BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

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

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E X H I B I T S

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| Hearing Exhibit 15 | 30 |
| Hearing Exhibit 16 | 117 |

P R O C E E D I N G S

(June 10, 1998; 10:10 a.m.)

HEARING OFFICER ERVIN: Good morning and welcome to this fourth hearing in Proportionate Share. 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 Pollution Control Board is presiding Board Member of this rulemaking, to my right, 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 my left is Board Member Tanner Girard.

BOARD MEMBER GIRARD: Good morning.

HEARING OFFICER ERVIN: Also with us today is Marie Tipsord, Board Member Girard's attorney assistant; and Jack Burds, who is one of our hearing officers; and Chuck King. He is here somewhere today. He is Board Member Marili 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 notice and

service list in this rulemaking. Please note that if your name is on the notice list you will only receive copies of the Board's opinions and orders and the hearing officer orders in this matter. If your name is on the service list, you will not only receive those items, but you will also receive 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 Liability scheme established by 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. The second hearing was held on May 12th in Chicago. The third hearing was held in Springfield on May 27th.

The purpose of today's hearing is to hear some additional comments from the Agency and to ask additional questions of the Agency. 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 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 this morning?

Seeing none, then I will ask Chairman Manning or any of the other Board Members if they have any comments that they would like to make at this time.

CHAIRMAN MANNING: No. Just good morning. Our regular caveat applies as well with this proceeding. Just because we are asking questions does not necessarily reflect any way we are proceeding. We might have a lot of questions for you this morning.

HEARING OFFICER ERVIN: Thank you. It is my understanding that the Agency, you have some rebuttal testimony as well as some responses to some questions you would like to present this morning.

MR. WIGHT: Yes, we do. I will start by once again introducing our panel of witnesses. With me again today for the fourth hearing, on my immediate right, Gary King who is the Manager of the Division of Remediation Management within the Bureau of Land.

On my immediate left is Bill Ingersoll, who is an associate counsel with the Division of Legal Counsel at the Illinois EPA who manages an enforcement unit.

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

Behind me and to my left is Larry Eastep who is the Manager of the Bureau of Land's Remedial Projects Management Section. Excuse me. Yes, that is right. You would think I have said these enough that I would have them down by heart, but it is confusing.

We do have some follow-up today both by way of some comments and rebuttal to testimony that was delivered at the last hearing and some follow-ups to some questions that were pending, as well. I guess we will just get right to that.

One other person, Vicki VonLanken is back with us again today. She is our legal assistant who is helping with document management. Anybody who has any questions about Agency documents can see Vicki to resolve those.

We will go right to Gary King to start today's --

HEARING OFFICER ERVIN: Why don't we have them sworn in.

MR. WIGHT: Yes.

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

HEARING OFFICER ERVIN: Whenever you are ready to proceed.

MR. GARY KING: What I want to do this morning is

to -- there is two aspects to the testimony. One is to respond to some areas and questions that we had left open from the previous hearing, and then to provide, in essence, a rebuttal on some of the points that were raised by SRAC's testimony at the last hearing.

There were quite a few points that we disagree with relative to their testimony. We are not going to try to focus on all of those, but we are going to try to focus on those that we feel are most significant. And sometimes as you go through these things you find more things significant than what you thought when you first started. So I will apologize at the start for the length of the presentation.

I want to begin by summarizing, at least from our point of view, the testimony that we heard coming from the SRAC panel at the last hearing.

We saw Mr. Marder as having summarized the business sector's view on the legislative history of Title 17 with particular focus on the need to limit the liability of the private sector for cleanups.

We saw Mr. Howe as discussing the problems created for business by what has sometimes been a draconian application by the U.S. EPA of the joint and several liability principles at Federal cleanup sites. Mr.

Howe, however, did not conclude that the problems on a State level were the result of IEPA's implementation of its program, which as we have testified to, it has contained elements of Proportional Share Liability. But that the problem was this perception of liability that had been created by the way the Federal government had handled joint and several liability on a nationwide basis.

We saw Mr. Rieser's testimony as supporting specific changes in our proposal. We saw that as supporting four specific areas of changes.

First was changes in the applicability provisions. And we thought a lot of those made sense, and we had incorporated those changes with some modification in our Errata Number 1.

The second area was that he proposed that the concept of the information order be deleted, and he contended that it was not needed; that first of all, civil discovery was adequate and, secondly, that Supreme Court Rule 224 is adequate to handle information requests before the filing of a complaint.

We disagree with both of those points. First, the notion of civil discovery really doesn't help in a prelitigation area. And we think that the need for an

information order is particularly critical because we have gone to the whole concept of Proportional Share Liability. It becomes particularly important as we have talked about it in trying to identify PRPs, the need to identify PRPs, to make the Proportional Share Liability concept work effectively.

The second point is that we have reviewed things, and it is our -- we are not sure that Supreme Court Rule 224 is incorporated in the Board rules, so that it is not clear that we could even have access to that as a methodology for getting prelitigation information. That was the second point, was the information order that we had.

The third change that Mr. Rieser focused on was proposing changes in the causation provisions. And from our standpoint, what he is really suggesting is going to amount to a need to fingerprint the waste and the releases, fingerprint the waste to the releases as an element of proof. He contends that is the approach required by the statute. We don't agree with that. We think that was just going to create an impossible burden for us if that kind of approach is used.

Finally, Mr. Rieser, and this is the fourth major point that he had, he is objecting to the shifting of the burden when we came to the allocation phase. As

you recall our proposal was that the State would have the burden in establishing liability. But then when it came to the allocation phase, then that burden would rest with the respondents. And he contended that this burden shifting concept, although it is unaddressed in Section 58.9, is prohibited by Section 58.9. And then his proposal simply repeats the statutory language which I think everyone admits is not clear and that is not going to resolve difficult interpretive issues. I just don't think that approach, in the long run, is going to be very helpful as far as working with these cases.

Now, I want to go back and talk about some of the things that we covered in our initial testimony. One of the things that I focused on initially is what is the purpose of this rulemaