues with what is in the statute. It doesn't specifically discuss burden of proof, because I don't think there is an issue of burden of proof. The statute is very clear that the State cannot bring an action except against those people who caused costs to be incurred and only to the extent of those costs.

Plainly, the statute can be -- I am sorry -- the regulatory proposal that I have presented can probably be improved upon. As I was looking at it this morning, I thought of some potential suggestions myself. But it was an attempt to give the Board some language to insert instead of what the Agency has, because I do believe, as I have said, what the Agency has is inconsistent with the legislation. It is not necessary, and it is not appropriate to use in this setting.

The final thing I want to talk about is the information order. Again, there is no language which specifies information order in the statute. There is numerous mechanisms that both the Attorney General's

office and the Agency has for gathering this information up to and including there is a Rule 224 which I suggested is a way of using a court proceeding to get information prior to filing an action, that could be the type of thing that was done. I don't know why that couldn't be done with the Board as well.

There is lots of different ways to get information; investigations, asking for it. I don't know that the Agency has really made the case to the Board that this is really necessary, necessary in such a way that the fact that this action is authorized, this additional Board action is not authorized by the statute. Further, the Agency has not really presented to the Board the real thought through process about how it ought to work. I think they are waiting for some suggestion that this is something the Board was interested in. And I guess our suggestion is that the Board should not be interested in this, because it is not necessary.

The final thing I want to say is that in thinking about the Proportionate Share Liability and its workability and whether this is going to present problems for the Agency in addressing the sites, I think the Board should also look at the Site

Remediation Act, Title 17, as a whole, and recognize that the legislation accomplished a huge amount in terms of providing for the remediation of hazardous materials sites in the State. What was needed and what that statute provided was a mechanism by which people involved in property, owners of property, could come to the State and get rational decisions to be made, that they have a process for getting the State to decide that the site was clean enough for its use, that they would have a process for evaluating appropriate remediation objectives for the site.

I think that the State would say, if asked, that the Site Remediation Program has been very successful and that many, many sites are being brought into that program that were not being addressed previously. So this legislation led to what it was intended to, which was that sites would be remediated, are being addressed, they are being put back into commerce.

I think the Proportionate Share Liability issue is part and parcel of that same process, that you want to give the people who have worked to address these properties some level of certainty that their mere ownership of the properties in the process of remediating them is not sufficient to cause them to be liable for all conceivable problems associated with

those properties. And that there is a straightforward process where the State has to be -- has to bear the burden and has to do a lot of work before it can demonstrate that any party is liable for any given share at a given site before that party has to contribute to the cost of remediating. I think it is part and parcel of the other portion of that legislation and it is an important element that has to be preserved.

As with Mr. Marder, I will be available for questions at the conclusion of Mr. Howe's testimony.

HEARING OFFICER ERVIN: All right. Mr. Howe.

MR. HOWE: Madam Hearing Officer, Members of the Board, my name is David Howe. I am a Senior Attorney with Caterpillar, Inc. based in Peoria. I very much appreciate the opportunity to have submitted the written testimony and also to submit oral testimony today.

Basically, Caterpillar, Inc. is a heavy equipment manufacturer. It is a mainstream manufacturer. At this point in time I believe that it is still the largest single private employer in the State of Illinois. I have participated in the events leading up to this proceeding on behalf of Caterpillar and on behalf of the Illinois Environmental Regulatory Group,

which I call IERG, and also as a member of the Environmental Law Section Council of the Illinois Bar Association. I am speaking today as a representative of Caterpillar and IERG.

To describe the nature of my oral testimony, I am not going to repeat my written testimony. But, basically, I am here as a member of the regulated community. I am here as one of the people that actually authorizes the checks that are written to pay for the cleanups, to pay for the attorney's fees, to pay the administrative expenses in all different types of contaminated site situations. Traditionally, we call -- I call them first party sites which might be a site that is owned by a company or a business entity that they may be the only entity involved in the contamination issue, or a third party site which is one that is thought of as the traditional Superfund site or cleanup site where waste has been transported to a site and there may be a number of parties involved.

But I am the guy that writes the checks, and I am the guy that goes to the meetings and sits there and listens to all of the attorneys arguing about things, and calculates up the amount of legal fees that are being expended per minute by the PRP committees. And

so I hope that that experience will be of benefit to the Board.

I will make a few brief general observations. I will also note that what I am speaking from is my experience in seven years of managing Superfund sites or traditional cleanup sites. I have not done a great deal of case research or anything like that to prepare for this hearing, but I hope that the experience that I bring to this proceeding will be of benefit to the Board.

In terms of the observations that I have, the first one is that most of these site remediation schemes that we are dealing with here, and I am talking about the traditional CERCLA type schemes and the equivalents in the various states are based upon the proposition in the 20 second sound bite that the polluter must pay. One thing I want to point out is by that definition, I am reasonably certain that every single person that is in this room today meets the definition of a polluter. A polluter, under these schemes, is a generator of waste that has a hazardous component. There have been numerous cases where there is expert testimony that household waste, household garbage contains somewhere between one and three percent of a hazardous component to it. So the point

is that everybody in this room could be deemed to be a polluter.

The other point here is that these polluters, as they would be called, and I will now refer to them as generators, because I feel that that is a more accurate term, do not have any kind of evil intent that you would see, say, in a Saturday morning cartoon like "Captain Planet" or something like that. Rather, these generators are business entities, everywhere from a company the size of Caterpillar down to a Mom and Pop grocery store or a sole proprietorship, that in the course of their operations, in the course of their daily life, generate waste that they then must then send away to be disposed of in locations that they would have deemed to be a normal landfill, a normal waste disposal site. They would have assumed that they would have been competently managed.

The other thing that you have to understand is that with respect to this type of scheme, you are dealing with in almost all situations, historic contamination. We are not dealing with contamination that has been caused recently by a specific action. People don't do that anymore. You are talking about things that may have occurred 10, 20, 30, 40, 50, 100 years ago. And in many situations you will have

situations where not only was it thought to be the correct thing to do, but in certain circumstances, there will be companies and business entities that will be able to point to letters from state environmental agencies or the equivalents back then directing them to dispose of waste at a particular site in a particular manner. And then later on that same agency may be directing them to clean up that. So those are some of the things that you need to understand about what we are dealing with.

Now, to reiterate the types of persons that you are talking about here, there are various types of business entities. They can include municipalities. They can include some types of local government agencies sometimes. And, as I have said, in the vast majority of situations, we are not talking about anything that deals with evil intent. You are also not talking about entities where if they have the money to pay without bankrupting themselves that they are necessarily going to be trying to not be cooperative, okay. So that is a basic background.

Now, let's talk a little bit about what happens with respect to a site when there is a historic contamination issue that comes up. As I have said, there are many different types of sites. The one that

I am really going to be focusing in on right now is what I call the third party type of site. Basically, most of the people that are involved in those sites are going to be very small players, and even very large companies in the vast majority of the sites that they are involved in are actually going to be de minimis parties. They will have less than one percent by volume of whatever is there. They are generally willing to cooperate to the extent that they can do so without opening themselves up to huge liabilities and/or liabilities that they do not feel are fair, particularly. They are also willing to pay money if it is being paid for cleanup. They want to see things remediated. They are like anybody else. Nobody wants to have a bad environment. They don't want to spend the money in an inefficient process. They want something that is going to work.

They are also typically dealing with information that is not perfect. Especially with historic contamination, it is the rule rather than the exception that information is not perfect, and they have to deal with that. The way that information is developed and used sometimes can be -- can really stretch credulity.

To give you an example, in one situation we were

presented with affidavits from parties alleging that Caterpillar had done various things. This was not in the context of litigation. This was prelitigation. The names of the affiants had been blacked out. We were not given the opportunity to even know who those affiants were, let alone interview them. And, nevertheless, we were being asked to contribute based upon that.

We have been in situations where we have received affidavits from people alleging that they emptied waste oil tanks back in the 1950s for plants, and that they did it from 1950 to 1960 for plants that were not even built until 1955. We have had many situations like that that come up. So information is not perfect, and the means by which information is gathered and used can be critical.

Now, given that, the process basically begins with some sort of request for information. At that point in time generally parties find out about each other and they try to get together. They try to work out allocation issues many times. There are numerous meetings that occur. There are all sorts of lawyers who can typically add up and figure an average hourly rate and come up with a fee in terms of hundreds of dollars per minute in some of these meetings. Then

after that there is usually a lull while the major players work on remedy selection and just exactly how is the site going to be cleaned up.

There are numerous frustrations that parties feel during this process. One of them is the amount of time that it takes. A typical site remediation from the time that you first learn about your potential involvement to the time that it is completed can take years and oftentimes can take decades. The expense that is borne is also very frustrating.

On the sites that Caterpillar has been a small player, I will tell you, without getting into hard numbers, that we will spend typically more in legal fees than we will wind up spending on the site itself. The remainder of that, especially if we are involved in PRP groups, goes to something called administrative expenses. We don't know a lot of times exactly what those administrative expenses ultimately get used for, because we try to get some closure on the site. But we suspect that in many cases it is used for lawyers trying to go after other PRPs to get them to contribute as well. The point here is that it is very, very frustrating for anybody to want to clean up the environment, want to do what is right and to spend that kind of money on legal and administrative

matters.

There are other frustrations. One of them is that you have a lot of uncertainty in terms of what is going to be happening. You have a lot of uncertainty about closure. You have a lot of uncertainty about whether after you are done with this somebody might try to bring you back in, things of that nature. And one of the others, I am sure you have heard of the situation where you can't win, you can't break even, and you can't quit. Many times small parties will want to work things out and try to buy out of the liability and get closure on the situation so that they can go on and do what it is that they are supposed to be doing. Sometimes everybody will agree to that and it still takes two or three years for that to occur. These things also become very, very frustrating.

The goal of the member of the regulated community, or the goals are to pay their fair share of a cleanup, to the extent that they have money. Sometimes they don't. Sometimes it is very difficult, especially for a small entity. They want certainty in the process. They want to achieve closure. They want to resolve it and move on. They want it to be fair. They want to leave the process without having a bad taste in their

mouth. As I have said, they really do want the certainty that is involved in this thing.

Now, I have dealt with this as part of my job. I will still have a bad taste in my mouth in many different areas, because under the traditional Superfund allocation scheme, it is not a level playing field. There are situations where you can be forced to participate in a scheme without being able to get your liability determined or adjudicated until after the cleanup is over. And then if you are wrong you can face a number of penalties if you have not participated in the process.

The point that I am making here is that entities are going to participate when they know the process is fair, when they know that it is efficient. To the extent that they believe that somebody can make the process very unfair, they are going to get their backs up, and that's when they are going to say to protect myself I need to go hire an attorney. And, unfortunately, that can contribute to this.

So the point that I have been trying to make is that entities will participate to the extent that the process can be made efficient, to the extent that the process can be made fair. There will be more participation and they will accomplish what everybody

wants to accomplish, which is making the environment better.

And, again, I will be glad to answer any questions that you have and, again, I very much appreciate the opportunity to have provided testimony today.

HEARING OFFICER ERVIN: Thank you, Mr. Howe. We will then open it up for questions. Mr. King?

MR. GARY KING: Mr. Howe, you were saying that you have been involved for the last seven years on -- I don't know if oversight is quite the term, but as a managing lawyer relative to contamination of sites?

MR. HOWE: Yes.

MR. GARY KING: And your comments represent nationwide experience of Caterpillar relative to this?

MR. HOWE: Yes, they do. So when I refer to a traditional site, I mean traditional as it is deemed in pretty much the national sense, yes.

MR. GARY KING: You mentioned -- well, you didn't mention any specific sites, but how many sites are you involved with in Illinois?

MR. HOWE: If you are talking about third party sites, we have been involved, I believe, in approximately five, six.

MR. GARY KING: When you say third party sites,

those are sites where Caterpillar has been a generator?

MR. HOWE: Caterpillar has been a generator, yes, and it is one of a number of sites, or a number of potentially responsible parties.

MR. GARY KING: Can you tell me what those five sites are?

MR. HOWE: Let's see. We have Brockman.

MR. GARY KING: Brockman?

MR. HOWE: Brockman. Ability Drum. Pierce Waste Oil and, Lord, to tell you the truth, the other two -- it may be four sites. There is another site that has been -- it disappeared so long ago that I don't even remember the name of it.

MR. GARY KING: So it is really three sites?

MR. HOWE: Three sites that I am able to talk about, yes.

MR. GARY KING: Okay.

HEARING OFFICER ERVIN: Do you have an additional question, Mr. King?

MR. GARY KING: Yes. You were making a comment that -- you said that people don't do this anymore. I guess I was not sure of the context. It was almost like you were indicating that all sites are historical in nature, and that there were not new cleanup sites

that are coming into existence. Is that what you were trying to say?

MR. HOWE: Yes, I think so. What I meant by that is when you are dealing with a traditional site, it is typically not one where there is an activity issue, meaning an activity leading to contamination or a management issue that is recent. Most third party sites in existence today that are new sites are typically pretty well managed and they don't necessarily lead to the contamination issues that we are talking about here.

If you are talking about -- what we are talking about basically is a site that may have been in existence for decades that the contamination issues that come up will have come up literally on the basis of actions and activities that took place in the 1960s or 1970s, in terms of the management of the site.

Oh, the other site is M.T. Richards, which is in Southwestern Illinois.

MR. GARY KING: So your view is that waste is not being generated that goes into sites that fail now?

MR. HOWE: Not in my experience, no. It could be, but not in my experience.

MR. GARY KING: So if we were to go out to sites around Illinois it is highly unlikely that we would

find any waste materials being released that had been disposed of, let's say, since 1990?

MR. HOWE: Oh, no, you will find waste materials disposed of. It is just a question of whether or not the site is being managed in a manner that will create a contamination issue.

MR. GARY KING: Okay. So it is your view that there are not sites being mismanaged today such that releases are --

MR. HOWE: Typically, if you have a site that is a new site that is a permitted site, I think that that is a fair statement. If you have a site that has ongoing activity but also has a lot of historic activity it may be that you are still dealing with contamination issues, but they will typically be more on a historic basis.

MR. GARY KING: This site where you talked about the affiants being blacked out, was that an Illinois site?

MR. HOWE: No, it was not.

MR. GARY KING: Have you seen any sites that -- you describe four sites that -- have you seen any activity relative on the Agency's part that has lead to your conclusions relative to this general traditional scheme? I guess what I am getting at is I

am trying to see how your very broad statements about how the traditional Superfund process has worked, particularly on a national level, how that relates to what your experience has been relative to the way Illinois sites have operated.

MR. HOWE: One site in particular did potentially have that problem which was the Ability Drum site. The activity with respect to Caterpillar in that site actually started prior to my joining Caterpillar in 1991. And in that site I believe the cleanup numbers were known at least to the State as early as the end of 1991. That site was not -- or Caterpillar's involvement in that site was not settled out until, I believe, 1995. We did wind up in litigation. In all fairness, we did wind up in litigation in that site that was brought, I believe, on the eve of the effective date of 58.9.

MR. GARY KING: Now, Caterpillar has settled on that site; is that correct?

MR. HOWE: Yes, we have.

MR. GARY KING: What was the percentage of the total that Caterpillar settled on?

MR. HOWE: I do not recall the precise percentage of total. I did not bring that information with me. We paid, I believe, somewhere on the order of

$800,000.00.

MR. GARY KING: Okay. The entire costs were about 2.2 million; is that correct?

MR. HOWE: Something to that effect, yes.

MR. GARY KING: What was the percentage of waste that Caterpillar sent to that site?

MR. HOWE: Again, I don't have the precise numbers.

MR. GARY KING: Was it about 40 percent?

MR. HOWE: Something on that order, yes.

MR. GARY KING: So, in essence, that was not an attempt to impose something far beyond proportionate share in that case?

MR. HOWE: There had been an attempt made at one point in time during the settlement discussions.

MR. GARY KING: But when the initial notices were sent back in the early 1990s wasn't Caterpillar given an opportunity to settle with much less than a full 100 percent?

MR. HOWE: Caterpillar was given the opportunity to settle for less than 100 percent of the site, yes. There was always the threat that in the event or the perceived threat that in the event that settlement would not occur Caterpillar might be forced to pay up to 100 percent at the site. As I said, at one point

in time the suggestion was made that Caterpillar should pay in excess of its actual proportion.

MR. GARY KING: Okay. So out of these four sites that you are talking about, the one that you really focused on as being something out of line is this Ability Drum case?

MR. HOWE: In terms of what we are talking about, my comments were necessarily general, because I was talking about what I view as traditional allocation schemes. In terms of the involvement in the process, there are other things that I have seen at other sites that, yes, I might have a problem with in terms of procedurally.

I don't know that I am answering your question, and I am not completely sure I understand it. But in terms of the allocation issues, that's the only one where it really jumps out. But in all of these cases you have a situation where there is at least the bogeyman hanging over your shoulder that you could be deemed to be liable.

MR. GARY KING: I guess what I am concerned about is the way that you have phrased a traditional Superfund allocation scheme process working, based on your experience in working at Federal Superfund sites, I assume, and at State Superfund sites in other states

around the nation, and are trying to translate that experience, having painted a very negative picture of that traditional scheme, and now you are translating that towards Illinois. I guess I am seeing that as kind of an unfair way to portray the issue. I wondered if you want to comment on that.

MR. HOWE: Yes, I will be glad to. There are basically two points to make in response to that. One thing that you have to understand is that this is not something where a fault is stated or even had any intention of causing that. Basically, what I am talking about is the experience that we have that anybody that manages these sites translates over from jurisdiction to jurisdiction. Because while certain nuances may differ, the basic scheme remains pretty much the same.

The first one is that regardless of what is done in the negotiations process, during that process, and whether or not there has been a suit filed or whether it is merely that you were trying to negotiate something up, whether it is involved in a federal situation, negotiations with the state or a private cost recovery, the threat of joint and several liability, the possibility that you can be deemed to be jointly and severally liable and have to pay the

entire cleanup cost, it is something that colors the activities that all of your actions that you do, whether it is in Illinois or Pennsylvania or anywhere else. It always colors what you are doing. It will cause somebody, even somebody who has a lot of experience with this, to go out and hire an attorney and engage in protracted negotiations for unallocation issues.

The second point to make is that this occurs even when you have experience. When somebody does not have experience in this thing, it makes it even more difficult for them. They really do feel like they -- that the process is unfair, et cetera, and this can be despite the best intentions and the best feelings of fairness on behalf of other parties.

MR. GARY KING: So that the threat of joint and several liability is really an important issue as far as the perception of people and how they approach cleanup activities?

MR. HOWE: I think so. It really does color their actions, and it can tend to polarize things.

MR. GARY KING: Of course, in our proposal you realize we have eliminated joint and several liability?

MR. HOWE: No, I do not.

MR. GARY KING: So you do not agree that we have eliminated joint and several liability?

MR. HOWE: No, I do not. Not under the proposal that is made. Basically, for all practical purposes I think that it is there, because once a party has been deemed to or has been found or deemed to have contributed anything to a site, they still believe that they have to -- you know, they are still put in a position of having to prove what it is that they have contributed. If they are unable to do so, or if the information is not there, then I still believe that there would be that type of liability.

MR. GARY KING: At the last hearing Chairman Manning asked me a question and it was around a hypothetical, if there were a total of 1,000 gallons of waste material that went to a site and there was only -- and the respondent only sent one gallon to the site, and she asked whether the person would be responsible for one gallon as opposed to the 1,000 gallons. And I answered her that that person would be responsible for one gallon. Isn't that Proportionate Share Liability? Joint and several liability would say that that person is responsible for the entire 1,000 gallons.

MR. HOWE: There were, as I recall, a number of

other things that went with that. And to give you an example from what I can recall, it went something like this. If there is proof made that the company only contributed X amount during a certain period of time, and the company can also show that it did not -- that its practices prior to that time were of the same order of magnitude, then in that situation, yes, they would only be liable for one gallon.

I think there were certain types of qualifications that depended upon proof that a company or business entity must provide. And that the question remains if the entity is not able to provide that proof, what is going to happen. And the biggest concern is in 741.210(d)(3), which is any respondent unable to prove the degree to which the respondent caused or contributed to the release or substantial threat of release may be liable for all unapportioned costs that are respondent's actions that are the subject of the complaint. And right there I say that if you can't make your case then, yes, you are subject to joint and several liability.

CHAIRMAN MANNING: If I might, I wanted to jump in on all of this whole issue of burden of proof and allocation and all of this kind of thing. Not just from the hypothetical that I asked about at the last

hearing, but Mr. Rieser, a lot of this goes to a lot of the testimony that you had as well earlier this morning. I want to ascertain before we leave the record, obviously, what everyone's position is on this whole question of burden of proof and persuasion and, you know, shifting of burdens and that sort of thing.

Because I think how we answer those questions really go to the question of liability, and you can see we are sort of mixing metaphors with, you know, well, can we prove it. Because, actually, I think the question Mr. King asked you, the answer probably would be, yes, that it is a proportionate share process, you know, if the -- it is really that what we are getting muddy here with is the burdens and who goes forward and who has to show what.

So if I might ask Mr. Rieser, and Mr. Howe or Mr. Marder would like to chime in, I understand your testimony to say part of the reason that you are concerned is you don't think that this should act like CERCLA, and part of the concern you have is that in CERCLA the federal government simply has to tag you, and you are tagged and, therefore, you are liable. You think that there is something more that has to happen in this process other than just being tagged and you are a potentially responsible party, and

that's all the State has to show. Am I correct so far?

MR. RIESER: Yes.

CHAIRMAN MANNING: What else is it, from your perspective, that the State has to show to make a prima facie case, if you will, of liability under this particular scheme?

MR. RIESER: Well --

CHAIRMAN MANNING: I know you are trying to do that with 741.210(a)(1) and (2).

MR. RIESER: I guess I have an issue with, again, this spliting off of liability and allocation as a very fundamental point. I mean, there is no question that what the State has proposed before the Board plainly has elements of proportionality written into it. You can't look at this and say, no, this is all joint and several. But what they did is they proposed those things yet still kept vestiges of the entire process in order, to put it in simple terms, to protect the leverage that they currently have in these issues when there is not sufficient information for people to make these demonstrations.

So I think what the State has to show is that they have to show that an individual contributed a certain amount to the cost of remediating the site. And I

think they also have to show the extent to which they think that person contributed to the cost of remediating the site. I think that's fundamentally what the statute lays out.

CHAIRMAN MANNING: And you think they have to show both of those things before there is any burden of going forward, if you will, forget burden of persuasion, but let's talk about a legal concept of a burden of going forward with information. Does industry, once they have been more than tagged, if you will, or there is some sort of showing of liability in the first part of that, where you said the State has come in and they have shown that there is a connection, if you will, with the generation of the waste and the particular remediation that has to be done at that site, isn't there, then, a burden that needs to be, in terms of the allocation, is there a burden of going forward that needs to be assumed by that person who is potentially responsible?

MR. RIESER: Remember that this doesn't happen in a vacuum. The first thing that happens is not the filing of an action before the Pollution Control Board. The Agency gets a lot of information about the site. Now, the first part of the information about the site it is going to get is this site is creating a

problem because of X and Y. Gary describes the leachate running off to the soccer field. Then it works back from that information to gather whatever information they can about the site to identify people that it thinks is responsible. And then it is going to start engaging with those people in a dialogue about their responsibility in order to get them to do what they think has to be done at the site. All of this happens before anyone starts filing anything or issuing -- well, maybe they will issue a notice and maybe not. Certainly, there is lot of discussion and information exchanged before anything is filed with the Board.

I certainly believe that anyone on the receiving end of the phone call or letter or whatever it is that they are going to get from the Agency is going to bring forward to the Agency whatever information that they have, and will do it because they don't want to be involved other than to the extent to which they think they are involved. And it is hard for me to imagine a person sitting there and taking no action whatsoever and saying, fine, sue me, and I only did a little bit, and you are not going to be able to prove anything.

Certainly, if the State has reason to think that a

person is responsible, they have reason to think that a person is responsible to a certain extent. They may not know the exact percentage, but they have reason to know that it is within a certain type of ballpark. Either it is a lot or it is a little, or it is in the middle someplace. There is a reason that they think the person is involved. There are facts which support that reasoning.

And I submit that those facts are going to go towards being able for the State to say we think that you are totally responsible because you are the sole person who operated this place, the only person who ever owned it while this stuff was going on, therefore, it is this. Or the site is full of TCE and it is all your drums or something. There is going to be some factual basis in what they know about the site that is going to allow them to say this is what you did at the site, and this is what we think the extent is.

CHAIRMAN MANNING: You are not suggesting that there is a certain number like ten percent over five percent over fifteen percent that the State has to get in the door with before --

MR. RIESER: No.

CHAIRMAN MANNING: Okay. So --

MR. RIESER: No, I am not suggesting a certain -- well, I don't know that it is -- it can be reduced to a percentage, but certainly the State has the burden for saying, you know, you are one of three people and all of you share equally, or you are one of three people and the other two guys did more than you did, and you have a smaller share. But, yes, I don't see that the statute says to -- I think what the statute says is that the State cannot bring an action against anybody except to the extent to which they -- to seek recovery except to the extent to which they contributed to the site.

Now, theoretically, you could say that there is some type of prima facie case that they have to make before they get into the door based on that language. I don't think that makes any sense, to set up some type of prescreening. I don't think we are saying that. We are saying the State does have the burden of coming in and saying that we think you are responsible for these three reasons and we think this is generally your share of the site.

CHAIRMAN MANNING: And so your short answer to the question of whether the person who is identified as being somewhat responsible without a number being tagged to it when the State comes in with a case, is

that, no, there is no burden of going forward with information during that proceeding then. I mean, that's -- what I hear you telling me, then, is that there is no burden of going forward on the part of that person or entity that has been --

MR. RIESER: You know, there is --

CHAIRMAN MANNING: That is a prima facia case, if that's what we call it.

MR. RIESER: There was a point where we discussed splitting this thing up in terms of the burden of going forward, and that people were not real happy about that. I guess I have an issue of burden of going forward, because it implies, without saying, that there is no burden of going forward because that implies that people won't submit information or there will be information that they have that the Agency won't be aware of.

I just don't think that is -- by the time that there is a trial of these issues, which is where the burden of going forward has its place, that that information is going to be available to the Agency, and that the Agency will be able to make to the State and be able to make some type of demonstration regarding that. Again, I think that any person in that situation, in defending that situation, would be

spilling whatever they had because they want to make sure they are identified with a certain -- with the percentage that they think is appropriate.

David, do you --

MR. HOWE: Yes, I do have a couple of comments. First of all, I am here -- we have a genuine desire to help, to be helpful. To the extent that I am not giving you a short answer and being too much of a lawyer let me know, okay.

The short answer that I have is that I believe that the person that is seeking to get another entity adjudged to be liable for a portion of the cleanup costs, whether it is the State or a private party, if one person is trying to get another person to be deemed liable for the cost of a cleanup, they would have the burden of going forward not only with respect to presence at the site, but also with respect to the amount or the extent of that liability.

I can give you some examples of what I am talking about. You have to judge this in the context that in these cases you are going to be dealing with imperfect information at all times. It is very, very rare that you have perfect information.

Basically what happens is that there will be certain evidence by which people can arrive at

estimates with regard to what may have reasonably been disposed of at a site, estimates as to what actually is there in terms of gallonages, et cetera. In addition to that, with respect to the types of things that are at a site, there are also different estimates.

For example, you can have a site where there are metal -- there is metals contamination and there is chlorinate contamination. The chlorinate contamination drives 95 percent of the cleanup cost. That is something that can be determined. And then it can be determined that there is X amount of chlorinates at a site and there is evidence by which a person can arrive at a range that a certain entity has -- may have generated that was shipped to that site.

Now, in that situation, dealing with imperfect information, the proponent is going to come forward with certain types of proof or certain types of evidence which that proponent is going to contend will show the extent to which the defendant, we will call him, or the PRP, contributed to that contamination. He would have to come forward with that type of evidence. The PRP would then have the opportunity to rebut that or to say that that particular proof does

not necessarily -- is not the best proof, or is not the most accurate or reasonable reflection of what actually had been sent to the site.

To give you an example, an affidavit from somebody who hauled waste oil from a 500 gallon tank establishes an outer range of how much waste oil might have been hauled to a particular site. Testimony with respect to a certain number of drums that were sent to the site can establish an outer range of what was there. The defendant might be able to come back and say, yes, but if you notice, every single one of those 55 gallon drums was loaded by hand and, therefore, they had to be empty, which may establish a minimum range.

In other words, there has to be -- the way the statute is written, there has to be a burden of going forward not only with evidence of involvement but with evidence of extent of involvement. The fact that there is generally going to be a lack of perfect information means that there will be an evidentiary back and forth in terms of the extent of that involvement, but the initial burden of going forward must be on the proponent. Does that make sense?

CHAIRMAN MANNING: I understand what you are saying. What if the proponent is a citizen, in a

citizen's enforcement action? I know you avoided this entirely and so did the State. You may continue to do so. But I wonder if you wanted to put something on the record in terms of what you think the Board needs to do, if anything, with the whole issue of Proportionate Share Liability and the burden of proof and allocation and all of this when a citizen comes forward. And you know we have these kinds of cases that are before the Board consistently. With the proportionate share concept, as you indicate in terms of the applicability, I see these issues coming forward in that context. I don't know how we are going to be able to avoid what process we utilize to deal with these. I just thought I would give you the opportunity, as I also give the State, to comment on it.

MR. RIESER: Well, this was an area of agreement with the State but for very different reasons, although I respect the State's reasons for their position. I think they had some valid concerns in that area. Our concerns were a little bit different in terms of citizen enforcement actions.

First of all, we saw them more the concern being greater for the issue of cost recovery actions under the Illinois Environmental Protection Act, which at

the time we started working on this thing was something that was, I think, closer to people's mind sets than enforcement actions to enforce a certain type of remediation. It was the position that I took, and I don't know that it was shared by everybody on SRAC, but something that we came around to on behalf of the regulated industries that I represent, that the Illinois Environmental Protection Act did not provide for cost recovery actions brought by the citizens. Plainly, it provides for citizens suits of a certain type with respect to violations of the Act, but it didn't provide for cost recovery actions. Now, I know the Board issued rulings in which it supported that.

Since then and since this discussion actually today of the -- since the day of the prehearing that we had there was a case law from the First District Court of Illinois that also made a finding that the Board didn't have the authority to hear the private cost recovery actions. The private cost recovery actions was a more significant issue for us because another element of this whole CERCLA thing and what impact the statute has with regard to CERCLA from the regulated community, and I think particularly the lawyers in the regulated community, was whether we could set up an entirely different system to take into

account private cost recovery actions and include them within what we were proposing and have an entirely new way for handling these private cost recovery actions. And that was the position that my associations were interested in, and it was a position that IERG was interested in as well, if I can speak for them on this point. And given the Agency's unwillingness to have the private cost recovery actions included for their reasons, which Gary stated, it worked out that they were not included.

Now, if the question is how does the Board deal with the enforcement actions that are brought by individual citizen suits, and I have to say that I am representing somebody, a defendant in one of these as we speak, and so I have thought a lot about this. Plainly, the Board will have to make a decision because the defendant in that situation has the ability to avail themselves of the defense that they did not cause or contribute to the remediation or cause or contribute to the contamination and cost of the remediation.

Now, it is a little bit trickier when you are talking an enforcement action when the remediation has not been done, because then you get into the issue about what the costs of the remediation or the extent

of the remediation is going to be, whether a plaintiff can require a defendant to do more remediation than would be normally required under a TACO approach to the site or not.

But I think the bottom line is that we probably have the same answer that the Agency does as to how the Board is going to handle it, which is you are going to have to look to the statute in the specific context of actions filed by citizens seeking to enforce the regulations. And there is a certain level of disconnect between the enforcement of regulations at a site and the remediation of that site. The regulations may or may not require the remediation. The remediations may or may not require the extent of remediation that an individual is seeking. There is some additional issues there that don't make this a clear connection between the one and the other that, as you say, we have not dealt with.

CHAIRMAN MANNING: Well, for purposes of clarifying the record, I think the First District case you were referring to was the NBD case?

MR. RIESER: Yes.

CHAIRMAN MANNING: And for purposes of clarifying the record, the Board has distinguished the NBD case in the context of cost recovery cases, in recent cases

before the Board where we have indicated that there is a distinction between NBD and the cost recovery under the Environmental Protection Act. So the Board still continues to proceed on cost recovery issues. And I just needed to say that for clarification of the record, because as far as we are concerned, the majority of the Board, the issue has not gone away. I just wanted to clarify that.

I don't have any further questions at this time. Do any of the other Board Members?

BOARD MEMBER HENNESSEY: I have one question.

CHAIRMAN MANNING: Member Hennessey.

BOARD MEMBER HENNESSEY: Mr. Rieser, I just wanted to follow-up on this burden of proof a little bit further. Does the State bear the burden of proving by a preponderance of the evidence that a defendant's share is a particular percent? This is at the conclusion of a trial.

MR. RIESER: Right, right. I understand. Yes.

MR. HOWE: If I could, I will add my concurrence to that.

BOARD MEMBER HENNESSEY: Okay. So if there is some uncertainty as to whether a defendant's share is 49 percent or 50 percent, and there is not a preponderance of the evidence on either one does the

defendant's share go to zero?

MR. RIESER: No. It is either 49 or 50 percent. I mean, that's the discussion that we had at the last hearing, and one of the real problems I had with the scenarios that the Agency presented is that they associated a lack of information with the Board making a decision that there was no share whatsoever. And I just don't see how that connection is there. I can understand that concern of the Agency, because it does take away from them a certain ability or a certain authority to just say that this is -- that, you know, this is your share or else it is going to be something larger, or this is your share or it is going to be something smaller.

But the Board is going to have make the decision based on the evidence before it. And the State has the burden of presenting and proving that evidence. Now, you know, the difference between 49 and 50 percent is not something people in the main are going to litigate. So it is a different situation if the State presents the evidence that they have and says it is X percent and the defendant says it is Y percent, the Board is going to have to choose between those. If the defendant chooses to sit back and say, well, you have not proven your case, they have the -- and

present no evidence in support of it, they have the possibility of the Board just simply adopting what the Agency proposes because that is the evidence that you have before you.

As David Howe says, there is never going to be perfect information here. The question is, who bears the risk of that information not being perfect. And, again, focusing on the theme that the legislation was intended to change things from the way they were, I think that risk and focusing on the fact that additional funding was provided to deal with this exact issue, I think that there has to be a determination that that risk of uncertainty goes back to the State instead of being imposed on individual parties. So I think that the logical consequence of that is, yes, the State does have the burden of proof in proving both liability and percentage.

BOARD MEMBER HENNESSEY: Mr. Howe?

MR. HOWE: Yes, I would like to add something. There may be a misconception. I don't know that there is, but there may be. In light of some of the issues in terms of thresholds or an all or nothing proposition, I don't think that anybody testifying today believes that it is an all or nothing proposition or that there is a certain minimal

threshold that has to be met before liability can be imposed. Rather, it is an issue of I think you are talking about an amount.

What I mean is, for example, if the proponent comes in and is able to establish that you did send chemical X to the site, and chemical X is causing the cleanup, and they establish what they believe is by a preponderance of the evidence that you sent 300 full barrels of that, and the PRP comes in and is able to establish through other evidence that they believe that of those 300 barrels only two of them were full and the rest of them contained residue, which might be three percent by weight, then in that situation it is going to be up to the trier of facts to determine by a preponderance of the evidence how much that trier of fact believes of that chemical was actually sent to the site. It is not an all or nothing proposition. It is more a proposition of how much.

BOARD MEMBER HENNESSEY: Okay. This probably doesn't need saying, but I will just for the record. As in any civil proceeding, there could be circumstantial evidence, that needn't necessarily have to have an eyewitness testifying that they saw these 300 full barrels coming in and directly being dumped.

MR. RIESER: It is a preponderance of the evidence

standard.

MR. HOWE: Yes, and the evidence can be anything, as far as we are concerned, that would ordinarily be admissable to the Board. As I have said, some of these examples do not come out of thin air. For example, the idea of is a barrel full or empty, a proponent may be able to come in with evidence that, yes, there were 300 barrels transported. The other side can come in and say, yes, but the evidence also shows and present testimony that those barrels were all loaded by hand. And a 55 gallon barrel weighs a heck of a lot if it is full, and you can't load those by hand. So, for example, there would be evidence presented that would indicate that these barrels are not full and that you should not do it. Then what the trier of fact decides to do with that is going to be up to the trier of fact using established evidentiary notice standards.

BOARD MEMBER HENNESSEY: Just one other, I guess, comment, slash, question. You have indicated that -- everyone on the panel has indicated that people don't want to be involved in these things, so it is in their own interest to come forward with the information, so the shifting of the burden is not really necessary. Without being cynical, I have occasionally had

experiences where people have not been entirely forthcoming with information when they have been PRPs. But isn't another answer to that that you have discovery and you have the ability to get orders from the Board enforcing discovery to require someone to disclose all of their information?

MR. RIESER: Absolutely.

MR. HOWE: I think so. I would add a couple of points to that. One of the worse things in the world to a PRP is to get some finality on something and then have their liability reopened because of newly discovered evidence. That is something that PRPs do not like to have happen. One of the other things to mention is that, yes, there should be a discovery period, but not at the expense of dragging something out to infinity.

In the last round of Superfund reform activities back in the early 1990s CMA came out with something they called the fair share approach, which was a rough justice type of deal where it was proportionate liability but a very accelerated process. And it was thought that the accelerated process would be the trade-off for a little bit rougher justice, if you could call it that, and limited appeals, et cetera. The point being that, yes, that can be developed

through the discovery process. Let's not make that discovery process something that drags out for years, would be the way that I would look at it.

CHAIRMAN MANNING: Is that part of the reason that -- I see these, particularly Subpart C cases, being different than what the Board has typically dealt with in the past in our regular kind of cases, and it seems to me what I hear you saying is you want a fair, efficient and quick process. Fair and efficient, I think, is what I heard over and over. And I think, obviously, that is true with all your experience with Superfund and CERCLA and the fees and that sort of thing. Is that part of the reason why your proposal indicates a greater role on the part of the hearing officers at the Board, where we might be able to allow our hearing officers to better drive the process, if you will, for us and perhaps it being a different kind of case before the Board that perhaps that is part of the reason you propose this new kind of procedure to us?

MR. HOWE: Yes, that is, to a great extent, a part of the reason. I want to be very fair to the State and to the IEPA. The proposal with respect to the hearing officer provisions actually did come from SRAC and basically the thought was, first of all, we know

that is a very thorny issue. What we did was rather than not say anything at all give a proposal that the Board in this area can do what they want. This, at least from my point of view, was a concept basically modeled on the magistrate system more than anything else, where a magistrate makes a proposal but then the district judge can either adopt or sua sponte ignore or modify or whatever and other people can object to.

The idea is that by the time it got to the Board for the Board's decision the Board would not be working in a vacuum, but rather would have a recommendation and if there were objections there would also be alternatives, so the Board would have something to work with and not be forced to come up with their own scheme, and that that would hopefully speed the process up.

CHAIRMAN MANNING: Thank you. I wanted to get to this cost recovery thing, too. You don't have to answer this today, but this private cost recovery, I am looking again at Section 58.9(a), and if you would, you don't have to answer this today, Mr. Rieser and the State, but if you could provide us with more of an answer regarding this legal question prior to the next hearing or even brief it, if you will, briefly.

The concern that I have is that I understand that

people don't think the Board has the authority to do the cost recovery issues on private enforcement actions, but I am troubled by the language. There is three places in 58.9(a)(1) where the words "any person" appears. And every place that they appear, this "any person" suggests to me that any person might file these kinds of claims against any other person, and any other person might be, therefore, liable for cost recovery for any kind of remediation that is indicated. So if you want to comment on what that verbiage, "any person," means in 58.9(a)(1) I would be happy to listen to that either now or later on in the record.

MR. RIESER: I can comment on it now. I think it is -- as Mr. Marder testified, this was a part of the statute that was not negotiated at all let alone as thorough as the rest of the statute. It was not intended -- and I think it is pretty clear it was not intended to create rights that are not there. Certainly, at the time it was written there were discussions about private cost recovery actions and certainly, as now, individual persons can file an action seeking to force remediation as opposed to recovery costs. And so I think that the language was probably overly inclusive to accomplish that to make

sure that those private enforcement actions were also addressed, but it wasn't -- there was no intent on the drafters to create by this a cost recovery action that was not otherwise in the statute.

I think the Agency has said pretty clearly that they don't view this legislation, this 58.9, as creating additional causes of action that were not there. I don't think it can be read that way. I mean, I know exactly what you are saying, that that does imply that such an action exists, and I think we have agreed that a person can bring an enforcement action purporting to seek remediation, but recovery of costs, you know, I would submit the reasons we discussed, that it is not appropriate.

CHAIRMAN MANNING: But even if we forget the cost recovery issue, and a private citizen can come forward, an industry can come forward and sue other industries for the question of remediation, don't we still even in that context get into the whole proportionate share issue?

MR. RIESER: Again, we are focusing more on the enforcement actions brought by the State.

CHAIRMAN MANNING: Right, but we would. I mean, it would seem to me we would have to entertain a defense on the part of the respondent that they were

only -- so it seems to me that whatever process we devise or help devise through the enforcement process of the State enforcement actions needs to somehow apply to an action brought by a citizen in trying to ascertain the degree of liability on the part of three or four respondents that are brought before the Board.

MR. RIESER: This is not, in the scheme of things, an elaborate process that has been brought out in terms of how the State enforcement actions are to be handled. I don't want to speak for the State, because they have a real separate issue about allocating liability and allocating responsibility for sites that they are not a part of, because they don't want -- again, I won't speak for them, but they don't want the site to be allocated so that it could be implied or supposed that the State bears the unallocated share of that individual site. That is a very significant problem. I don't necessarily think the statute does that, but I can see why they would be concerned and want to make sure that that is not a result of that type of allocation.

You know, there is no reason that in an individual enforcement action between two parties or even between three parties the Board cannot apply the same principles that are drawn here. And there is no

reason that, you know, in the scheme of things that that is a huge -- that that is a huge issue. But as I said, it is a very slippery slope from requiring remediation to the recovery of costs. From the State's perspective it is very slippery slope between allocating shares and making them be the ones responsible for the unallocated share.

CHAIRMAN MANNING: Mr. Howe, did you want to add to that?

MR. HOWE: Yes, just briefly. With respect to the 58.9, the way that I had interpreted that is to the extent that a private right of recovery might exist elsewhere in the Act, that then in that situation, you could not -- a person could not force somebody else to pay more than their proportionate share. That is another very thorny issue, one that did receive a lot of debate. And I really have no answers on that particular subject.

But there was -- there were a couple of other things that needed to be mentioned there. And that is that there has been a rather large fear expressed during this entire process that it might be possible for a developer, say, to come in and try to clean up a site and then try to share the wealth and try to get other people to pay for the cost of their cleanup.

That is something that I just wanted to mention right now, that that is something that has been a concern and it has been a difficult issue to deal with. How does one prevent that type of activity, where somebody comes in and pays, say, just a nominal amount to start a cleanup, tries to get prior parties to pay for the cleanup, and then winds up with a clean piece of property that they can sell at an enormous profit. So that was another issue that kind of gets wrapped up in here.

Do you understand what I mean?

CHAIRMAN MANNING: Yes, I think so.

MR. HOWE: Okay. Thank you.

CHAIRMAN MANNING: Mr. King?

MR. GARY KING: I just wanted to follow-up on the discussion that Mr. Howe and Mr. Rieser had in response to Board Member Hennessey's questions. I thought that that discussion was very interesting, I guess, for one, because I don't think I had heard it before. And, second, I don't see that it is reflected in your proposal anywhere. Could you point out where that concept that you were talking about is set forth?

MR. RIESER: I think it is implicit in 741.220(a).

MR. GARY KING: So it is not spelled out

anywhere?

MR. RIESER: Yes, I would say that is true.

MR. GARY KING: So the Board is simply supposed to glean that procedure from your recitation of the statutory language?

MR. RIESER: Well, I don't know that it is a separate procedure that plays out how -- what case the State has to bring based on the statute, and then Chairman -- Board Member Hennessey had some questions about that.

MR. GARY KING: So you don't provide any additional guidance language for the Board to develop in that other than that statutory --

MR. RIESER: Yes.

MR. HOWE: I think, obviously, many of the Gore factors wouldn't apply because they don't deal with the issue of proportionate liability. But it is the issue of what actually went to the site, what is driving the cleanup, what is driving the cleanup costs, and what is the quality of the information, the quality of the evidence.

MR. RIESER: It is like any enforcement action, the Board is presented with evidence and the Board makes the decision based on the evidence.

MR. GARY KING: Is it your intention to spell that

out in any kind of explicit way, or do you want to just leave it implicit for everybody to try to understand?

MR. RIESER: Well, similar to the proposal on information orders, you know, plainly, we can provide more guidance than we have done to date. In looking at what I have proposed, I was thinking there were ways that it could be improved, and that may be something that we could do.

HEARING OFFICER ERVIN: Mr. Wight, do you have a question?

MR. WIGHT: Yes, I do have a question on another issue. I am not sure if this discussion is finished. Did anyone have any follow-up questions?

I had another question. I think this is for Mr. Rieser. It goes to the discussion on the burden of proof that was in your testimony. You were talking generally about how you felt that the division between liability and allocation was really somewhat artificial and not that easy maybe in practice to distinguish. I can't remember exactly how the testimony went, but at some point shortly following that comment, you stated that there had to be something more than just did you send chemical X to the site. I believe that was your statement in terms

of what had to be proved.

MR. RIESER: Yes.

MR. WIGHT: Sort of along the lines of whose burden of proof that it is, what is it that -- what more would have to be proved? What specifically did you have in mind when you made that statement?

MR. RIESER: Well, I think it is what we talked about in discussions with the Board where the State, in its proposal, limits what it has to demonstrate the fact that a person brought any kind of -- any hazardous substance to a site, and we had actually had a discussion about -- and that there was a release of a chemical at the site. It didn't have to be the same chemical. Any person that brings any hazardous substance to a site in which there is a release of a hazardous substance, even if it is a separate hazardous substance, is liable under the State's proposal. We have even talked about limiting in the State's proposal the hazardous substance that had to be shown for that generator to be liable, that generator had to have brought that hazardous substance which had been released from the site, and that was -- my recollection was that was not an acceptable amendment.

So I think what we are saying is it is not enough

that a generator generated a hazardous substance at a site at which other hazardous substances were released. I think there has to be a causation element between what that generator arranged for the disposal of at a site and what costs were incurred in remediating conditions at the site. And that that causation element and percentage element, as we have talked, is something that is part of the State's burden to show.

MR. WIGHT: So the answer you just gave seemed to be distinguishing between chemicals that a person brought to a site and different chemicals, but what about where you are talking about generators who brought the same chemical, so that you are talking the same chemical constituent with multiple generators, what would your view be on that with regard to --

MR. RIESER: Well, I think the view would be that you use the best information that you have with respect to your waste in allocations and everything else, as is currently done, and try to make some determination based on all of the information that you can gather about what each generator's contribution was to the site and whether that is the chemical driving the remediation.

MR. WIGHT: Well, the gist of the comment was it

had to be something more than just did you send chemical X to the site.

MR. RIESER: Right.

MR. WIGHT: So then in addition to that would there be some additional requirement for what is commonly known as fingerprinting? In other words, it would have to be shown exactly whose chemical constituent was released and found its way into the plume?

MR. HOWE: I think realistically that what you are talking about, again, has to do with preponderance of the evidence. If you have three people that sent a certain chemical to a site and you are able to show that it is chemical X, and that party A sent 50,000 gallons, and party B sent 100,000 gallons, you have met a burden of proof. If then the defendant is able to come in and show, be it fingerprinting or whatever, that the material that he sent could not be that, that, again, is part of the evidentiary mix that the trier of fact would have to consider.

MR. WIGHT: So the defendant would have the obligation to distinguish between his chemical X and the chemical X of the other generators?

MR. HOWE: I think we might be getting a little bit too specific, but basically, again, it is a

preponderance of the evidence still. If it is chemical X and you can show that party A sent chemical X, in the absence of anything else, I would say that by a preponderance of the evidence you have shown that he sent 50,000 gallons of chemical X to the site. If he is able to come in and show, be it fingerprinting or whatever, that his chemical X is different from the chemical X at the site, then he has basically made a rebuttal to the extent that the trier of fact considers that credible.

MR. WIGHT: Well, suppose there is a scenario where the individuals are unable to make that demonstration. What would be the outcome of that particular case then under your proposal?

MR. HOWE: Well, if I were a trier of fact, which I am not, I would probably say that by a preponderance of the evidence you have shown that he contributed that amount to the site. And that he would be, therefore, liable for that portion of the cleanup cost.

MR. WIGHT: The proportion would just be done on the volume of the chemical that was brought to the site?

MR. HOWE: If we assume, for example, that there is only one chemical at the site that is driving 100

percent of the cleanup, there is -- and this person sent 25 percent of that chemical -- and I love working with percentages on this stuff -- and he sent 25 percent, he would be responsible for 25 percent of that cleanup cost. That would be the way that I would look at it.

MR. WIGHT: Okay.

HEARING OFFICER ERVIN: Are there additional questions for this panel?

MR. DUNN: Matthew Dunn, with the Attorney General's office. Following up on those questions, what if releases of the chemical A had occurred a year before a new generator first sent their waste to the site? Would that be evidence that would be appropriate to introduce that it wasn't my chemical A, because I wasn't there when the release began?

MR. HOWE: I would think so.

MR. RIESER: Sure.

MR. DUNN: What about I send my stuff always in nice, neat over pack drums, and generator Y over here, they always send theirs in rusty ones that are about ready to fall apart and are always a hazard. Is that credible evidence?

MR. HOWE: It would be credible evidence, I would think, in terms of whether, you know, to what extent

somebody may have proven by a preponderance of the evidence that was not theirs. I think, again, it is going to depend basically on exactly what the evidence is and what the trier of fact thinks about it.

MR. DUNN: Do either of you gentlemen have a concern with all of these new elements about conditions of the drums, and dates of receipt, and fingerprinting, and the new elements that are established either at whoever's burden, are not going to decrease transaction costs in the number of elements and the need for experts and the time involved in discovery and all of that, but will, in fact, increase it tremendously, if not skyrocket it?

MR. HOWE: I don't think it will. The reason that I don't is because so much of this is done through the negotiation process. So much of this can occur long before there is a genuine issue to present to a trier of fact. I am not going to spend a lot of money going to a trier of fact if it is something that there is not a heck of a lot of genuine dispute in terms of numbers and amounts and things of that nature. A small party, a small generator is not going to do that either, simply because it is not going to be worth it to them, okay. This is a part of the process that gets negotiated.

The thing that I am trying to do is I am trying to get it to the point that when the process starts there is an accelerated process that it can be done, that you can make it more efficient and spend the actual money on that, on the cleanup costs, and I think that with the joint and several liability out of the picture there is going to be less tendency to polarize positions.

MR. RIESER: Just to add, I mean, we are not -- you know, all of the things that you described are evidence in my mind rather than elements. The way you have described them implies to me that these are issues that have been brought up in the past to you in cases that you have handled. And, yes, these are all issues, pieces of evidence that have to be considered.

Does the State have to go out and disprove absolutely everything that it can think of with regard to a site? No, that is not what we are saying. They do have to make a prima facie case regarding what people contributed and to the extent they can how much, and then if people dispute that based upon fingerprinting and based upon factual issues with respect to the site, that is their right. The virtue of this is what the legislature has said is that that

is now all relevant information that is to be considered by the trier of fact, and it is relevant information.

HEARING OFFICER ERVIN: Board Member Girard.

BOARD MEMBER GIRARD: Thank you. I have a question for Mr. Howe, going back to Subpart C. What element or elements of the magistrate model make for a more fair or efficient decision in Subpart C?

MR. HOWE: In Subpart C there may not be anything that would make it more fair or efficient.

BOARD MEMBER GIRARD: Is that your answer or would you like another question?

MR. HOWE: No, I am just going to continue on. Subpart C, my belief is the way that the IEPA is involved in this thing -- well, okay, let's go back. Let's assume that there is some sort of dispute between the parties in Subpart C in terms of what the allocation is. In that situation would the magistrate's participation make it a more efficient process? I would say the answer is probably yes in that situation. So I will retract that previous statement as probably being too bold or general.

The point here is that by the time -- the Board is going to be making the ultimate decision in these cases. By the time it gets to the Board, we would

want the Board hopefully not to be working in a vacuum, to be able to have the benefit of a recommendation, objections, et cetera, so that they would be able to take that and make a reasonable decision. To the extent that a magistrate was not making any kind of a recommendation, then in that situation what you would have is basically a briefing to the Board with conflicting interpretations and without the benefit of the magistrate's -- the hearing officer's thinking on the subject.

As I have said, this was a suggestion. There is a possibility, given many other concerns, that that is not the way the Board wants to do it. But we just felt that it would be appropriate to at least make a suggestion that the Board can either accept or do something else with.

MR. RIESER: Another element of this that also sort of plays off the model of the magistrate is that there would be somebody in authority, sort of in control of the process as they move through it with that process resulting in recommendations for the Board to make a -- an organization of the information and perhaps some recommendations for the Board to make a final decision on. And because that person would have a little bit more authority than the hearing

officers typically do, they may be able to direct the discussion, direct the negotiations in a way that is more fruitful for everybody, and by that way make the process more efficient.

So that was just the idea that having somebody in that position would help the process. As David says, it is a proposal that we are making that is new, that is different, but it is something for the Board to consider.

MR. HOWE: One other thing to mention, this is in connection with my very general statement. To the extent that the parties have already agreed upon an allocation, then, obviously, the recommendation from a hearing officer would probably be superfluous, you know, just to the extent that private parties avail themselves of the mechanism to reach an agreement with respect to 100 percent of the cost of the site, which is another avenue that this can be used in.

CHAIRMAN MANNING: On that very question, if one of the parties -- if all of the parties -- let's say there is four parties, all four of them agree that somebody was 25 percent liable, including the person who is 25 percent liable. Would you all agree that that person could just opt out then and just write the check for the 25 percent of whatever the remediation

cost is going to be, and they are done?

MR. RIESER: Yes.

MR. HOWE: Yes. Sometimes what may happen is that you will know the proportion, but you will not know the ultimate cost, which is one reason that percentages sometimes work very well here, is that you are liable for X percentage of whatever the cleanup cost is.

CHAIRMAN MANNING: And they could agree to that percent without even knowing what the cost is going to be and as long as everybody that is at the table agrees to the percentage that particular participant is done?

MR. HOWE: At least with respect to allocation.

CHAIRMAN MANNING: Right.

MR. HOWE: Now, if somebody proposes to increase their cost by 200 percent, they might have a say in the remedy. But that's not what we are dealing with here.

CHAIRMAN MANNING: Thank you.

HEARING OFFICER ERVIN: I think there are probably several additional questions for you. Beings that we have been going --

BOARD MEMBER GIRARD: Well, I would like to finish this line of questioning.

HEARING OFFICER ERVIN: All right.

BOARD MEMBER GIRARD: Mr. Marder looked like he was about to jump into it. But if he isn't, I have another question along this line.

HEARING OFFICER ERVIN: We will go to Mr. Marder. Do you have a comment?

MR. MARDER: I have just a quick comment on the issue of the hearing officer. The Board should be aware that this was not an issue that was -- it was a consensus issue that went into the proposal, but there was quite a bit of debate in the discussion as to whether it was or was not the most appropriate way to go.

From our point of view, listening to the testimony of the last two hearings as to the limited number of cases that would probably come before the Board on this issue, it makes it more possible that a Board Member could be in attendance and a Board Member could make those decisions. I think there is a fundamental difference on how you handle this if you are dealing with hundreds of cases and if you are dealing with three or four cases a year.

CHAIRMAN MANNING: I appreciate that, Mr. Marder. There is quite a bit of dispute at the Board as well as to what process we will adopt on this particular

provision.

BOARD MEMBER GIRARD: Well, as a follow-up on your response, so you are saying that other models could be appropriate, say, having a Board Member in attendance or a panel of Board Members?

MR. MARDER: Yes. I think that's correct. I think as both Mr. Howe and Mr. Rieser said, this was a suggestion. It was a consensus of the group, but it is not by far the primary element of the proposal.

CHAIRMAN MANNING: The key is, as I understand it, that you want someone close to the process to be able to give a recommendation ultimately for the Board's seven members to make a determination? Am I correct?

MR. HOWE: I think so, yes. There were a number of different alternatives that were thought about. For example, having a panel that there was a Board Member and, say, an attorney that has been doing it for a long period of time, hopefully not me, and a licensed professional engineer. There could be, for example, a small panel of the board itself. There are any number of ways that could be done. In terms of what made the most sense, we were not sure, frankly, so we gave a proposal.

CHAIRMAN MANNING: Did you give any thought to a whole private process, an arbitration, a mediation

process, that would be done privately with somehow being connected to the Board ultimately for a Board decision on an arbitration award or a mediation that preceded an arbitration award that you would like to speak of in terms of that process?

MR. HOWE: There was some discussion about that process, and I believe that there is some language in the proposal on it. The one thing to be cautious about with respect to arbitrations and mediations is that at times unscrupulous people have used those as a means of delay in the sense that they will agree to nonbinding arbitration and go through a lengthy, expensive, or sometimes inexpensive process, and then choose not to accept the position of the arbitrator and then wind up back in court basically with a delay.

In this particular situation, there is always that possibility that it could be an arbitration panel that could make a recommendation. That, again, in terms of what the Board's power are and things of that nature I haven't really thought that through. But there are all sorts of ways to skin a cat. It is a question of what makes the most sense, what is the most efficient, what does the Board have the power to do, et cetera.

MR. RIESER: The Site Remediation Advisory

Committee, in our discussions in an earlier draft, had actually had language allowing for other dispute resolution mechanisms to be eventually approved by the Board at the end of the day. Actually, I thought it was in here. That's plainly something that we think is appropriate and could be doable under the way that this is proposed. I mean, this is essentially -- what is laid out here is essentially a publicly funded dispute resolution mechanism, where at the end of the day you have a Board determination as to the appropriate allocation which I think has a great deal of value, and the value of this process.

But there is no magic to the particular -- based on the fact that the parties can agree, the parties are in this process because they agree that they are going to undergo a process always struck us that the parties could go a long way towards setting the rules as they went along consistent with getting sufficient information, sufficient detail to the Board so the Board can make a final -- could make a final decision, and there is any number of ways of undergoing that process if the Board is in the position to make that final determination that is being called for here.

BOARD MEMBER GIRARD: I just have one more line of questions. Under the magistrate model, how do you

determine the appropriate qualifications of the magistrate for a particular case?

MR. RIESER: When we talked about this, that was an issue that we discussed. And out of that discussion is what came the -- is what came the discussion about having a panel to bring a lot of different abilities and experience to making those types of decisions. I guess at the end of the day we have to trust the Board to appoint the appropriate people to handle these things, and the qualifications are, obviously, people that -- one would hope that you have people who are experienced in this area, would have some experience in handling these types of cases before, because that's the reason to have a person independent of the Board overseeing this process.

But, you know, we understand that if it is not the actual current Board hearing officers, it be somebody else. There is a variety of issues, decision making issues in terms of how you select those people to go along with that. But that's -- that was not something that we specified in this proposal.

MR. HOWE: One possibility that had been briefly discussed was that it be a hearing officer but that the procedures spell out the particular qualifications that the hearing officer would have to have in terms

of experience and things of that nature. Again, there just was not a right answer, and this was an issue that was kind of like trying to tackle a cloud. It was very difficult to sink your fingers into it and figure out what would be the best means of doing it, what would be the means given the concerns of the Board in the area of what would be the best way to handle it. So it was felt that let's go ahead and make a suggestion but, quite frankly, we have been happy to discuss all of these options with you.

BOARD MEMBER GIRARD: Do you believe that the decisions on the allocation factors as given in the proposal are purely legal decisions or do they involve scientific understanding?

MR. HOWE: Frequently they will involve scientific understanding.

BOARD MEMBER GIRARD: Thank you.

BOARD MEMBER FLEMAL: The proposal that is currently before us, the issue regarding hearing officer recommendations and I would note as well the statements regarding ruling on issues of fact and law occur only in Subpart C and not in Subpart B. Is it SRAC's position that that is an appropriate way to split the role of the hearing officer or does that apply to both?

MR. HOWE: I will refer to my lawyer.

MR. RIESER: I know it was our position that Subpart B being a traditional enforcement action would follow the way the Board had always handled enforcement actions. And that setting up a separate process and a separate person to make recommendations to the Board probably was not going to be appropriate in the enforcement context. Whereas in this dispute resolution process there might be some room for some more flexibility, because you could look at this as being a step away from the core responsibilities of the Board where it might be useful to them to delegate some abilities to an individual to further this process in the situation so --

BOARD MEMBER FLEMAL: To the -- excuse me.

MR. RIESER: So, yes, there was a specific decision to do it in the context of Subpart C and not in the context of Subpart B.

BOARD MEMBER FLEMAL: To the extent that you retain any support at all for this concept it would be confined solely to the dispute resolution?

MR. RIESER: Yes. We are not -- I guess what we are saying is this is not -- what Mr. Marder was saying is that this is not integral to the proposal. We think it is -- we do think it is a useful way to

approach this. We understand that there are issues for the Board in adopting this, but we think it is a useful approach. But the proposal does not stand and fall on whether there is a hearing officer or not.

BOARD MEMBER FLEMAL: There is a phrase in the current proposal that says that the hearing officer shall rule on any issues of fact and law presented in the hearing. Is there any conflict between somebody ruling on issues of fact and law and not being a trier of fact?

MR. RIESER: Can you direct me to the language you are reading, please?

BOARD MEMBER FLEMAL: Section 741.320(a), the hearing officer shall preside over hearings conducted pursuant to Section 741.315(a)(3) above and shall rule on any issues of fact and law presented at the hearing.

MR. RIESER: Well, what I am trying to do is to square that language in A with the language of C in terms of presenting a recommendation to the Board on the allocations. I think what we had in mind is -- and who do I turn to to correct me if I am wrong?

I think what we had in mind was that the hearing officer would make evidentiary rulings and things of that nature and make recommendations to the Board in

terms of the ultimate decisions. Because I don't think there is any question that the Board is the ultimate decision makers on the issues of fact and law, and it may have been that this was inartfully drawn or there was a -- these drafts went through numerous drafting stages, and it may be there were some decisions made where this thing was not addressed. But I think what we had in mind was that the hearing officer will make evidentiary rulings and then make recommendations with respect to fact and law that would be provided to the Board.

MR. HOWE: Just to add, currently a hearing officer makes findings with regard to credibility. So there is a certain amount of activity involved with regard to the fact determinations that may be minimal, but they are there. In terms of rules of law it has always been the case that any reviewing body can determine issues of law de novo without any question. There is no deference given ever. But basically there is certain things that the person that is there might want to do with respect to issues of fact, perhaps with respect to issues of law. But they are going to be making recommendations which the Board can either adopt in whole or in part or sua sponte ignore, whatever.

HEARING OFFICER ERVIN: Okay. I think we will take a break for lunch and we will reconvene at 1:30.

MS. ROSEN: Excuse me. Before we go off the record, I don't know if there is a way to gauge how much more questioning will be done of these witnesses.

HEARING OFFICER ERVIN: Mr. King, you had a question earlier?

MR. GARY KING: Yes, I can either do it now or wait until after lunch. It won't take very long.

MS. ROSEN: Because if it is a matter of just having one or two questions remaining it might be worthwhile to finish up with these witnesses so that if they are unable to return, unless there is more --

HEARING OFFICER ERVIN: Yes, we do have several questions from the Board.

MS. ROSEN: Okay. That's fine.

HEARING OFFICER ERVIN: We won't keep you too long in the afternoon, though.

MS. ROSEN: Thank you.

(Whereupon a lunch recess was taken from 12:30 p.m. to 1:35 p.m.)

AFTERNOON SESSION

(May 27, 1998; 1:35 p.m.)

HEARING OFFICER ERVIN: Back on the record. Are there any additional questions for this panel? Mr. King?

MR. GARY KING: I want to go over a couple of things.

Mr. Rieser, I am concerned that either I misunderstood something that you were saying in response to a question from Mr. Wight or you misunderstood my testimony from the first hearing. I want to put it in terms of a hypothetical to kind of draw that out.

Let's assume we have got a site and there has been a release from that site, and it is identified that the release is -- the chemical constituent that comprised the release is benzene which is a hazardous substance, and we determined that there is two generators who sent material to the site, one of them, the generator A, has sent benzene to the site. Generator B has sent a hazardous substance that is not benzene. For purposes of the example let's just say it is lead.

Now, my testimony was that under our proposal, if we were contending that generator B was liable for the

release of the hazardous substance benzene on the basis that he sent the hazardous substance lead to the site, that would be insufficient proof under our proposal. What I heard you say this morning was I thought maybe you were saying something different than that.

MR. RIESER: Well, I think my recollection of your testimony was that in that scenario generator B would be liable, but that he might not have -- but that his allocation would be zero. I think that was more specifically what you said. In other words, the liability is tied to whether -- to the simple issue of whether that person arranged for the disposal of the hazardous substance at the site, whether or not that hazardous substance caused the release which was the subject of the remediation. And I don't read your proposal as limiting the liability determination to causation of the specific release which is the subject of the remediation at the site, or that the generator in order to be liable has to have arranged for the disposal of that chemical which was released at the site which was the reason the site is of concern to the Agency.

MR. GARY KING: Let me draw you to 210(b) where it says to establish liability the State shall prove by a

preponderance of the evidence that the respondent caused or contributed to the release or substantial threat of release in one or more of the following ways. That, in my mind, is the introductory concept in all of our proposal as to proof of liability.

MR. RIESER: If you look down to (4), the proof, if you will, of (b), the mechanism by which you make that demonstration is by arranging -- someone who arranged with another person for the disposal of a regulated substance at a site or facility from which there is a release of such substance.

(Board Member Girard entered the hearing room.)

MR. GARY KING: So are reading that clause, caused or contributed in (b) as not having any independent significance?

MR. RIESER: I read (4) as being the means by which if you prove (4) you have proved (b). In other words, (4) is an example as it is written. I use (4) as an example of (b) not (b) as being a limitation on (4).

MR. GARY KING: Okay. I think that clarified for me where we may have to adjust the language a little bit here.

The second thing I wanted to talk about, we had a chance to check in over lunch hour a little bit, this

M.T. Richard site, Mr. Howe, that is a federal jurisdiction site; is that right?

MR. HOWE: I believe so, yes.

MR. GARY KING: Okay. So that would not be a site that would have any -- this proposal would not impact that type of site?

MR. HOWE: No.

MR. GARY KING: Okay. The same is true with Pierce Waste Oil?

MR. HOWE: With Pierce that is going to be a long-term issue, and I am not -- I would not be comfortable right now saying that I believe that that is going to be solely a federal jurisdiction site.

MR. GARY KING: But the activities to date have been strictly federal in terms of the removal action?

MR. HOWE: In terms of the recovery, yes.

MR. GARY KING: So we are talking about -- really out of the four sites we are talking about two sites that were --

MR. HOWE: Brockman and Ability Drum.

MR. GARY KING: Right.

MR. HOWE: Yes.

MR. GARY KING: I don't think I asked you this. How many sites is Caterpillar involved with as a third party respondent nationwide?

MR. HOWE: At any given time that can vary, because some sites we have been able to resolve our liability. As an active participant in third party sites, we probably average about 20 at a given time.

MR. GARY KING: Okay. So the fact that we have a couple of sites ever in Illinois is a small percentage of all of the sites that Caterpillar is involved in?

MR. HOWE: In terms of number, yes. In terms of liability perhaps not, but in terms of number, yes.

MR. GARY KING: Okay. I have no other questions.

MS. WALLACE: I am Beth Wallace with the Attorney General's office. Does your proposal expect that the State has to allege a person's allocation in its complaint?

MR. RIESER: Just a minute.

(Mr. Rieser and Ms. Rosen confer briefly.)

MR. RIESER: Well, that's a good question. And I guess the -- it does create a -- excuse me.

(Mr. Rieser and Ms. Rosen confer briefly.)

MR. RIESER: I mean, plainly you have to -- pleadings state you have to allege the facts and your claims but, you know, it is like -- I guess I make the analogy to the damages where you don't necessarily have to specify the exact amount of the damages that you are seeking in a complaint. So based on -- I

mean, to the extent you have that information initially certainly it should be done. To the extent you are not in a position to do that, I guess my analogy would be to something like damages where it is not something that is always capable of being specifically alleged in the initial complaint and you would allege whatever information you have at the time with the understanding that based on the discovery you may refine those allocations more specifically.

MS. WALLACE: Okay. So you don't expect that if the State files a complaint and it doesn't have the information to make an allocation that then you could file a motion to dismiss saying that the complaint is deficient because we have not alleged what we need to under your proposed regulations?

MR. RIESER: I don't think so, because we are talking in terms of burden of proof. I mean, if at some point, obviously, the State is going to have to demonstrate what it has to support its allegations with respect to specific percentages. Excuse me.

(Mr. Rieser and Ms. Rosen confer briefly.)

MR. RIESER: So I guess my answer -- the complaint itself would outline the allegations you have in terms of the cause or contribution and to the extent you are in a position to identify the specific percentages you

would have that. But, certainly, as we have talked about, these are things that -- where the information may get developed through the process. And I think, again, going through the analogy of the damages, you may not have that specific information, but you plainly have to be able to develop that information in discovery or at some other point in the procedure.

MS. WALLACE: Okay. Thank you.

HEARING OFFICER ERVIN: Mr. King?

MR. GARY KING: Now, isn't that -- but that is not, to follow-up on Ms. Wallace's questions, again, that is not explicitly stated in 220(a)?

MR. RIESER: No, it is not.

MR. GARY KING: It is implicit within 220(a)?

MR. RIESER: Well, we have not specified the specific allegations that have to be included in the complaint.

MR. GARY KING: Should it be explicit within 220(a)?

MR. RIESER: Well, I mean, it is in context of the enforcement action in the Board's 103 rules, and I suspect it would apply to the pleadings. It is something that we can look into and develop, but I am not sure that it has to be.

MR. GARY KING: Okay. That's all.

HEARING OFFICER ERVIN: I have a question for you, Mr. Rieser. In your proposed revisions to Section 741.105, if I understand this right, a Subpart C action is not applicable to a site on the NPL list or if it is subject to a court order. But a Subpart B action is not applicable to those sites as well as to the parties in Subsection E. Why is there a distinction between applicability for a Subpart C action as opposed to a Subpart B action?

MR. RIESER: Let me make sure I have the information in front of me. I am sorry, Ms. Ervin, you were looking specifically at --

HEARING OFFICER ERVIN: At your Section 741.105.

MR. RIESER: Yes.

HEARING OFFICER ERVIN: Maybe I am reading this wrong, but a Subpart C action applies unless it is an NPL site or a site where there has been a court order which is (c)(1) and (2) and (3), right?

MR. RIESER: It says this part, so it was intended to be the entire Part 741.

HEARING OFFICER ERVIN: Right. But a Subpart C action can be brought for any other site?

MR. RIESER: I don't read --

HEARING OFFICER ERVIN: I guess my question is why is the Subsection E which says Subsection A is not

applicable to actions against the following parties, does that only apply to Subpart B actions or does that also apply to Subpart C actions?

MR. RIESER: Subpart E -- both Subpart C and Subpart E are intended to be limitations for the entire part. In other words, Proportionate Share Liability is not available to allocate away responsibility for -- allocate away the responsibility that an individual has under federal regulations. So, certainly, the intent that these would apply under both.

I suppose you could see an example where if the State or if there was an agreement that the site would be remediated and everybody had agreed to do it, which is part of the prerequisite for a Subpart C action, then it doesn't really matter whether it is a regulatory responsibility as long as it gets done. But that is not how this was really written.

HEARING OFFICER ERVIN: I think my confusion was in that Subsection E it refers to Subsection A.

MR. RIESER: Yes.

HEARING OFFICER ERVIN: Subsection A refers to when a Subpart B action is applicable, so I think that reference is probably just --

MR. RIESER: I don't -- let's put it this way.

There may have been a discussion about since parties are agreed to remediate the entire site, those -- the statutory and regulatory responsibilities with which the State is concerned will be addressed and it is not as important an issue as long as it -- from the State's perspective as long as it gets done. These things only happen in the context of these things being Subpart C, activities only happen in the context as presently drafted where there is an approved corrective action plan.

Sitting here today, I don't recall that we drew that type of distinction between the Subpart B and Subpart C for those purposes. I think that was intended to apply across the Board. But by the same token, I don't know that there would be a real issue of allowing Subpart C activities to apply to Underground Storage Tank sites or RCRA sites since there is a commitment that the stuff is going to get done. So I guess it is a long way of saying if it is written that way it doesn't have to be. It could apply and probably should apply to both.

HEARING OFFICER ERVIN: Thank you. Are there any additional questions?

BOARD MEMBER HENNESSEY: Just a question on Section 741.215.

HEARING OFFICER ERVIN: Is this of the proposed --

BOARD MEMBER HENNESSEY: This is of Mr. Rieser's proposed language. I am sorry. It is Exhibit B to the --

MR. RIESER: All right. I have got it.

BOARD MEMBER HENNESSEY: The introductory phrase reads in addition to the requirements of Section 741.220. I wonder, should that be a reference to 741.210 instead of 220 or both maybe?

MR. RIESER: No, it really applies to 210. Thank you.

BOARD MEMBER HENNESSEY: And another question on 741.220 of your proposal, in (b)(2) of that section you have the language, consistent with the provisions of 35 Illinois Administrative Code 742. I have a guess at what you mean by that, but I think it would be helpful if you could explain what that phrase is intended to mean.

MR. RIESER: Well, the allocation factors we laid out here are a little bit different than the allocation factors that the Agency provides and the State provides in their proposal. It is a difference in degree more of kind, and I think what we were looking at here, we have four things that we have described. We have got volume. We have got degree of

risk or hazard posed by the individual substance, extent of remediation necessary, and degree of involvement in the generation, et cetera, of the site. And I believe we laid out the -- separated the degree of risk from the degree -- from the extent of remediation necessary, because it struck me that those really were two separate issues especially at sites where the remediation had not actually been performed.

Then it strikes me also that when you are talking about degree of risk at a hazardous substance site in Illinois anymore that evaluation has to be made, ought to be made in all cases consistent with 742, which provides a wealth of information in terms of how you evaluate the extent of risk at a given site based on those factors. So, again, we want to tie both risk, the termination of risk, and extent of remediation to the Board's determinations in 742.

BOARD MEMBER HENNESSEY: Okay. In your proposed Section 741.220(c) at the end you are -- that's where you are talking about the degree of remediation in that factor.

MR. RIESER: Yes, 220.

BOARD MEMBER HENNESSEY: (c)(3).

MR. RIESER: (b)(3).

BOARD MEMBER HENNESSEY: It is (b)(3). I am sorry.

HEARING OFFICER ERVIN: Which (b)(3)?

BOARD MEMBER HENNESSEY: The first (b)(3).

MR. RIESER: The first (b)(3). If I was able to count, I would probably not be a lawyer.

BOARD MEMBER HENNESSEY: You talk about having the site cleaned up to allow it to be used consistent with its current and reasonably foreseeable future use.

MR. RIESER: Yes.

BOARD MEMBER HENNESSEY: Would this -- if someone is cleaning up an industrial site and they want to clean it up to residential standards, would this factor be a limitation on that person's recovery?

MR. RIESER: Absolutely. I mean, this is not in the context of that specific thing. But this is an enforcement action, and what we are trying to say is that --

BOARD MEMBER HENNESSEY: The State --

MR. RIESER: Right, if it is the State bringing the action, but it is something that the Board is going to consider how this applies in the context of the citizen's dispute. This is an incredibly crucial and important issue for which there is currently no real specific solution in the regulations. And a

big -- it is a real problem. Unlike federal agents, unlike the U.S. EPA, there is no specific national contingency plan that really dictates how remediations of this nature are to be carried out. They could be carried out under the Site Remediation Program which provides a series of decisions. But there is no requirement in terms of the extent of contamination.

So the concern that David Howe voiced this morning about a person buying a piece of contaminated property that has always been industrial, spending 3 million dollars so that it be cleaned to residential standards, and then suing the former owners and operators of that property for that entire amount so that they can use it as residential property, it certainly strikes us as an inappropriate use of money.

I mean, they are getting a much better property as a residential property than they had as a contaminated industrial property, which is the property that they bought. And that you ought to be very careful about allowing either the State or a private party to require people to pay for an additional level of remediation that is not mandated by the current use of the property.

So this is, yes, exactly intended to be a

limitation on making the proper -- spending more money on remediation than is appropriate for the use of the property as it stands today and it is likely to stand in the future.

BOARD MEMBER HENNESSEY: So that is going to require us in some cases to -- suppose someone wants to clean it up to residential, and they only sue you for the -- the State wants cleanup to residential standards, but they say we understand we can only hold these parties liable for those costs that would be required to bring it to industrial standards. So the Board is really going to have to make a determination there about what percentage of the costs are excessive, I guess.

MR. RIESER: Yes. Believe me, that is something that will be brought forward by the parties because the whole issue of the extent of remediation will be a very specific issue that gets discussed. If to keep it industrial all you have to do is install a cap and record appropriate deed restrictions, then that is -- and it has always been industrial property and that is what should be done, somebody says, well, we want it cleaner than that, then that is not money that ought to be allocated to the responsible parties.

MR. HOWE: There is another example that could be

given here. And that is a situation where you have contamination in an area that is -- the terrain is configured so that it could never really be used for residential use. Say, it is a mountain top or something like that. And the question becomes well, but, you know, maybe somehow it could be used that way or something like that, and you wind up having to clean it up to a standard that is really not going to be ever, as a practical matter, used and that is an area that -- that is another type of area that this can get into.

BOARD MEMBER HENNESSEY: Thank you.

CHAIRMAN MANNING: I had a couple of questions that flow from Ms. Wallace's question on the issue of the complaint. I think -- I understand you to say that you would consider the complaint to have to allege contamination, of course, allege the typical ownership, operation, some sort of type of constituents in the contamination, elements of causation, I think I hear you saying, as well. You think the complaint needs to have some sort of nexus between the contamination and the potential cleanup, what actually constituents are in the ground and what the cleanup is going to entail.

Let's say that the State comes in with all of that

against one party. And this one party knows, well, you know, that is probably all correct, but there are other parties here that contributed much more substantially than I may or may not have. If I have any liability at all it is perhaps ten percent. Is that an absolute defense? Can the respondent then argue, well, I am not a material contributor, because there are other parties here who are unnamed? Is there a responsibility on the part of the respondent to go find the other potentially responsible parties? Where does the State sit in that situation, when it has filed a complaint against one person who is, in fact, responsible but maybe only for a minor percentage?

MR. RIESER: I mean, I would say the State cannot recover -- I don't -- the answer to is this an absolute defense, that there are other people involved, I think the answer has to be no.

CHAIRMAN MANNING: Okay.

MR. RIESER: But on the other hand, the State -- in that situation the State can't -- the statute says the State can't recover from that person more than their proportionate share. And at some point the discussion has to be had that they have only had X. If the State doesn't allege it, that person will come

back and say, hey, we are only excess the extent of your recovery. Or if the State, they engage in discovery and an exchange information through discovery, and the State says, well, we only have you as this, and we have somebody else as 90 percent, then the 10 percent is the answer. So I guess --

CHAIRMAN MANNING: Who comes up with the ten percent first? Who comes up with the figure of ten percent? How is that derived at in the hearing process? If the State only knows that -- you are saying that the evidence will show somehow, based on all of the -- if the evidence only shows there is a certain degree of liability --

MR. RIESER: Right.

CHAIRMAN MANNING: -- how do you get to the percentage of liability without -- who throws out the number first? Does the Board just ascertain that based on facts that are there and facts that are missing?

MR. RIESER: No, no. I think at some point -- at some point the State -- at some point the State has to be in a position to prove -- and what I have said and I am going to stay with, is that at some point the State has to be in a position to prove an individual's proportionate share. They either know that going in

or they develop that information through discovery and at some point they have to answer a contention that says that this is -- this is where we are.

Now, it may be and certainly if I were in the position of that individual, I would be spewing out any number of documents saying this is what we did. I suspect that in 90 percent of the cases that is what is going to happen, because that is -- as an attorney, that's how I would represent that person. I wouldn't lay back and say, well, we will wait and see what happens. If I had information, we would go with it.

CHAIRMAN MANNING: Would we expect that that party, if the State doesn't bring the other parties forward, that that party would try to cross-claim against those other parties?

MR. RIESER: The interesting thing about this is that they don't need to. I mean, contribution ought to drop out. It may not. But it ought to drop out, because that person is only liable for a percentage that doesn't involve the other parties. And the State is going to have to make the decision if it sues somebody in that situation or they are a relatively minor player at the site that it may well be a decision at the end of the process that this person is a minor player at the site, and it is not going to be

worth it to us, if this is not a resource useful activity to pursue it in this name, in this manner, we are going to have to bring in people who are the big players at the site. Excuse me.

(Mr. Rieser and Ms. Rosen confer briefly.)

MR. HOWE: I would like to add some observations to what Mr. Rieser has already said on this particular issue. In a joint and several liability situation, Caterpillar has been faced with situations, not in this state, but in other jurisdictions, where it was a very small player. A government agency sued Caterpillar and a number of other defendants basically under the theory that they were jointly and severally liable, and even though there were well over 500 additional possible defendants, the agency involved did not file suit against them under the theory that the defendants that they did sue would have a real interest in filing cross-claims, et cetera, and bringing these other 500 people or entities into the situation.

What basically the reasoning was in that situation was, I think, that Caterpillar was the deep pocket. That rather than -- in this case it was the federal government -- going in and suing all of the 500 PRPs that were viable PRPs, they would just sue 30 and let

those 30 bear the expense of suing everybody else. Because if they didn't then those 30 would bear the cost of the entire site. Our responsibility at that site was less than half of one percent. And there were well over 500 PRPs involved in that site.

That situation is one that under a proportionate liability scheme -- admittedly, Caterpillar does not like to be put in that position. I don't think any PRP wants to be put in that position. In a proportionate liability scheme of the type that we are talking about here, it would be in Caterpillar's interest if they had information with respect to other PRPs to bring that information to the State's attention. I mean, we would have a strong motivation in a general sense to do that. But on the other hand, we don't want to be put in a position that the an agency sues us, sues only a small portion of the defendants, and then uses joint and several liability as a means of making them sue everybody else.

So in this situation I think it would be our position that the State, if they were able to prove that a given party had ten percent of the liability that they would go ahead and go forward with that proof. But if that's the only entity that they sued, then they would collect the ten percent of the

liability from that particular party. They wouldn't collect anything else, and that party would not be put to the burden of turning around and suing everybody else.

CHAIRMAN MANNING: They, in part, get to the ten percent because you indicated to them on the record your extent of the liability because you perhaps named these other 500 or other potentially responsible parties on the record?

MR. HOWE: Not necessarily, but if the State has developed information that there is X number of gallons of X at the site or, you know, a million gallons of X at the site, and they are able to prove that company Y contributed 100,000 of the million gallons, then they would be able to recover from Y if they only sued Y one tenth of the cost. They would not be able to force Y to go and sue everybody else. It would be in Y's interest, frankly, if they had information regarding these others to provide that. And I think in the ordinary course of discovery that would come out, and then at that point in time the State would be able to sue other parties.

CHAIRMAN MANNING: So your presumption is that generally the facts will show the extent of the contamination and get you to a number because most of

the -- I mean, in the situation you gave me the facts are pretty clean. You have a certain number of drums and a certain time frame and that. There are some situations, I would assume, that the facts are not going to be that easy to ascertain, and that's what I am looking for, where the facts are not going to clearly show the extent of the contamination and someone is going to have to come up with some sort of information to help get to a number, a percentage.

BOARD MEMBER McFAWN: For example, what if you can't come up with a volumetric figure? If you just have practices at Caterpillar, that Caterpillar seemed to have a practice of using this disposal site over a period of years, how do you find out the whole of the contamination and know what your share of it is? The State being, how do you --

MR. RIESER: Well, I think this all assumes that you have an idea of what is going on at the site, and you can turn that question around saying if you don't know that, how can you bring an action against any individual person and say that they caused or contributed to that particular problem, which is what the statute --

BOARD MEMBER McFAWN: Well, I don't quite understand that. What if you know that that site

needs to be remediated and you know what the problem is, and you only know of one company and their practice of using that site?

MR. RIESER: Well, the statute says you can't make that company do more than their share, so if you don't know what that share is you can't go to that company and say you have to clean it all up because we know you were there. I mean --

BOARD MEMBER McFAWN: But the State is not saying you have to clean it all up. The State is saying you have to help, or you have to prove what your share is. They are not saying you have to clean it all up or you are liable for all of it.

MR. RIESER: No, no, that's how it worked before, that the State would go to the one people, the one person that they know and say you have got to do the whole thing because we don't know. We don't know, therefore, you are it, and that's, in my opinion, a little bit of what the State's proposal smacks of now. I am not hearing, from what the State presented to the Board in terms of the information regarding how it administers its program, that that is what happens. What I am hearing is that at the sites where there are immediate problems that they don't have an individual that they can go and take care of those

immediate problems that they feel is responsible for those immediate problems, they go and take care of those problems themselves and then go from -- and in the process of doing that they are going to develop a lot of information about the site, and they may give them the ability to start parcelling out responsibility to individual parties.

BOARD MEMBER McFAWN: Can they recover their cost for that investigation, so to speak?

MR. RIESER: I don't know. Yes. I mean, assuming that they have the parties before them.

BOARD MEMBER McFAWN: So they have to do the PRP searches, in CERCLA terms, and they can recover their cost for PRP searches?

MR. RIESER: I would assume that that is recoverable as part of their investigation. I mean, that is one of the things that people have to weigh in terms of how -- in terms of how much they dispute these things. But, yeah, I don't -- we are not really talking about recoverability or outlining recoverability of specific costs, but I don't know of anything that says that that is not a recoverable cost.

MR. HOWE: To give you some additional examples of the way that that can work, there will be situations

where, for example, I mentioned somebody putting together an affidavit that said that Caterpillar had a 500 gallon tank of waste oil that this person emptied once a week from 1950 to 1960. And they submitted that affidavit and based upon that and the gallonage of the tank they were able to calculate a certain number of gallons. Now, that was evidence, whether that was the greatest evidence in the world or not, it is evidence that the trier of fact can consider. Now, we came back in that situation and showed that the plant had not been built until 1955 and, therefore, they were at least halfway wrong and it also went to the credibility of the rest of the affidavit.

There are also other situations, for example, where somebody says that he hauled one dumpster a week out of the plant and that can be, for example, your high end of your range. We went back and we showed that 90 percent of the time he hauled it to a different site, you know. So there is not an exact means of going about this. Again, it is a question of what evidence there is, how credible is it, and what inferences can reasonably be drawn from that evidence as a means of determining percentages, gallonages, and things of that nature.

The one that really got to me and, again, not in

the State of Illinois, but somebody attempted to hold us liable for plant trash, et cetera, being hazardous waste under the theory that we had on occasion taken dry paint rags and had them in the dumpster and that was, therefore, hazardous and we were liable for huge amounts of material that didn't have anything to do with any hazardous component. So, again, it all goes to weight and credibility.

CHAIRMAN MANNING: It would be your position, then, as a respondent, if you were just the one respondent that the State brought forward, it is not your responsibility to bring any other potentially responsible respondents forward, rather, you will contest the evidence presented by the State and stand on the record evidence that was or was not presented by the State; am I correct?

MR. HOWE: Yes.

MR. RIESER: Yes.

CHAIRMAN MANNING: Is there any situation where you could envision desiring to pull in other respondents?

MR. RIESER: Yes. I mean, anything could happen in these things.

CHAIRMAN MANNING: How could you do that in an enforcement process? Do a --

MR. RIESER: Well, according to Brockman and Fiorini you could bring contribution actions in those settings, and there is nothing here that we are excluding that. But what we are saying, though, is that the need to do that and the incentives to do that under this situation are far less. And the idea is, as David Howe has been saying, is that it ought not to be, under the way the statute is drafted, the PRPs burden to bring in the other people who were responsible instead of turning to a deep pocket like Caterpillar and saying, well, hey, you have got money, you have got lawyers, go do this for us.

It is the State's responsibility to bring these people in and recover the costs from all of them directly. I mean, yes, I can envision a situation where that would seem like a good idea, but that is certainly not the direction that this proceeding ought to take.

CHAIRMAN MANNING: So your version, that I would guess, is that the way this process should work is the State should, in the first instance, determine when they are going to go after anybody in an enforcement action on a proportionate, that they should try to name all of the potentially responsible parties as opposed to just going after one or two?

MR. RIESER: Oh, absolutely, absolutely.

BOARD MEMBER HENNESSEY: But they don't have to, though. I mean, as information develops there is not anything to prevent them from bringing this piecemeal if that's the way the information develops?

MR. RIESER: Well, that is absolutely right. As the information develops they can bring more and more people in. But, yes, the idea is for that to be the responsibility of the State, as it should be, and as the statute requires it to be.

HEARING OFFICER ERVIN: Yes, Mr. King.

MR. GARY KING: Mr. Howe, I just wanted to go back to the federal site that you talked about. I think you had described 500 potentially liable parties.

MR. HOWE: Over that, yes.

MR. GARY KING: Over that. Okay. Caterpillar were the only ones named?

MR. HOWE: No, there were approximately 30 defendants named.

MR. GARY KING: Are you aware of anything like that occurring in Illinois where there has been that kind of singling out?

MR. HOWE: I am not aware of anything like that having been done by the State of Illinois. I am aware of that being done by the federal government, yes.

And by the way, I should clarify when you had asked me originally about sites that were involved in Illinois I thought you meant sites that are physically present in Illinois.

MR. GARY KING: Yes. That was my confusion.

MR. HOWE: All right.

HEARING OFFICER ERVIN: Are there any other questions for this panel?

BOARD MEMBER McFAWN: I have a couple. On your proposal Exhibit B, Section 741.210, liability, could you just explain paragraph (a)(1) to me there especially in the context of the statutory language at Section 58.9(a)?

MR. RIESER: Yes. What we --

BOARD MEMBER McFAWN: My question may be better put, how can you limit it this way, given the language at 58.9?

MR. RIESER: Well, the language at 58.9 is that notwithstanding anything in the Act the State can only bring actions against parties who caused something or did something. So this was -- as drafted, this was a reaction to what we perceived the Agency's position to be, which is that liability is based solely on status, in 22.2(f), status, and once they demonstrated status, that then you went into the allocation. That was the

burden to be proven, the defendant's burden to prove.

What this is saying is that to be liable, a, you have to meet these 22.2(f) factors, and there has to be an issue of causing or contributing to the site. So rather than lay out those specific 22.2(f) factors, people liable, this was a way of providing shorthand a direction as to the types of potentially responsible parties, plus it wasn't enough that they were status. There had to be a demonstration that they had caused or contributed to the release of a regulated substance that were identified and addressed by the remedial action. So it was a two-part deal, whereas I perceive what the Agency is proposing is a one-part liability demonstration.

BOARD MEMBER McFAWN: So this is really in response to their Paragraph B under their liability section?

MR. RIESER: Yes.

BOARD MEMBER McFAWN: So this could -- so could this cost assignment of 58.9 be used in actions brought under, like, for instance, Section 9 or Section 12 of the Act, enforcement actions brought by the Agency?

MR. RIESER: Yes is, I guess, the short answer. You know, I was thinking about requiring a person to

conduct remedial action or seek recovery response costs. I was focusing pretty solely on the issue of the 22.2(f) factors. But, yes, of course, that could be -- that could also be an issue, as well. It is hard to imagine somebody being liable under 12(a), for example, that wouldn't meet one of these categories in general, or for that matter, be outside of those categories. But I would think anyone liable under 12(a) would be an owner or operator of the property or someone who arranged for the disposal of contaminants, or a transporter, for that matter.

BOARD MEMBER McFAWN: Okay. Thanks. My next question has to do with 741.220. I don't know if you just didn't include it, but I was wondering if you had intended for the Subparagraph B that the Agency has under its allocation factors which reads, the Board shall not be required to determine precisely all relevant factors provided substantial justice is achieved. Were you proposing that that be included or not?

MR. RIESER: I was not proposing that that be included, because I don't -- I don't know what it means. I don't know what it is intended to do. My assumption is that the Board will always do substantial justice, and that it is not necessary, and

that the Board will use a mix of the factors as we have provided for to make those decisions.

What I read the Agency's statement to be is more literally a safety valve saying, well, you can go outside of these factors, and as long as you -- as long as what you are doing is basically okay, then it is okay. I just don't understand the purpose of laying out factors for decision making and then following up by saying, well, you don't have to follow these factors as long as your final decision is basically okay. I don't know what basically -- I don't know what substantial justice means if you don't follow the factors that you lay out for decision making.

BOARD MEMBER McFAWN: Well, thank you for the compliment to the Board. So the Agency has language which says you shall consider the following three factors including but not limited to, so you would have us limited to these four factors listed under Paragraph B?

MR. RIESER: Yes.

HEARING OFFICER ERVIN: So you don't think there is any other factors that bears upon a person's proportionate share responsibility that we could consider?

MR. RIESER: Well, I think what has to happen is that the factors have to be -- well, let me put it this way. We couldn't think of any. And we spent a lot of time considering factors to be considered and these struck us, and these are, I should say, pretty general. On the one hand, they are pretty specific to the issue of how you identify appropriate costs of a remediation of a site, which is the issue that we are talking about. That is not to say that we are all seeing and we thought of everything. But I do think it is important to specify the factors that the Board is -- on which the Board makes these decisions.

I always have a problem in the general sense of saying the Board can make decisions on factors including but not limited to, because I always wonder what could we come up with at the last minute that I don't know about and didn't know about when I started defending the client in the action. So I think it is important for unspecified factors to do the best you can in terms of outlining them, but there ought to be specified factors.

MR. HOWE: There is another aspect of that, too. And that is that we are limited by what the statute says in this particular case, which basically deals with the issue of proportionality and causation. So

that's why I made the comment earlier that we could not use all of the so-called Gore factors which, you know, are based upon things other than actual contribution at the site or in addition to actual contribution at the site.

HEARING OFFICER ERVIN: Are there any additional questions?

BOARD MEMBER McFAWN: Yes, I have one more. This is kind of a sticky one, so if you would like to think about it that would be fine. In light of that, in that the allocation factors proposed by the Agency, as well as you, are limited to the degree of hazard posed by the regulated substances or pesticides contributed by the parties, I don't read the statute as actually saying that. And my question is what if you are a party that contributed a nonregulated substance and, of course, you have a commingling going on, for instance, a municipal landfill, should you have any responsibility? Or liability, maybe, is the better word.

MR. RIESER: I guess my -- perhaps we should think about this one for a better answer later, but the off the top of my head response is if it is a nonregulated substance they are not liable under this particular act or statute. It has to do with recovery of --

22.2(f) talks in terms of regulated substances and this section talks in terms of regulated substances or pesticides. So the whole point of this is to limit the liability to proportionate share to regulated substances for which you are responsible. So if they are nonregulated substances, those are not part of the problem. Those are not the reason that the remediation is being performed.

MR. HOWE: To add to that, in addition, the statute, I think there is also a very practical reason for that. Recently the federal government had proposed, and I am trying to remember just exactly how this came up, but basically it involved certain types of permit approvals, and there was a provision to be drafted on or proposed to be drafted on that said that you had -- that there were certain things that had to be done with respect to any species that was either on the endangered species list or had been proposed for inclusion on the endangered species list, which at that point in time would give the Agency involved a great deal of latitude and more latitude than I think they were really allowed. It is a hazy example, and I apologize.

But the point was that all of a sudden if anything had been proposed for inclusion, somebody could deny a

permit regardless of whether or not there was any scientific evidence to back up that species being included on the endangered species list. Here there is a definition of regulated substances that is used, and if you start going beyond that I guess one of the questions that I would have is where do you stop.

BOARD MEMBER McFAWN: On a different subject, at Section 741.205 in the Agency's proposal, there is a reference to sanctions. It says, sanctions for failure to comply with procedural rules, subpoenas, or orders of the Board or Hearing Officer shall be as set forth therein. Especially in light of your considerations, Mr. Howe, that this be an expedient process, I was wondering what kind of sanctions you envision the Board using against the dilatory party. Are you talking monetary sanctions? Are we talking attorney's fees? What would you envision us having the authority to do? And should we set it -- should we have a fee schedule? A sanctions schedule, I should say.

MR. HOWE: There is the possibility that you could do that. To give you -- this is not something that I have thought through, but to my mind, for example, the cost of discovery of that additional evidence, for example, if evidence has been withheld, the cost of

bringing that to the Board's attention, et cetera, could be a factor to be considered. Monetary -- some sort of monetary fine, perhaps. There may be many other things. Evidentiary exclusions. And, again, I am speaking pretty much off of the top of my head on this.

BOARD MEMBER McFAWN: The reason I asked you is because you had addressed that this should be a fast process, a quick process. And it seems like sanctions would be the way to do it. If you would like to think about it some more and give us a comment on it I would appreciate it.

MR. HOWE: Okay. Thank you.

BOARD MEMBER McFAWN: I would appreciate that from the Agency, as well.

HEARING OFFICER ERVIN: Are there any additional questions?

All right. Seeing none, on behalf of the Board, I would like to thank you for presenting your testimony today. It is very helpful. We will take a five minute break right now.

We are also going to deviate a little bit from the schedule I announced earlier. We have Laurel O'Sullivan who is here today who is going to be testifying on behalf of BFI. We will take her

testimony next. Then after that we will go to the Agency. I am sorry. It is BPI, not BFI.

(Whereupon a short recess was taken.)

HEARING OFFICER ERVIN: All right. Let's go back on the record.

We will now begin with the testimony of Laurel O'Sullivan.

Would the court reporter please swear in the witness.

(Whereupon Laurel O'Sullivan was sworn by the Notary Public.)

MS. O'SULLIVAN: Good afternoon, Chairman Manning, Members of the Board. My name is Laurel O'Sullivan. I am here today testifying on behalf of the Business and Professional People for the Public Interest. I am a staff attorney at the BPI which is located in Chicago, Illinois. BPI is a public interest law and policy center which provides advocacy on issues relating to the environment.

In the past BPI has participated extensively in other rulemakings and adjudicatory matters before the Board, including the development of hazardous waste disposal regulations, the development of groundwater quality standards, and the development of groundwater technology and control regulations. In addition, BPI

has been an active participant in the City of Chicago's Brownfields Forum.

BPI commends the Illinois Environmental Protection Agency on producing a proposed rule that does a reasonably good job of protecting the health of Illinois' citizenry and the environment. Overall we think the rule strikes an appropriate balance between protecting these very important interests, while also providing sufficient incentives to make remediation of Brownfields a much more attractive and viable option in the State of Illinois. By placing the burden of proof for demonstrating its proportionate share of liability on a responsible party and imposing consequences on those parties that fail to do so, the rule accomplishes many important policy objectives. First, it recognizes the appropriateness of holding polluters accountable for their actions. Second, it acts as an important deterrent to prevent businesses from adopting poor record keeping practices. Third, it is protective of public health and the environment because it imposes repercussions on parties who cannot demonstrate their proportionate share.

While we applaud some provisions of the rule, other provisions leave us deeply troubled. First and foremost amongst our concerns is that by not even

addressing the issue of orphan share liability, let alone providing for the allocation of such liability, the rule does not go far enough to protect the health, welfare, and environment of the Citizens of the State of Illinois. Instead of achieving the much touted and desirable objective of quick and sure remediation, at best the rule can only provide hope that a few more sites may be remediated. It is clear that in most instances cleanup at sites will lag because of a shortage of funding to cover these orphan shares. In other instances, even if resources are available, protracted cost recovery litigation between the Agency and responsible parties is likely to occur due to the inevitable complexities involved in apportioning liability.

We also believe it is important to draw attention to the fact that this rulemaking has not been the result of a true consensus process. There is a real danger that the interests of the business community may overshadow the concerns of the People of Illinois. For this reason, we urge the Board not to assign importance to comments on the basis of numbers alone; and more importantly, we are here to remind the Board that there are many citizens in the State of Illinois who are concerned about the impacts of this

rule on their communities, their families, and their wallets.

Stated at the table alongside the agencies were nine representatives from various sectors of the business community, including the Illinois State Chamber of Commerce, the Illinois Manufacturers Association, the Chemical Industry Council of Illinois, the Consulting Engineers Council of Illinois, The Illinois Bankers Association, The Community Bankers Association of Illinois, and the National Solid Waste Management Association. Together these representatives collectively comprised the Site Remediation Advisory Committee, or SRAC, appointed by Governor Edgar. The interests of these participants are principally to limit cleanup liability for businesses.

Glaringly absent from the table, however, was any formal representative purporting to represent the interests of three important groups of participants who have a very real stake in this rulemaking: (1) Illinois citizens concerned about the environmental and public health impacts of this rule; (2) community organizations interested in ensuring restoration of Brownfields to productive uses, and (3) Illinois taxpayers concerned about the fiscal implications of

this rule. In light of this skewed representation, it is disturbing to hear these same representatives from the business community complaining about the inequities of a rule which was the result of a process in which their input was the sole input formally solicited.

The skewed representation on the Site Remediation Advisory Committee causes us concern with respect to the manner in which any proposed changes to the rule may be handled in the future. All of SRAC's members have a common goal: Protecting the narrow self interest of their constituents, namely potentially responsible parties. Their concerns were voiced then and they have continued to play a substantial role in commenting on this rule before the Board. And while we believe the agencies did a reasonably good job of protecting the interests of Illinois' citizens, we propose a few modest changes to the rule.

My testimony will begin by laying out some of the inequities in this rule in terms of the burdens and costs imposed upon the Agency, and by extension taxpayers, versus the costs imposed on responsible parties. By way of illustrating this point, I will refute contentions that the proposed rule is not sufficiently distinct from CERCLA or Superfund by

reiterating the significant distinctions between several provisions contained in this proposed rule as compared to its federal counterpart. I will then address the significant and serious problems presented by the unanswered question of orphan share liability.

There is no denying the fact that this proposed rule provides the business community in Illinois with a far more economically advantageous regulatory program than the alternative program available under the federal Superfund program. In light of the active participation SRAC played in developing the rule, and when compared to the much stricter penalties imposed under CERCLA's strict liability scheme, it is difficult to understand on what real basis members of the business community claim to still be dissatisfied with this rule.

Make no mistake about it: the Agency's burden under the proposed rule is significant; to suggest otherwise, as some representatives have, is to ignore the larger context into which this rulemaking fits. In the future, parties who find themselves subject to a cleanup order from the IEPA should breathe a sigh of relief. In addition to replacing joint and several retroactive liability with proportionate share liability, several other provisions of this rule

provide favorable accommodations for responsible parties, while adding to the Agency's burden. The allocation section provides responsible parties with an opportunity to reduce their liability through the development of risk-based remediation objectives. And under the Appeals and Adjustment Section, a responsible party is provided with the opportunity to bypass the formal requirements of a regular appeal and may instead request the Board to reopen a case where subsequent facts reveal a different allocation assignment would have been more appropriate. This Section in particular has the potential to strain the Agency's resources by an untold factor, although we do recognize the value when appropriate and necessary in certain situations.

By comparison, far worse financial burdens and legal entanglements would await them under CERCLA if this same party were involved in a site which had been referred to the U.S. EPA. There is a danger that if the criticisms levied by the regulated community are heeded and the rule adjusted accordingly to reflect these criticisms, the Board may totally whittle away the protections the rule provides for the public health and the environment as well as the tax dollars of the State's citizens.

The most troubling aspect of the rule is the tremendous inequity which it imposes on the Agency's resources relative to the resources of responsible parties. The inequity is present throughout the rule and nowhere is it more apparent than in the initial stages of a remedial investigation. The proposed rule places a substantial premium on the Agency's ability to initially identify, up front, as many potentially responsible parties as possible. The Agency's motivation stems from the very real possibility that it will become responsible for cleaning up any unapportioned orphan shares. Even after the Agency has expended considerable time, money and personnel resources on an investigation there is no guarantee that this investment will have paid off in the form of a viable PRP. In the meantime, protracted and potentially lengthy investigations threaten to erode the very policy objective that was at the heart of this rulemaking; instead of expedited cleanups, the State of Illinois and its citizens will face certain delays and hurdles in cleaning up the environment and putting these sites to protective uses.

Once the Agency has identified as many potentially responsible parties as possible, it must then proceed to prove that these potentially responsible parties

are in fact responsible parties. The standard of proof which the Agency is required to meet is a preponderance of the evidence, a typical standard applied in civil action cases. This standard should be viewed with favor by members of the business community because it represents a significant departure from the strict liability standard applied in CERCLA. Under CERCLA a potentially responsible party becomes a responsible party solely by virtue of the party's status as an owner, operator, generator, or transporter. In Illinois, by contrast, under the proposed rule, the Agency must prove by a preponderance of the evidence that a party caused or contributed to a release; thus, the party must have either owned or operated the facility, have been a transporter, or arranged for the transportation of the waste at the time of the release. This is a significant departure from CERCLA's retroactive liability. However, it raises the difficult question of determining when a release occurred. In some instances, where for example, an unusual substance was discovered, such as coal tar, tracing it to the responsible party and then working backward to determine approximate time of the release will not be a problem. But in most instances, where common

contaminants are discovered, determining the time of release will be extremely difficult. In light of these distinctions, it is untrue to suggest that the standard of proof and the methods of proof which are presented in this rule are not distinct from CERCLA's strict liability scheme.

Throughout this whole process, the Agency must go it alone; in other words, it can forget receiving any assistance from other responsible parties. Unlike a PRP involved in a federal Superfund site, this rule provides absolutely no incentive for a PRP, once identified as such, to provide the Agency with assistance in identifying other PRPs. The simple reason stems from the fact that it is not in their self interest to do so, because the rule does not place responsibility for orphan share liability on these parties. The information orders help to offset this lack of assistance and are therefore an absolute prerequisite to insuring that the Agency is able to prove liability in the first instance.

Section 741.115 authorizes the Board to, at the Agency's request, require a PRP to provide the Agency with information relevant to the proposed cleanup. An order will not be granted by the Board, however, unless the Agency first provides a reasonable basis

for its need. This is another area of the rule which has been criticized for giving the Agency too much authority. The orders, however, are an essential tool necessary for the Agency to do its job as expeditiously as possible. To suggest that the Agency should simply rely upon traditional tools used as part of the litigation process, such as discovery requests and interrogatories, is like sending the Agency out in a row boat heading upstream with only one oar. It will significantly impede its ability to undertake an already significant task. The suggestion also adds one more layer of bureaucracy and red tape to the Agency's job. This task is made all the more important in light of the premium which the rule places on the Agency's ability to identify as many PRPs as possible. Identifying PRPs is the only mechanism which the Agency has for safeguarding the State and taxpayers against the likelihood of being stuck covering the orphan shares.

We strongly support the provision in Section 741.210(d) which requires a party, which has been proven by a preponderance of the evidence to be a legally responsible party, to demonstrate its proportionate share of liability. In our view this is exactly the party who should bear this burden. First,

considerations of fairness dictates that the obvious party to bear this burden should be the party which has already been demonstrated to have contributed, in the first instance, to the contamination and which stood to profit from the activities which led to the contamination. In addition, common sense dictates that it is the responsible party and not the Agency which is in the better position to have access to records and information and personnel resources which may help to determine its proportion of the responsibility. And, as a policy matter, it makes sense to require an entity that polluted the environment, while profiting, to be responsible for knowing what kinds and what amounts of pollutants it is emitting. By establishing this provision, the State of Illinois will be sending a strong message to businesses operating within its borders that they must keep accurate and detailed records of the pollutants which they emit, or else face the consequences.

Not only will the provision act as a deterrent against bad record keeping practices, but it will also serve the dual purpose of insuring that the health and welfare as well as the environment of Illinois citizens will be sufficiently protected. Requiring the Agency to be responsible in the first instance for

documenting the share of contamination for which a party is responsible will not further any of these desired policy objectives. Instead, it would only encourage irresponsible record keeping practices which would, in turn, jeopardize the health and safety of citizens and community members who live near a contaminated site.

The Agency is correct to respond, as it does, that this provision is not a unique provision, but rather it is an accepted principle of tort law jurisprudence which is relevant whenever there are two or more tort-feasors whom it has been demonstrated caused or contributed to a harm. It is only after the Agency has already established liability, that the party which is in the best position to produce the evidence documenting its exact share or proportion is required to do so.

Despite the soundness of this burden shifting provision, it remains unclear, and not addressed by the rule, what type of check or assurance there is for the citizens of Illinois that businesses really are held responsible for their fair share of the contamination. In other words, how is it possible to verify the accuracy of a proportionate share claim made by a responsible party? And, who is responsible

for doing so? Presumably, the answer to who is some combination of the Agency and the Board. But it is more unclear how and under what circumstances the Agency would be prompted to undertake such an investigation. Given the limited resources of the Agency already stretched thin by other provisions in this rule, the reality is such that an investigation is simply not likely to occur in most instances.

Even if resources were not an issue, it is extremely unclear how to deal with the difficult and complex questions involved in dividing and apportioning responsibility for waste at a site which may contain hundreds of contaminants in several different media. It was recognition of precisely these problems which led legislators to adopt joint and several liability under the federal Superfund program. The larger and more troubling question then becomes, what incentive does a responsible party have to document fully its proportionate share, if there are no harmful repercussions for potential misrepresentations, and indeed no explicit provision for dealing with such a situation?

Section 741.210(d)(3) states that any responsible party unable to demonstrate its proportionate share of liability may be held liable for all unapportioned

costs. This section is a critically important provision which serves as the only real incentive for businesses operating in Illinois to be protective of the environment and to maintain responsible and accurate record keeping practices. Industry representatives are absolutely correct to say that the real issue here is which party should bear the risk of the lack of site information.

There are several solid and common sense reasons why the answer to that question must be the polluter, the responsible party in the first instance. First, established principles of common-law dictate that the party who has been proven liable must then bear the burden of demonstrating its share of liability and if it cannot it must endure the consequences.

Secondly, holding parties who cannot document the proportion of contamination for which they are responsible, potentially responsible for the entire orphan share is imperative as a policy matter because it provides an incentive for all potential polluters in the State of Illinois to maintain accurate records.

Third, this provision is protective of human health and the environment because it encourages businesses to adopt more responsible practices by

rewarding those that do with a definite share of liability and those that do not or cannot with a potentially greater share. Without this provision there is absolutely no incentive for liable parties to produce any information and indeed there is reason for concern that a party may escape liability entirely, thus leaving Illinois taxpayers to cover these costs.

The orphan share provision, however, remains problematic because it raises more questions than answers. For instance, this provision of the rule fails to address the very significant issue of what party is ultimately responsible for cleaning up unapportioned orphan shares. The inevitable answer to that question is the State. Therefore, in a situation where two PRPs have been identified, and they have each successfully demonstrated they are collectively responsible for 60 percent of the contamination at a site, the Agency has two options regarding how to deal with the 40 percent unallocated orphan share. It may (1) do nothing and ignore the issue of the orphan share; or it may (2) try and cover the costs of cleaning up the orphan share. Under either scenario citizens of Illinois are the ones paying the price, while industry continues to profit.

Industry representatives who propose that the

orphan shares can be simply ignored, are not being realistic about the responsibilities of the Agency in the face of a threat to human health. Under the do nothing alternative, the health and welfare of as well as the environment enjoyed by the Illinois citizens will certainly be jeopardized by waste sites that may remain unremediated for years while the Agency waits for the necessary resources to be able to clean up the site. Meanwhile, the goal of achieving expedited cleanups of abandoned industrial sites may be defeated.

Under the second approach Illinois taxpayers will be forced to cover the costs of remediation at sites if the Agency deems it to be a priority due to the threat which it presents to human health and the environment. It is true that in some instances the State may recover the costs through litigation, but it is also true that in the majority of situations sites will simply languish because there will not possibly be sufficient funds to cover every orphan share at every site in the State. The Agency is ultimately the party left to shoulder all the costs, which will in turn come from taxpayer dollars. Thus, even though a solvent party, who has been proven to have some connection to the site has been identified, this party

is totally off the hook for any of the orphan share costs. And what is even more frustrating is that this party, unlike a party involved in a federal Superfund cleanup, has absolutely no incentive and is not required to assist the Agency in identifying any other potentially responsible parties because it will not suffer any negative consequences for failing to do so.

So the question then becomes with what funds will even a portion of these orphan shares be cleaned up? The answer, according to the Agency, appears to be some version of "robbing Peter to pay Paul." Several sources of funding which have been identified by the Agency as providing the source for orphan share cleanups are problematic because they represent costs recovered by the Agency for dollars already expended. For example, the largest portion of the Hazardous Waste Fund comes from cost recovery litigation fees. This means that costs expended by the Agency to pursue responsible parties in the past will not actually be used to cover those costs, but will instead be relied upon to fund further investigative and remedial work, resulting in a net loss of monies to the State of Illinois. Likewise, another source of earmarked monies will come from the fees levied against a

responsible party when the Agency issues a no further remediation letter. Again, this sum of monies represent monies which the Agency has already outlayed. Its inclusion in the Hazardous Waste Fund effectively deprives the Agency of reimbursement for expenditures already made. Finally, as a policy matter, it is worrisome that funds from the Solid Waste Fund, accumulated from tipping fees levied for solid waste disposal, are being used to clean up hazardous waste sites. These funds were intended to be used to assist the State with its recycling program and not to pay for the costs of cleaning up hazardous waste sites in which the State was not even necessarily a party.

Rather than having the State of Illinois foot the bill for the costs of remediating the orphan share, we propose the rule be amended to require the orphan share be divided proportionally between all identified responsible parties. It is more equitable for the costs of remediating the site to be divided amongst the responsible parties identified at the site than amongst Illinois taxpayers. However, in keeping with the proportionate share liability scheme the costs would be apportioned based on the parties' overall contribution to the site. So that parties who are de

minimis parties would only be responsible for a de minimis portion of the share. For example, at a site where three responsible parties demonstrated that each was responsible for a 30 percent share, the remaining 10 percent orphan share would then be divided evenly, with each party assuming responsibility for an equal share of that ten percent, which would amount to an extra three and a third percent of liability. If, on the other hand, a site involved four responsible parties, two of whom could each demonstrate a 20 percent share liability and two who claimed to be responsible for 20 percent, but could not sufficiently document their respective shares, then the 20 percent orphan share would be divided, in its entirety, between only those two responsible parties that could not sufficiently document their share. Neither of these provisions violates the two basic principles of Section 58.9 of the legislation which establishes that liability must be predicated on the cause or contribution and that it should be allocated amongst the parties proportionally.

This approach will save taxpayers untold millions of dollars in cleanup costs and it places the responsibility more squarely on those parties who have been proven to have contributed at least some share of

the contamination. By allocating the orphan share in this manner, citizens in the State of Illinois would be able to breathe easier knowing that sites which pose a potential risk to human health and the environment will be remediated, and remediated much more expeditiously than under the proposed system because responsible parties will now have an incentive to assist the Agency with identifying other PRPs.

In conclusion, if all these unanswered questions are left unanswered, the consequences will be an unworkable and dysfunctional rule, the intended policy goals of which will not be achieved. Rather than definite and sure liability and quick remediation, the opposite result will accrue: cleanup will languish as sites compete for the scare and finite resource dollars of the Agency. Such a result is not good for any of the parties which seek to achieve the laudable goal of environmental remediation. We urge the Board to consider our proposal and its implications for helping to further the worthwhile policy objectives embodied in this rule.

I now move to have this testimony entered as an exhibit to this hearing.

HEARING OFFICER ERVIN: Any objections to the admittance of this document?

Seeing none, we will enter the testimony of Laurel O'Sullivan into the record as Exhibit Number 13.

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

HEARING OFFICER ERVIN: Are there any questions for Ms. O'Sullivan? Mr. Rieser?

MR. RIESER: Ms. O'Sullivan, with respect to your proposal on page 13 and 14, how do you square that proposal with Section 58.9 of the Act regarding Proportionate Share Liability?

MS. O'SULLIVAN: Well, I would square it with that section of the legislation on the fact that it is in keeping with Proportionate Share Liability. Which example under the proposal are you referring to?

MR. RIESER: Well, I am referring to the section of the legislation that states each parties are only supposed to be responsible for their proportionate share.

MS. O'SULLIVAN: No, I am asking -- my question to you is which of -- are you referring to both scenarios that I presented as hypotheticals or are you referring to just the latter? Or I am sorry, the prior.

MR. RIESER: I would say both.

MS. O'SULLIVAN: Okay. Well, with respect to the latter, the issue becomes one of I believe the

legislation reads or discusses -- uses the words may be attributed. Now, in that situation you have the distinct problem that that has not been clearly defined. In other words, you have the inclusion of two parties that have not been able to document how much of the share has been attributed to them. So I would say that it doesn't contradict the legislation.

With respect to the prior example, where you have a ten percent share being divided amongst the three orphan shares, I would say that this is -- that it does not contradict the legislation in that it is a policy decision that has to be made regarding who should bear the burden of the cost of the ten percent cleanup.

A lot of the hypotheticals that were thrown around earlier this morning and this afternoon were based on the presumption that the facts will work out neatly and that there is not going to be any messiness involved which, you know, is not, I don't think, the reality of most situations. So in this situation I am saying it is compromised with benefits that outweigh the cost, from our perspective.

MR. RIESER: In preparing for your testimony, are you familiar with the -- the Public Act number escapes me, but it is the Public Act that resulted from the

passage of House Bill 544 and Senate Bill 46 which preceded the current Section Title 17?

MS. O'SULLIVAN: No, I am not familiar.

MR. RIESER: So you are not familiar that that legislation set aside on the Site Remediation Advisory Committee three seats for environmental organizations?

MS. O'SULLIVAN: I read that -- I did read the language regarding the Site Remediation Advisory Committee, and I believe it says three other persons. It didn't specify who, and I don't know that there were -- I know the agencies were actively involved, obviously.

MR. RIESER: The current legislation says that, but the legislation which preceded that did identify three specific environmental organizations to be members of SRAC.

MS. O'SULLIVAN: And what happened to that?

MR. RIESER: Well, the question is whether you know whether any representatives of those organizations ever attended one of our meetings?

MS. O'SULLIVAN: Not that I am aware of. But are you also saying that that legislation was then changed and those three parties were not specifically --

MR. RIESER: Well, obviously, the legislation was

changed, and I don't know that anyone was excluded, but I don't know that anyone ever came in the first instance.

MS. O'SULLIVAN: I am not aware of that.

BOARD MEMBER GIRARD: Could I ask a question for the record?

For the record, Mr. Rieser, do you remember which three groups those were?

MR. RIESER: We were trying to find the original copy of the legislation, and I don't -- I don't have it handy. But, certainly, the Citizens For a Better Environment was involved in the drafting, the negotiating of the legislation itself. There were -- I believe they were identified as one of the groups.

MR. GARY KING: The only other -- there was one, and I wouldn't call it a citizens group, but the City of Chicago was included as one of those other three members. As I recall that was kind of the Agency's selection process, and the City of Chicago did participate. The other two slots I don't know that they were formally filled, because the Petroleum Council and Petroleum Marketers Association requested to be selected to fill those other two slots, and we didn't think that was appropriate.

MR. RIESER: They were not appointed but,

certainly, originally there were three spots specifically listed for three specific environmental organizations.

MS. ROSEN: Just for the matter of the record, there were no specific entities named. I believe the legislation indicated that there should be a representative of a community organization, and a representative of a public interest organization. It was generic terms such as that that were there. There was not specific reference to Citizens for a Better Environment, although they did participate in our meetings on legislation and initial SRAC meetings.

MR. RIESER: I know that they were invited and notified of the initial SRAC meetings, and that we didn't have any attendance.

CHAIRMAN MANNING: In any event, this was SRAC as was constituted prior to becoming law?

MS. ROSEN: No.

MS. O'SULLIVAN: No.

MR. RIESER: That was the original law.

MS. ROSEN: That was the original law.

CHAIRMAN MANNING: Okay.

MS. O'SULLIVAN: Do you have a copy of that, because the copy that I read was that three other members --

MS. ROSEN: Well, that's what is in here now.

MR. RIESER: That is exactly what the law says now.

MR. ROSEN: If anyone has a copy of the --

MR. EASTEP: I have a copy of the old one.

MS. O'SULLIVAN: When was the old act overridden? Because that seems to be the real issue.

MR. HOWE: The new act even says --

MS. ROSEN: Well, it is three spots --

MR. HOWE: It says there are an additional three spots that were never filled. But the point being that there were offers and invitations extended to public interest representatives who never showed up.

MR. RIESER: What the Act says, if I can read it for the record, in addition, the Agency shall select one member each from an environmental advocacy group, a community development corporation, and a public interest community organization.

So as originally constituted, SRAC was intended to have these people. My recollection is that people were invited. My recollection is that they didn't attend. And that was probably why there was not a representation.

MS. O'SULLIVAN: Well, I did consult and check around with other environmental organizations, and

they looked over the testimony and I apologize if I somehow misrepresented that. But that was not at all represented to me.

HEARING OFFICER ERVIN: Are there any further questions for Ms. O'Sullivan?

BOARD MEMBER HENNESSEY: I have a quick question. On your proposal, let me just take a different -- give you a different hypothetical to make sure I understand how this works.

MS. O'SULLIVAN: Sure.

BOARD MEMBER HENNESSEY: If there are two parties at a site and they each demonstrate that they are responsible for five percent of the waste then that leaves a 90 percent orphan share. Under your proposal, as I understand it, that 90 percent would be split evenly between the two parties?

MS. O'SULLIVAN: No. Actually, it -- and that is a very good question, and one that I had wanted to address. I think that in that instance, where there is an extreme disparity between the part that they have been demonstrated to be responsible for, in other words, five percent and you have 90 percent, I think some sort of caps or range could be established whereby if the orphan share amounted to, you know, I don't know what would be inequitable, 50 percent more

than what their demonstrated share is, you could perhaps cap their responsibility for the orphan share liability at a certain percentage.

BOARD MEMBER HENNESSEY: Okay. I guess I would recommend that you make that -- through a public comment indicate that. The more you can provide us with specific language the easier it is for us to get a handle on it.

MS. O'SULLIVAN: Okay.

BOARD MEMBER HENNESSEY: One other comment I would just make for the Agency. At some point either through your testimony or in a public comment I would like your response to BPI's discussion of inadequate funding sources. They make some discussions there about where the money is going to come from. I would just like to get your response on that.

MR. GARY KING: That could be a fairly broad exercise. It depends on what you are really looking for.

BOARD MEMBER HENNESSEY: Well, I guess I am wondering -- I mean, there is statements in here that some of these monies have already been earmarked or have already been spent. Do you agree that that is accurate? Those kinds of allegations, I am interested in hearing your response on.

MR. GARY KING: What I want to make sure of is one of the issues that, in fact, was a little bit alluded to this morning talked about at the time the legislation was adopted, the Agency identified certain backlogs of cleanups. And I assume we are not talking about that. I mean, I don't want to revisit some issue that has been decided legislatively.

BOARD MEMBER HENNESSEY: As I understand Ms. O'Sullivan's testimony, and she can correct me if I am wrong, she is talking about the future, on a going forward basis, how orphan shares are to be funded.

MR. GARY KING: Okay.

MS. O'SULLIVAN: That's correct.

HEARING OFFICER ERVIN: I have a question for you. On page seven of your testimony you are talking being about information orders, and you said the traditional tools for discovery are basically inadequate for the Agency to obtain enough information to go forward. Why do you believe that the traditional tools are inadequate?

MS. O'SULLIVAN: Well, inadequate -- I would not characterize it as inadequate. I would say that it is adding another -- it is just adding one more hurdle and another layer of procedure that the Agency has to go through. I mean, to me, the Agency is going to

appear before the Board and provide a reasonable basis for the Board. It is not as if, you know, the Agency is going to be going off on one of its own, you know, wild goose chases or with this authority that has not been already sort of provided a check against it. So I guess I would not say that it is inadequate. I don't think I used --

HEARING OFFICER ERVIN: That is my terminology. I am sorry.

MS. O'SULLIVAN: I wouldn't characterize it as inadequate. I would just say that in keeping with my testimony that I think it just adds an unnecessary hurdle and another burden to the Agency's -- you know, identifying PRPs could be potentially a very lengthy process. My comment is simply that I think these seem like a reasonable tool for them to have at their disposal to aid them in trying to do that, which I think is in the interest of the State and the citizens.

HEARING OFFICER ERVIN: Are there any other questions?

MR. HOWE: Could we have just a moment, please?

HEARING OFFICER ERVIN: Sure. Ms. Tipsord, do you have a question?

MS. TIPSORD: Yes. Marie Tipsord with the

Illinois Pollution Control Board. I would like to kind of follow-up also on the information orders aspect of your testimony. Your testimony seems to say that you think this is an acceptable practice based on common-law principles and jurisprudence, tort law jurisprudence.

MS. O'SULLIVAN: Wait. I am sorry. The information orders are based on common-law jurisprudence?

MS. TIPSORD: Oh, I am sorry. I skipped over. I am looking at something else. My question is what do you believe is the Board's authority or the Agency's authority for using these information orders or requesting these information orders?

MS. O'SULLIVAN: I know that comments were made that it was not provided for specifically in the legislation. I don't know what you are getting at there with your observation, but it seems to me as though it is just, you know, a reasonable tool. I don't know if I answered it.

HEARING OFFICER ERVIN: Mr. Howe?

MR. HOWE: Just a couple of questions, if you will. Referring to page ten of your testimony, towards the bottom, there is the statement that says, "established principles of common-law dictate that

the party who has been proven liable must then bear the burden of demonstrating its share of liability and if it cannot, it must endure the consequences."

What established principles of common-law are those?

MS. O'SULLIVAN: Are you specifically -- I guess I would amend that sentence to perhaps stop after the liability. Are you taking issue with, "if it cannot it must endure the consequences?"

MR. HOWE: No, actually, I am taking issue with the entire --

MS. O'SULLIVAN: I believe --

MR. HOWE: It says, "that the party who has been proven liable must then bear the burden of demonstrating its share of liability."

MS. O'SULLIVAN: I believe that perhaps what is missing from that sentence is if there has been one or more parties identified as liable then the burden shifts. I believe it is just straight out of the tort treaties that if you have demonstrated liability and you have two or more parties who have been demonstrated to be liable, then the burden is on them to demonstrate which party is responsible.

MR. HOWE: I believe there are other elements that need to be --

HEARING OFFICER ERVIN: Can you speak up a little bit? When you turn your head we can't hear you.

MS. O'SULLIVAN: I am sorry. Would you like me to repeat my answer?

HEARING OFFICER ERVIN: That's okay.

MR. HOWE: I believe that there are other elements that have to be established for that to be put into place, but we will go on.

MR. HOWE: There is a statement on page eight in the middle, "common sense dictates that it is the responsible party and not the Agency which is in the better position to have access to records and information which may help determine its proportion of the responsibility."

I will agree that a responsible party or a company will have records and information to the extent that it might dealing with its own activities. But with regard to the activities of others or the denominator that would show the proportionate part of that liability, are you trying to say that a company should also have information with regard to the total amount of waste contributed at a site or what other parties have done?

MS. O'SULLIVAN: No, I am not trying to make that a -- it was solely intended to be related to their

share.

MR. HOWE: Well, if it involves share, that indicates that there has to be some knowledge of the total amount contributed. Would you agree that it would only be an amount, rather than a share?

MS. O'SULLIVAN: Yes, I would agree to that.

MR. HOWE: And on page eight at the end of that paragraph, concerning accurate and detailed records, are you aware of the current record keeping requirements of permitted disposal facilities in Illinois?

MS. O'SULLIVAN: I am not intimately familiar with them, no.

MR. HOWE: In the event that those facilities are required to keep those kinds of records, do you believe that would be sufficient?

MS. O'SULLIVAN: If they are required under current and existing law, I am not going to quibble with that law, but I still believe that it is -- you are making, through this provision, that you are going to provide that incentive. It is another incentive. I don't know that I would say that I think that law alone is sufficient.

MR. HOWE: Okay. Thank you.

HEARING OFFICER ERVIN: Are there any further

questions? Mr. King?

MR. GARY KING: Ms. O'Sullivan, in response to one of Mr. Rieser's questions I think you mentioned something about that other public interest groups had looked at your testimony in this proposed form; is that correct?

MS. O'SULLIVAN: Yes.

MR. GARY KING: Can you share what other groups were involved?

MS. O'SULLIVAN: I am not sure if I can do that. I think in one instance there may be -- I think that there is some --

THE REPORTER: I am sorry. Could you please repeat?

MS. O'SULLIVAN: I think that in some instances there are some privacy issues at this point.

MR. GARY KING: Okay. That's fine. Thank you.

HEARING OFFICER ERVIN: Ms. Rosen?

MS. ROSEN: Just for my own information, I would like to know more about what the Business and Professional People for the Public Interest is.

MS. O'SULLIVAN: Sure. As I said, we are a nonprofit law and policy center in Chicago. Amongst other --

HEARING OFFICER ERVIN: Could you speak into the

microphone, please.

MS. O'SULLIVAN: Yes. I am sorry. Amongst other issues that BPI provides advocacy on are, in addition to the environment, we are involved in school reform and housing and civil rights activities. We are not a membership organization, but we do have active involvement, and our board consists of many business and professional people from the Chicago area.

MS. ROSEN: How are you guys funded?

MS. O'SULLIVAN: We are funded through private donations and grants.

MS. ROSEN: Do you -- you referenced activities. Do you operate like actively involved in legislative issues, regulatory issues, or just --

MS. O'SULLIVAN: A mix. We are involved in some litigation, some regulatory issues, some just policy advocacy issues. It is a mixture.

MS. ROSEN: Thank you.

HEARING OFFICER ERVIN: Any further questions for Ms. O'Sullivan?

Seeing none, I would like to thank you for participating today.

MS. O'SULLIVAN: Thank you.

HEARING OFFICER ERVIN: Next, we will turn it back over to the Agency.

Mr. Wight, do you have any introductory comments you would like to make?

MR. WIGHT: No introductory comments, as such. Once again, I would like to introduce the panel of witnesses today. They are the same witnesses that appeared in the previous hearings on behalf of the Agency.

To my immediate right is Gary King, who is the Manager of the Division of Remediation Management in the Bureau of Land.

To my immediate left is Bill Ingersoll, who is Associate Counsel for the Agency, Division of Legal, and supervises the Enforcement Unit, Division of Legal Counsel.

To Bill's left is John Sherrill, who is supervisor of the unit in the Remedial Projects Management Section within the Bureau of Land.

Behind me and slightly to my left is Larry Eastep, who is the Manager of the Remedial Projects Management Section within the Bureau of Land.

Today we would like to continue with our presentation in support of our proposal. We have a couple of items of unfinished business to take care of. The first of those is the Agency has, as promised, proposed revisions to our initial proposal,

and so we have put those together in the form of an errata sheet, which we will be introducing as an exhibit. Secondly, we have some responses from the last hearing which were deferred until today.

We would like to go first with the errata sheet, because we think some of the language changes will answer some of the questions that were carried over from the previous hearing, and so we will be able to avoid taking additional time answering those.

HEARING OFFICER ERVIN: Why don't we go ahead and swear in -- they have been sworn in on previous hearings, but for the record we will just go ahead and swear them in again.

MR. WIGHT: Okay.

HEARING OFFICER ERVIN: Will the court reporter swear them in.

(Whereupon, Gary King, John Sherrill, Larry Eastep and William Ingersoll were sworn by the Notary Public.)

MR. WIGHT: I have a document here which has not been marked as an exhibit for identification. I believe it will be Exhibit 14.

HEARING OFFICER ERVIN: That's correct.

MR. WIGHT: Okay. Mr. King, I am handing you a document that has been marked Agency's Errata Sheet

Number 1. Can you please take a look at the document?

MR. GARY KING: Yes.

MR. WIGHT: Would you describe the document, please?

MR. GARY KING: It is a document simply entitled, Agency's Errata Sheet Number 1, and it lists various sections and proposed changes to our proposal.

MR. WIGHT: Okay. I have to admit error. I have a mistake in the caption here. It states, Proportionate Share Liability, 35 Illinois Administrative Code 740. That, of course, should be 741.

Also, we have made a commitment to serve everyone on the service list with this document prior to the time of the hearing scheduled for June the 10th, so in addition to those of you receiving it today it is on the service list and you will receive it and have an opportunity to comment in that hearing.

At this time I would move to admit the Agency's Errata Sheet Number 1 as an exhibit.

HEARING OFFICER ERVIN: Are there any objections to the Agency errata sheet? Mr. Rieser is out.

We will admit the Agency's Errata Sheet Number 1 as Exhibit Number 14.

MR. WIGHT: Thank you.

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

MR. WIGHT: What we would like to do with the errata sheet is just go through the items one by one and explain the changes to our proposal that we are proposing in this document. Gary King will start, and Bill Ingersoll will discuss the changes in the procedures that we have added for the information orders, and we will go through them as they appear in the documents.

MR. GARY KING: Beginning on page one, we have proposed changes to Section 741.105 dealing with applicability. And what we have done with those changes is really moved to an approach that I think is entirely consistent with where SRAC was recommending that this provision go. We had changed some things a little bit. We don't have some of the introductory language they add to their provision. After looking at that, it is in depth and it was not necessary.

We tried to resolve an issue that the hearing officer brought up this morning about does this apply to B and C. We have -- we think it should apply to B and C, Subparts B and C. So we have included this exemption provision under 741.105(c). We just lumped

everything together so that we wouldn't have those reference problems.

One of the things that -- the way the SRAC's proposal -- if you look here, we have got six contacts in which this would not be -- this part would not be applicable. Under the SRAC proposal item number six would be limited to items four and five. So, in essence, you could only -- you would not be able to use this, this procedure, under anytime for two or three. We thought that was -- we thought that was too narrow, and there might be situations where a site, even if it was on the NPL list, if there was a federal approval given to use this type of procedure on, you know, that that should be -- that that possibility should be there. So we have included that.

As I said initially, in general I think that this meets the concerns that SRAC had raised with regards to what we had proposed earlier. As I said, it is somewhat different than theirs, but I think it is conceptually consistent.

The next changes on the definitions, 741.110, we have included a definition of unallocated share. That was a question that we got at the first hearing. And we are kind of trying to distinguish unallocated and orphan. As we said back then, we did not think that

orphan share should be a defined term. We agreed that unallocated share probably should be. And so we have put together a definition of that here.

Then the next section is on information orders.

MR. INGERSOLL: In response to some of the questions about information orders and whether or not we needed procedures, we tried to put together some. In the Subsection A we made it clear that the Agency would be filing a petition that would start this process.

Down to Subsection B, we included kind of what we would expect the process -- how we would expect the process to take place. The notice would include information that we would expect the respondent to respond within 14 days. We have a list of the elements or the components of the petition. Specifically on C we would like to point out that we felt it necessary to put in a time frame so that the Board would not be acting in a vacuum and would exceed our expectations, that would partially respond to our need for the information, and how fast we would need it, and how long it might take to put it together. But we did put a 30-day minimum on that.

Subsection (2)(d) shows that we would expect that the petition would be supported by affidavits and

briefing would be available. We provided for a 14-day response time for the respondent. And they would also support, as needed, their response by affidavits, and briefing is an option. And then the Agency would have seven days for a response. We would expect that service and filing be done consistent with other service and filing requirements in the Board's procedural rules. However, to make sure that personal jurisdiction was obtained, the initial petition must be served personally or by registered or certified mail or by messenger service so that the Board can be assured that that service was, in fact, effected.

In Subsection C, I think our point is that the petition will be evaluated on the pleadings, not on any hearings, and that the Board will issue the order and specify the time for compliance.

Subsection D is similar to the compliance method that we had on our prior version. Subsection E points out what we would expect to occur if we believe that the respondent has failed to comply. We feel that in the first instance we could pursue injunctive relief under Section 42, but we split this apart with penalties that were available under Section 42. And we took the fails without sufficient cause language, I believe, 22.2(k), in the provisions for failure to

adequately respond to a 4(q) notice, such that we would have to demonstrate that the respondent failed without sufficient cause to respond in order to obtain monetary penalties. And Subsection F was I think in there as well. I would think that if we asked a court or the Board for monetary penalties that the respondent would be expected to show that they did, in fact, have sufficient cause for failing to comply.

MR. WIGHT: We can move ahead and explain the rest of this rather than take questions.

HEARING OFFICER ERVIN: Please.

MR. GARY KING: Just a minor change on Section 741.120(d). It is just a typographical change. 741.210(d)(3) is really kind of the perhaps the most important. It certainly is a large part of what we discussed the last -- at these three hearings. We have totally rewritten that provision. However, we have not rewritten the intent there. It is still -- the testimony that we use to support the first draft is the same testimony that goes to support this new provision. We are not intending a generic change in position or intent by this language change. We did, however, want to redraft it to clarify some of the issues that came up relative to the way that (d)(3) was phrased.

First of all, we put it in an active voice as opposed to a passive voice so it is very clear. It is explicitly clear that it is a Board determination. We made it real clear that it is a Board discretionary determination, that it is a Board discretionary determination based upon the facts and circumstances before it.

There was an inference in the previous draft of (d)(3) that the Board -- if there was an inability of the respondent to prove its degree of proportionate share that the Board -- that the result would be to jump to the extreme, jump to an extreme position. We wanted to make it clear here that the Board's authority was allocating any or all of the unallocated shares. So that there is a complete range of the Board's discretion on those things, rather than emphasize one end of the spectrum as opposed to the other. So we rewrote it for purposes of clarification. It still presents the same generic issues that have been discussed in the previous hearings.

Relative to Subpart C, there were questions about it that were general in nature that I think we will respond to later on. Then there were questions that were very specific as to potential language changes.

What we have done here is responded to those specific questions relative to language changes, and have made those in the way that we thought would be the appropriate way to make those. That is not making a comment relative to the general issues which we will discuss later on. That would be true for each of the changes on 305(d), 315(a), 320(b)(3) and 325(b).

MR. WIGHT: If you prefer, we can take questions on this now or we can continue. Certainly, I know people are just seeing this for the first time and may have some initial questions and may have some follow-up questions for the fourth hearing after they have had a chance to take the document and kind of digest what we have proposed here.

HEARING OFFICER ERVIN: Are there any questions right now that people have?

I have one that -- yes, Mr. Rieser.

MR. RIESER: With respect to the information order, will it be part of the Agency's petition to identify what documents are to be produced?

MR. INGERSOLL: Well, it might be. I think we would more likely be describing the nature of the information that we want to see.

MR. RIESER: At what point would a respondent see the extent and be able to comment on the extent of the

information that they are being asked to produce?

MR. INGERSOLL: In the response to the petition?

MR. RIESER: So that information would be in the petition?

MR. INGERSOLL: I guess I am not following your question.

MR. RIESER: The question is whether -- I think we are talking about the same thing, but the question is will the Agency identify in their petition exactly what documents or types of documents the respondent is to produce so that the respondent, in its response, can comment that the extent is too broad given the subject matter or the issues being discussed?

MR. INGERSOLL: Well, I would hope to be as specific as I can. I can't guarantee that we will know exactly which documents you may have or don't have. If we ask for a type of information, you may, in your response, point out that you don't have what we are asking for. You may have it in document form or some other form.

MR. RIESER: Would the respondent be able to withhold documents on the basis of trade secret or legal privileges?

MR. INGERSOLL: On trade secrets, no. Privileges, yes.

MR. RIESER: So trade secret protections of the Act wouldn't apply to documents you requested through this?

MR. INGERSOLL: Trade secret protection does. That doesn't mean that you can withhold it from the Agency.

MR. RIESER: Okay. I understand.

MR. INGERSOLL: You can submit it marked --

MR. RIESER: Right. I understand.

MR. RIESER: Would a respondent be able to get more time to respond to the request from the Board?

MR. INGERSOLL: You mean the response date from the order or the response date from your 14 days?

MR. RIESER: You have 14 days. Can that be extended?

MR. INGERSOLL: I would assume the Board would have discretion pursuant to your motion to extend your time. I also expect that we wouldn't like it much.

MR. RIESER: I don't have anything further.

HEARING OFFICER ERVIN: You don't have any further questions?

MR. RIESER: No. Thank you.

HEARING OFFICER ERVIN: I have a quick question for you. Under your new Section 741.305(d), basically the provision says if you have a Subpart C action

pending and a Subpart B action is filed the Board may stay the Subpart C action. Why does a Subpart B action trump the Subpart C action? Can we stay either, or is it just we can only stay the Subpart C?

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

MR. GARY KING: The reason we did it this way, the way we have it phrased here under D is to maintain organizational consistency with the rest of the proposal. If you look in 741.105(b) it provides that Subpart B is applicable when -- Subpart C is applicable when no complaint has been filed by the State. It was our belief that because of the fact that a Subpart B proceeding is more often going to be addressing complete remediation of a site that that should be the primary focus. We didn't want to have a Subpart C proceeding end up delaying efforts to get a site cleaned up under Subpart B.

HEARING OFFICER ERVIN: Are there any additional questions at this time on the errata sheet?

I am sure we will probably have additional questions for you on the fourth hearing after we have digested this a bit more. Would you like to continue on with your testimony?

MR. WIGHT: Yes. We have several responses from the last hearing which were deferred until today. I

will do as I did the last time and try to paraphrase the question or comment to which we are responding and describe where it can be found in the transcript, and then one of the witnesses will reply.

The first question for which we have a response, of the 85 sites receiving 4(q) notices, at how many was recovered and all the costs achieved. This question was found in the transcript of the second hearing at approximately page 85. John Sherrill has a response for that.

MR. SHERRILL: At seven of the 85 sites receiving 4(q)s, cost recovery was achieved in, like I said, seven of those. To kind of further elaborate on that, this is kind of a progression here. At 61 of these 85 sites, because then the question becomes, well, what's the balance at some of these sites, the outstanding monies due. At 61 of the 85 sites, the balance is greater than $5,000.00. At 36 of the 85 sites, just to kind of give you a range, the balance is greater than $50,000.00, and at 28 of the 85 sites, the balance is greater than $100,000.00.

BOARD MEMBER McFAWN: That's the outstanding balance?

MR. SHERRILL: Yes, monies that the Agency spent and that we have not recovered all of the monies.

HEARING OFFICER ERVIN: Is there a follow-up question to this answer?

BOARD MEMBER HENNESSEY: I take it for those 36 sites, the recovery amount outstanding is between 50 and 100?

MR. SHERRILL: At 36 of the sites, of these 85, the balance is greater than $50,000.00.

BOARD MEMBER HENNESSEY: I am just wondering, is there an overlap between that and then this category where there are 28 over $100,000.00?

MR. SHERRILL: Correct. Yes. They all overlap there, yes.

BOARD MEMBER HENNESSEY: Okay.

MR. SHERRILL: Probably the most significant figure of those is that 28 of the 65 -- 28 of the 85 sites the balance is greater than $100,000.00. That's probably -- of all the numbers I gave you that is probably the most significant.

MR. RIESER: At those 28 sites or at any one of those 28 sites are there efforts underway to recover those monies?

MR. SHERRILL: Yes.

MR. RIESER: At all of them?

MR. SHERRILL: I don't know.

HEARING OFFICER ERVIN: Are there any other

questions?

Mr. Wight, would you like to continue with the next response?

MR. WIGHT: Yes. The next question I believe was a question by Charles King at page 60 of the second transcript. What does Section 741.115(c) do that is not already part of the law under Section 42 of the Act?

We have proposed some language changes to that subsection. However, the question still seems to apply even with the new language.

MR. INGERSOLL: It doesn't necessarily add anything new. I think it points out if this were implemented by the Board, the Board's intentions with what can and should be done for noncompliance with one of these orders.

HEARING OFFICER ERVIN: Mr. King, do you have a follow-up question?

MR. CHARLES KING: No.

HEARING OFFICER ERVIN: Thank you. Mr. Wight.

MR. WIGHT: The next question there may actually have been a series of questions here, questions by Board Member Hennessey, page 72 to 73 of the last transcript. I believe these arose out of -- these were follow-ups to a question about whether the

applicability Section 741.105 applies to the information order provision.

The question was along the lines of what if there were a RCRA site but it was unclear that it was a RCRA site, would the Agency have to have good faith belief that the Proportionate Share Liability rule would apply in a situation where they were asking the Board to issue an information order with regard to one of these sites. The question actually was answered, but we would like to clarify that answer.

MR. GARY KING: I am not sure if I am going to create a whole lot more clarity to the answer, but what I was struggling with at the time was the notion of the term good faith belief and how much subjectivity that would be adding to matters. And what I think is that we want to try to have the Board's inquiry be as objective as possible. It is really the issue of whether the site is a RCRA site or not, not what the Agency believed as to its regulatory status. I think it is an issue that would be raised by the respondent if they are willing to.

I would think most of the time if we were contending a site was not a RCRA site, it would be a rare occasion that the respondent would be willing to say it was a RCRA site because then he is, in essence,

subjecting himself to a more stringent regulatory process and enforcement criteria. You know, if somebody did that I can't -- I wouldn't think that we would object to them saying now that they are a RCRA site. So we were trying to do something -- in conclusion, I just didn't think that we should set up a good faith belief that would be too subjective.

MR. WIGHT: Mr. King, would it be the Agency's duty to make some demonstration in its petition or would it be the responsibility of the respondent to raise that more or less as a defense?

MR. GARY KING: I saw it as something being raised by the respondent.

HEARING OFFICER ERVIN: Are there any follow-up questions?

MR. RIESER: Is that identified among the things that a respondent can raise a response to in an information order in the language that you proposed?

MR. INGERSOLL: It is not specified. I would think that applicability of the process at all would be something that you would raise.

MR. RIESER: Thank you.

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

MR. WIGHT: Yes. Next was a question asked by

David Rieser. A discussion took place at approximately 105 and 110 of the transcript. What percentage of the Hazardous Waste Fund was spent on remediation in fiscal 1997.

Then the second question, of the 5 million dollars we said was spent on remediation in fiscal 1997, what percentage is that of the total amount in the Hazardous Waste Fund.

John Sherrill has a response.

MR. SHERRILL: I would like to clarify that. Approximately 5 million dollars was spent by the Hazardous Waste Fund in fiscal year 1997. Of that 5 million dollars, 4.216 million was Bureau of Land remedial related expenses. So 4.216, and actually the figure was 4.952 million, so the percentage was 85 percent. The other $736,000.00 was Bureau of Water groundwater related expenses. They have various programs mandated by the Act.

BOARD MEMBER McFAWN: So those were not remedial actions? They were --

MR. SHERRILL: Correct. The Bureau of Water has various programs with various cities providing grant money, identifying water resources, groundwater resources and so forth.

HEARING OFFICER ERVIN: Mr. Rieser, do you have a

follow-up question?

MR. RIESER: Yes. When you say Bureau of Land remedial resources, does that mean specifically cleaning up specified sites or what?

MR. GARY KING: What that means is the entire amount, okay, that goes toward remedial activities. We did not separate it out into specific contractual items or that kind of thing. That is the entire amount going to land related remedial activities.

MR. RIESER: That includes --

MR. GARY KING: To give you an example, for instance, within the Bureau of Land there are payrolls where we run our voluntary cleanup program off of that. That money comes out of the Hazardous Waste Fund. So that's an amount of money that is related to remedial activities.

MR. RIESER: So a portion of that 4.07 million; is that correct?

MR. SHERRILL: 4.216.

MR. RIESER: 4.216. Thank you. That went to the payrolls for people working in the voluntary remediation program?

MR. GARY KING: Right.

MR. RIESER: Okay. And other portions went to people who were working in the remedial project

management program?

MR. GARY KING: Right. There were other people -- in John's unit, that goes to pay salaries in John's unit.

MR. RIESER: How much of it went to actually directly remediating specific sites?

MR. SHERRILL: I guess I would argue that all of it went to remediating sites, because every activity we do -- I mean, it is paying for my salary now. But every activity we do is on an effort to get people to cleanup the site.

MR. RIESER: Right. But it is paying for your salary now.

MR. SHERRILL: Right.

MR. RIESER: I guess is there a portion of that that represents payments to contractors to remediate sites or for sampling?

MR. SHERRILL: Correct.

MR. RIESER: Or sampling that the Agency performs at the sites?

MR. SHERRILL: Correct.

MR. RIESER: Do you know what the percentage of that is?

MR. SHERRILL: No.

MR. RIESER: Okay. Thank you.

BOARD MEMBER McFAWN: Do you have a ballpark figure how much that might be?

MR. GARY KING: It is real difficult to do that because we have different contracts for different types of activities, and we have a division of laboratories, and we -- some of the samples go to them, and then we have other contract laboratories and then some of the samples go to them. So it is a whole conglomeration of things under the Hazardous Waste Fund. We thought the simplest way to look at the issue was to just break it out to Bureau of Land and Bureau of Water.

BOARD MEMBER McFAWN: So, no, you don't have a ballpark figure?

MR. GARY KING: No, I don't.

MR. SHERRILL: It would take us one whole afternoon to come up with that number, the four of us.

HEARING OFFICER ERVIN: Mr. Wight, would you like to continue with the next response.

MR. WIGHT: Yes. There were a series of questions by Dr. Flemal, Dr. Girard, and other Board Members regarding Subpart C and the hearing officer proposal. It also included questions -- excuse me -- these are at approximately pages 118 to 123 of the transcript. Also all of questions by Board Member McFawn and

Chairman Manning as to whether we wanted the hearing officer to act as a mediator or arbitrator or some sort of a mixed role.

Then a comment by Dr. Girard concerning whether or not the enhanced role for the hearing officer was contrary to the requests from other participants for a simple, timely process.

So we just kind of lumped a response to all of those together.

MR. GARY KING: I saw the Site Remediation Advisory Committee people this morning on the hot seat talking about this, so I guess it is my turn now to talk about it a little bit.

Our concern with fundamentally why we thought this might be an advisable way to proceed was because there could be an extreme case. Now, in the remediation program that we operate sometimes we have seen cases where there will be literally hundreds of respondents, and we have had to proceed with litigation relative to those. And we were concerned that if for that type of mega case if that got thrown into Subpart C, with the existing Board hearing format, that that hearing officer might not have strong enough authorities to move things all the way through to progression. So we included this provision because we were concerned that

there might be that eventuality.

Now, as the Site Remediation Advisory Committee was saying this morning, it is not a fundamental part of the proposal. It clearly is -- for the Board, if the Board was going to go this way and go to an alternative approach I think it would be a significant step for the Board as far as a different type of procedure. So we are not wedded to that concept, although we think it would be good, particularly if the Board was encountering that type of very large case.

I think what you can really take from the presentation from both the Site Remediation Advisory Committee and from us is that if the Board chooses to go that route of having this stronger hearing officer authority that there is not going to be opposition from either the Advisory Committee or from the Agency going that route. Again, as I was saying, it is not something that is fundamental to the nature of our proposal.

In response to Board Member McFawn's question about it, we did see that it was more of an arbitrator type role as opposed to a mediator type role, but with the recognition that if you did have one of these mega cases where you have several hundred defendants or

something like that, that any hearing officer is going to do a type of mediation in terms of trying to focus the issues, just as a matter of good case management.

Board Member Flemal asked about the statement as to ruling on issues of fact and law presented at the hearing and why that language was chosen. Again, I will -- we took a lot of this -- as the SRAC people were saying this morning, this was, quite a large measure, their proposal and we supported it. We did look at -- it is a concept that has been used by other state agencies and the language that was questioned about there, it is a type of language that we have seen in other types of hearing rules that other state agencies have.

HEARING OFFICER ERVIN: Are there any follow-up questions?

Seeing none, Mr. Wight, would you like to continue with the next response.

MR. WIGHT: The next response was to a question by David Howe. Generally the question was found at page 143 of the transcript, and it concerned the absence of language providing opportunity to reach a settlement under Subpart B, I believe, in particular, although it may have also extended to Subpart C, as well. There was a discussion then following that about a provision

in the Act that provided for de minimis settlements and some concerns as to whether or not other settlement options would be available under our proposal.

MR. GARY KING: The section there was referred to there by Mr. Howe and his question at the last hearing was Section 22.2 A. And that's not 22.2(a) but 22.2 A. That was a section that was passed in September of 1989. Actually, it is modeled after a provision that appears in the federal law that was passed in 1986. If you read Subsection C of 22.2 A, which I will go ahead and do, it says that nothing in this section shall be construed to affect the authority of the State to reach other settlements with other potentially responsible parties.

So the fact that there is -- this provision relative to de minimis parties and how the State would settle with them would not prevent the State and defendants to reach an agreement and settle independently in other proceedings.

HEARING OFFICER ERVIN: Is there a follow-up question? Mr. Wight.

MR. WIGHT: The last response was a response to a request by Dr. Girard concerning the types of evidence and the examples that would be submitted under the

allocation factors and what weight would be given to each and whether or not the Agency would provide examples.

John Sherrill has a response to that. Before he responds, there was some perhaps confusion on our part. Based on notes, I felt that you just wanted a narrative description of those types of evidence, what types of evidence we might expect to see and what we would find in them. Upon getting the transcripts later there was some disagreement as to whether you wanted actual concrete examples of that type of information. I made the call that we would just bring in the narrative description today.

However, if after hearing the narrative description, if your intent was to have specific examples of that type of information, we can certainly bring those in at the fourth hearing and give you specific types of documents from our files.

BOARD MEMBER GIRARD: Thank you. I will look at what you have.

MR. WIGHT: With that today, John will go ahead and provide an overview of the types of things we have seen. I might add that typically in the past we have looked at this information with the idea towards identifying the PRPs but not always so much to

determine the proportionate share. But they might also be useful in a proportionate share context.

With that, John, why don't you continue.

MR. SHERRILL: Yes, I will answer -- this will be about a five to ten minute answer, and then I think Gary will follow-up somewhat on it.

Dr. Girard's question of what type of concrete evidence the Agency typically reviews, I am going to discuss specifically manifests, invoices, county property records and aerial photographs.

Since 1979 manifests documented the cradle to grave concept of hazardous waste. A manifest documents the name of the waste generator, the waste transporter, the facility the waste is being put to grave, the volume of waste, and identifies the waste. A manifest is signed and dated by a representative of the waste generator, and is signed and dated by the waste transporter and signed and dated by a representative of the facility receiving the waste.

Other types of information that the Agency reviews are site inspection reports, and those could be by Illinois EPA field inspectors or other government field inspectors or public health field inspectors, photographs, newspapers, and when I say newspapers, it could be a 1950 newspaper that talks about a

particular plant and what they are producing and so forth, interviews with local citizens and interviews with former employees, interviews with site owners and interviews with site operators.

And then if there are any company records, we touched on that a little bit today, manifests, which I just talked about, courthouse records, tax records, property titles, Secretary of State records, and interviews with former employees of the site and interviewing local neighbors of the site, and then also like a Dunn & Bradstreet business publication review.

Just to reiterate, under the new proportionate share rules this PRP or RP identification and RP contributions are more critical than ever if the State is able to continue to initiate State cleanups. Also a good site investigation report establishes the type and extent of contamination and in conjunction with TACO provides an indication of why and what needs to be remediated. The Agency typically in the 4(q) notices establishes why and what needs to be remediated. What I mean by a good site investigation is that a lot of times the Agency will perform the site investigation and determine the nature and extent of contamination, and then will issue a 4(q) notice

saying that these type of contaminants need to be cleaned up. So it is real evidence in the 4(q) what needs to be cleaned up.

In the Agency proposed Section 741.215 there is three factors for allocating costs among the responsible parties: The volume that we discussed, the volume of regulated substance or pesticides caused or contributed by a party; the risk and hazard potential of the contaminants; and the degree of involvement of the party of the generation, transportation, treatment, storage, or disposal of the regulated substance or pesticide causing or contributing to the contamination at the site.

And touching on what we have said before, you know, for those parties that can show that their volume contribution to the environmental damage is relatively small in terms of their amount of waste generation, they stand in a better position to be allocated a smaller portion of the responsibility.

The actual weighing factors of allocation are site specific, and I would anticipate that one or more of the responsible parties will propose a weighing system or they may propose a percentage system as we have discussed earlier, or a simple dollar system. They may propose this at the pre-remedial or the

post-remedial phase of the project. And what I mean by that, we may have one allocation scheme where just simple dollar figures are assigned, party A is $10,000.00, and party B $10,000.00 and so forth. I can see another example we would assign cost on a percentage basis, party A 15 percent and party B 15 percent and so forth.

I am just going to talk a little bit about invoices for a minute. Invoices detail a list of service or products rendered with an account of all costs between two parties. Invoices are part of a company's records, and not of the Illinois EPA's records. The reason I bring this up, the Illinois EPA and the Attorney General, just within the last year and a half, we have been settling a multiparty waste drum oil cleanup site. Our principal evidence or concrete evidence, as you have asked for, was from invoices that we were able to obtain from the company.

Much of how we identify the responsible parties and the volume of responsibility were by these invoices. There were 15 banker boxes of invoices. The invoices documented how many times a responsible party utilized the services of this waste oil company, this waste oil drum company. On the specific invoice

was the letterhead of the waste oil drum company, and written on each invoice was the party who used that waste oil services, and the date of the services. I would like to point out that this is rare that the Illinois EPA comes across invoices such as this. In this particular case we did have invoices but it was rare that we had these type of records.

The next type of evidence are county property records and aerial photographs used in conjunction together. In each of Illinois' 102 counties are records that provides a legal description of a property, the owners of the property, and the date of ownerships. Combining the county property records with aerial photographs, a model of site operations begin to develop. This concept was touched upon by Gary King and myself at previous hearings. We really didn't go into it very far, what we meant by that.

Aerial photographs are taken by the Illinois Department of Transportation approximately every seven to ten years. They are also taken by private firms such as Sidwell Company and the U.S. Department of Agriculture. The aerial photographs are dated, and the picture quality is excellent. Actually, the picture quality is better than excellent. The photographs are outstanding, and can be blown up

several times before the picture becomes fuzzy. The picture quality details small outbuildings, trucks, small vehicles, roads, truck traffic patterns, effluent discharges, lagoons, drainage ditches, stock ponds, building placement, and just property use in general.

So you think what can we get from an aerial photograph. For an example, the last set of photographs that I saw at a particular site, the initial photograph was taken in the 1950s and the latest photograph we have was taken in 1996 with two intervening years in between. Well, combining these photographs with the county property records, we can depict what was occurring at a particular site, the phases of the operation, were lagoons built, were lagoons not there during certain phases of these time periods.

The latest set of photographs that I saw at a site that I won't mention, the 1962 picture clearly showed striped clay mines. And then the 1996 picture shows that the strip mines have been covered. Well, it was reported to the Illinois EPA that there was buried waste in these strip mines. If you were to go out there today, you would not see any evidence of buried waste, but looking at the past history of these aerial

photographs you can see a progression in history of what was occurring at this site.

These invoices, county property records and aerial photographs provide input into what we call this model of site operations. These all relate to the volume allocation factor, the risk allocation factor, and the degree of participation. For example, the invoices in this case that we just are settling now, the invoices may tell us how much of a waste was contributed by a particular party, which they did, and it also told us the waste volume and waste type. Which this addresses all three allocation factors that the Agency is proposing.

For example, party A may be identified as a waste old generator who used the services of this waste oil facility two different times. For example, 500 gallons of waste oil each time for a total of 1,000 gallons. The company records of the waste oil firm, the site investigation, or even the aerial photographs may indicate what was done with that 1,000 gallons of waste oil. There again, for an example, if we can show a common example maybe someone taking drums of ways to a site, and they are not being a lagoon there, and then another aerial photograph ten years later showing a lagoon and they are receiving waste oil and

they are dumping it in the lagoon. So that was a contribution to that site's waste. So these aerial photographs may show the lagoon being utilized for waste oil dumping.

Or another example, the waste oil company records may show that the oil was being subsequently coal burned as fuel in a coal fire generator. There again, we are looking at what caused the contamination at that site. So it is not uncommon for waste oil companies in the 1960s and 1970s to receive waste oil and then coal burn some of that in some type of coal fire generator.

So the volume of regulated substance or pesticides caused or contributed by a party indicate the waste volume, as we have touched upon. So the greater the waste volume the party caused or contributed, the greater, we would say, the proportion of responsibility allocated.

I would like to touch upon -- I went over this a little bit more in my written testimony. When records that depict the amount of waste contributed by individual parties are not available, the length of time an owner or operator owned or operated the site should be considered as a surrogate measure for volume. For example, in an allocation proceeding,

where the precise amount of waste caused or contributed by each owner or operator is unknown, the number of years an owner or operator used the site should be used as a surrogate measure for the volume amount.

I will give you a little example. Suppose the facility generated the same waste for 40 years, from 1950 to 1990. The facility generated approximately the same amount of waste each year. Party A owned the property for ten years, from 1950 until 1960. Party B owned the property for 25 years, from 1960 until 1985. And party C owned the property for five years, from 1985 until 1990.

Therefore, everything else being equal, party A's volume estimate would be ten years since they owned the site for ten years, divided by the 40 years, which equals 25 percent.

Party B's volume estimate is 25 years divided by 40 years, which equals 62.5 percent.

Party C's volume estimate is five years divided by 40 years, which equals 12.5 percent.

I just give that example to show that there are other measures other than volume such as this time that a party owned a facility that may be used as a surrogate. We believe that time is a surrogate value

is reasonable and should provide consistency among all other allocation factors.

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

In my written testimony I reference a U.S. EPA publication, EPA 530-D-97-004. That is in my written testimony. It is called the Draft Prioritized Chemical List. It provides answers to the question which waste are of greatest concern based on the chemicals they contain and potential risk that they may pose. And it lists 879 chemicals. So it ranks all these chemicals and provides a ranking of them. We have made it clear that together with this toxicity and persistent potential of a waste the site specific remediation objectives are to be developed consistent with TACO to derive this risk and hazard potential. So we would like to reiterate, you know, if we were cleaning up a site for benzene and some other PRP or RP contributed lead and we were not out there for lead concerns, then we are not interested in that responsible party that caused the lead.

(Board Member Flemal exited the hearing room.)

MR. SHERRILL: So we would believe that all sites would have some developer remediation objectives in conjunction with TACO. In other words, we would be asking the question why are we cleaning up a site. You know, is it due to PCB, PNAs, lead, mercury and so forth. So a focus of the allocation factor would be to determine the harm that each party causes the environment and that the party should bear those responsibilities that are attributed to them to that specific harm.

In other words, if we were to base allocation simply on waste volume alone that makes the simplifying assumption that a unit of any site waste creates the same remedial cost. We are not stating that, because we are saying the risk and hazard potential allocation refines this simple volumetric approach by considering the TACO characteristics of the specific waste.

Then this third factor that we have proposed, this degree of a party's involvement in generating, transporting, treating, storing, disposing, or otherwise improperly managing waste by an act or omission is meaningful, we believe, to determine the apportionment. We had expressed 741.215(a), that the

Board may consider any or all factors related to a liable party's causation of or contribution to a released or a substantial threat.

741.215(b) states the Board shall not be required to determine precisely all relevant factors provided substantial justice is achieved. That kind of gets to the party may cause or contribute to the environmental problem by various acts or participation or omission.

I can give you one site example there. We had provided written approval of a site to go ahead and build a building on a particular piece of property. That owner or operator of that site started putting -- we also stated that nothing beneath the ground could be disturbed, because there was waste in place. Well, that particular party started putting footings in for this building and an oil sheen contaminated product started going into the footings and they just started dumping it right into the river. Well, that violated it. And so there this new party that really didn't generate the waste on the site but accepted that condition, you know, I would argue that they were contributing to the contamination because they did not leave it in place. So that may fall under this third allocation factor.

Gary, did you want to follow-up?

MR. GARY KING: It is kind of hard to figure out what to follow-up on, John.

What I wanted to just talk about a little bit, just to give you kind of a visual image of what we are faced with with some of these projects, what John has outlined is we are trying to develop this skeleton of what was the site operations all about so we can figure out who the responsible parties were, what kind of remediation needs to be done and so forth.

But if you think about it in terms of like these photographs, when it is a fly over, and these are done, you know, once every ten years or so, well, once every ten years we get a snapshot of a facility, and we know what happens on the date of that snapshot. We have a pretty good idea what maybe going on. But what has happened in that intervening ten years and who has the information relative to that. That is something that we really don't have. You know, we have some public records that we go through and that, but really if you are talking about a site operation that intervening ten years, the information as to what was going on during that time frame belongs to the people who were doing the operation at the site, and that is one -- it is one of the things that has really driven us to see the need for the burden of proof on that

allocation issue to be somewhere else other than us.

CHAIRMAN MANNING: You know, just to follow-up on that, I appreciated the testimony presented by Mr. Sherrill in terms of all of the things that the Agency looks at and all of the documents that you need to determine these questions and these factors. But what still I think would be helpful for the Board to know, and you don't need to do it today, but maybe for purposes of preparing for the next hearing, if you could delineate for us, if you could, what it is that you have in your offices and how it is organized, I mean, a lot of this stuff you are talking about you wouldn't even have yet. Correct me if I am wrong, but manifests --

MR. SHERRILL: Well, the manifests that I was discussing was the mandated RCRA type manifest.

CHAIRMAN MANNING: So for a RCRA site you would have manifests?

MR. EASTEP: For 809.

CHAIRMAN MANNING: Okay.

MR. SHERRILL: And then, like, the aerial photographs, those are public records of the U.S. Department of Agriculture, the Illinois Department of Transportation. They do fly-bys for all of the major roads, but it is so -- their aerial photographs are

basically all of Illinois. I know of no place that they don't have aerial photographs.

CHAIRMAN MANNING: So do you like have one room in the Agency that has all of your photographs that you look at at a site and you point to a particular point in Vermilion County and look at a photograph for it? How do you know where to begin and how your information is organized in terms of whatever it is you have at your disposal? I understand you have a permit file, you have a generator, you would have files related to the permit and the generator of the waste and that sort of thing but --

MR. SHERRILL: What usually initiates it, and this was kind of touched on in my written testimony, is let's say a complaint is issued to our field office that some site is causing contamination. Let's say a complaint is issued to our field office that some site is causing contamination. Let's say I see something emanating through a stream. Well, basically, we would assign a project manager to that site or field person, and they basically start with a clean slate knowing nothing of that site and they start gathering information.

CHAIRMAN MANNING: And you keep that all in a file in the field manager's office and that file would grow

over the years and all the site inspection reports that you are talking about are in that file?

MR. SHERRILL: Right.

CHAIRMAN MANNING: And manifests are in that file? Not necessarily manifests, but the site inspection reports?

MR. SHERRILL: Right, the site inspection reports.

CHAIRMAN MANNING: Okay.

MR. SHERRILL: But, I mean, some of these sites it is not -- it is typical that some of these sites have been in environmental violation for years prior to us issuing, let's say, a 4(q) notice. So we kind of build a site history of environmental -- of course, our focus is on the environmental part, but in conjunction with that we are identifying responsible parties along the way.

CHAIRMAN MANNING: Do you have documents that have the history of the site just for the current owner, or do they go back? What kind of information on historical contamination do you have? Do you purge all of your records after five years?

MR. SHERRILL: As far as I know we have all of our records.

MR. EASTEP: We keep all the records. After so many years we microfilm them. Those are still

available. And then as long as there is any kind of Agency involvement we will keep a hard copy of the record or the microfiche at the Agency. If we have fiche, we will take the boxes of the hard copies and store that somewhere. We won't destroy it.

MR. SHERRILL: But like some of these waste oil site that occurred in the 1960s and 1970s and even in the 1980s, we did not have -- I mean, we would document that a waste oil facility, let's say a recycling facility, that they had bad environmental housekeeping principles. But we don't sit there and document who is bringing in the waste. In other words, they send a waste oil truck to various companies picking up waste oil, and we don't necessarily review that information at that time.

MR. GARY KING: They may have just a one-step permit. They may have a permit that --

MR. EASTEP: That information will be kept at the site that receives the waste material. They are supposed to keep a copy -- if they have a multi-stop permit, they are supposed to keep an ongoing log of all the generators. If you want to get the exact amount that each generator gets, then you would have to go back into their invoices, because these get fairly small as opposed to larger companies that might

bring in a truck load of their own waste, for example. Those would be at the site that received it. So you might have records collected from the generator site and from the receiving site. So you would have two files that might contain information in this type of case.

MR. GARY KING: But when we start we don't have that kind of information. That is something that we acquire as we go through the process.

CHAIRMAN MANNING: If there is a new generator, what kind of information do you see that they have refrained from the prior generator? What kind of legal obligation are they under to retain any sort of information or documentation in terms of manifests? Are they under any?

MR. EASTEP: There is an obligation to keep the manifest records for a certain period of time. That escapes me. I think there was something under 809 for the nonhazardous.

CHAIRMAN MANNING: We can check that as well, too. I am just sort of concerned about how much information is at your disposal in your offices versus how much is available at the site, and trying to ascertain those kinds of things.

MR. GARY KING: One of the things that I think you

should think about in terms of the relationship between the private sector and the Agency on this, under our system of government, a private party who is a PRP is given the power through FOIA to know whatever it is that the State knows. We, however, don't have that authority. We don't have the authority to FOIA private businesses. So it is -- again, that is one of those issues that causes us to see where we should shave things. When we start into a cleanup case we get FOIA'd for all those documents, so they know what we know as we go through the process.

HEARING OFFICER ERVIN: Does the Agency have any further testimony today?

MR. WIGHT: No, we don't. That concludes our presentation.

HEARING OFFICER ERVIN: Thank you. Are there any additional questions for the Agency today?

BOARD MEMBER GIRARD: Yes.

HEARING OFFICER ERVIN: Board Member Girard.

BOARD MEMBER GIRARD: I have a question in terms of the waste oil generator example you gave us. You seemed to indicate that the records you had in that case were unusual. They were unusual in their volume and their continuity; is that correct?

MR. SHERRILL: It was unusual in that we were able

to, in this particular case we had invoices from the facility, the waste oil facility, of people that they had invoiced. In other words, they had invoiced A, B, C company for this amount of waste. It was unusual that we were able to get ahold of those records. We spent quite a bit of effort, and it was kind of almost the ideal type of allocation proceeding, because we had, like I said, 15 boxes of records and we were able to go through -- I don't know how many RPs were on that site.

MR. GARY KING: What makes that case unusual is that usually a guy who is running a sloppy environmental operation is doing so because he also has sloppy business practices which means he is probably not maintaining invoices relative to his business records. This case was unusual in that we had a sloppy operator who kept good records of what he had done.

BOARD MEMBER GIRARD: Also, when you have waste oil, would you be able to sort of start from the assumption of the risk factor involved with one barrel of waste oil is the same as the risk factor involved in another barrel, so it sort of reduces some of that uncertainty.

MR. SHERRILL: It kind of did in that instance

that we would just assume it was all -- we had waste oil that was all mixed together, you could say. I mean we do have sites where we have the example of they have benzene over here in this corner and lead over here, but the lead does not have to be cleaned up or some other metal type contamination. In this one all the waste oil you could kind of say was equally contributing to this one big probably.

MR. EASTEP: If I could follow-up a little bit to that. You also have to realize that over the years practices have changed substantially from -- there used to be, for example, a lot of open burning of fuel. It was relatively unregulated years ago. There also was a lot of people prior to the passage of RCRA and CERCLA in 1980, there was a lot of mixing of solvents of the waste oils. So, of course, as time went on that practice sort of stopped. Now if you get waste oil picked up and the company is doing it legally or trying to make sure that the waste oil that they pick up from every generator is the same and it doesn't contain solvents or PCBs or anything else mixed in it. So overtime that has changed. Over time our records have changed, because we didn't have manifests before 1979, and I am told that a lot of business was done on a cash basis. So there was

probably never a bill given out or never a receipt. They literally did business on a cash basis. I think we probably have got some sites where that is alleged now. Then you had manifesting and you had RCRA manifesting.

MR. SHERRILL: The sheet I provided on the number of sites we 4(q)'d, a lot of those were landfills. Several of those landfills were not your municipal type landfill. What they were, they were landfills run for the pleasure of several area industries that only several industries contributed to, and so the records that we were relying on were the waste transporter and site landfill operator. This landfill was centrally located among four or five big industries. They were only receiving waste from those four or five industries. So people would give affidavits saying I hauled waste from company X to this landfill, you know, eight hours a day 365 days a year. So that is kind of the record we have there. Then when I say we would do a site investigation, we would investigate the landfill and determine the nature and type of contaminants and the extent of it and was consistent with the type of waste that company X would have been generating for those numbers of years.

HEARING OFFICER ERVIN: Ms. Rosen.

MS. ROSEN: Yes. I had a question for Mr. Sherrill. It goes back to the discussion that we had kind of at the beginning of your testimony. You indicated that the Agency felt like time could serve as a surrogate factor almost when you are trying to determine the volume as an allocation factor.

You gave an example of, you know, A was at the site for so many years and B was at the site for so many years, and C was at the site for so many years, and that you could use that length of time each entity had been at the site to decide the amount of volume of a certain company. And I just wanted to make sure, I would understand that your statement would mean you would also have to -- the Agency would also have to have some sort of information that company A, company B, Company C had each generated a certain type of chemical --

MR. SHERRILL: Correct.

MS. ROSEN: -- and whatnot?

MR. SHERRILL: Correct. That is kind of a simplifying assumption, because usually what happens is that company A generates the same amount of waste that company B did. Then company C comes along and there new manufacturing processes. It is, like, well,

company C only did this for five years, and even though they were there ten years or five years of their time they have actually improved their manufacturing process and had less waste. That is actually more typical. So in that case you would adjust your time surrogate value downward.

MS. ROSEN: Right. So you certainly wouldn't be looking at time in a vacuum in relation to what else was going on at a facility?

MR. SHERRILL: Correct.

MS. ROSEN: Thank you.

HEARING OFFICER ERVIN: All right. Are there any other additional questions for the Agency at this time?

Seeing none, then I will note the fourth hearing in this proceeding has been scheduled for June 10th at 10:00 a.m. in the same room, Sangamon County Building, County Board Chambers, Room 201, at 200 South Ninth Street here in Springfield. The fourth hearing will deal with any remaining issues.

I will just remind the Agency that we will probably have some additional questions on the errata sheet.

The Board will also be asking for comments on the fact that the Department of Commerce and Community

Affairs has not produced an Economic Impact Study for this rulemaking pursuant to the Act. Also, if there is anyone else who would like to testify at the next hearing, the Board will hear the testimony as the time allows.

The Board has requested an expedited transcript for this hearing, so the transcript should be available next Tuesday in the board offices. Again, as we have in the past two hearings, if anybody would like a transcript they can contact myself or the Board's Chicago office and they will give you a transcript free of charge. That goes as well for copies of the transcripts from the past two hearings.

Are there any other matters that need to be addressed at this time?

All right. Seeing none, I would thank you very much for -- this has been a long day for a lot of people. I thank you for your participation. We will adjourn and hopefully we will see you back on June the 10th.

(Hearing Exhibits 10 through 14 were retained by Hearing Officer Cynthia Ervin.)

STATE OF ILLINOIS)
) SS
COUNTY OF MONTGOMERY)

C E R T I F I C A T E

I, DARLENE M. NIEMEYER, a Notary Public in and for the County of Montgomery, State of Illinois, DO HEREBY CERTIFY that the foregoing ^ pages comprise a true, complete and correct transcript of the proceedings held on the 27th of May A.D., 1998, at 200 South Ninth Street, Springfield, Illinois, In the Matter of: Proportionate Share Liability, 35 Illinois Adm. Code 741, in proceedings held before the Honorable Cynthia Ervin, Hearing Officer, and recorded in machine shorthand by me.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my Notarial Seal this 29th day of May A.D., 1998.

Notary Public and
Certified Shorthand Reporter and
Registered Professional Reporter

CSR License No. 084-003677
My Commission Expires: 03-02-99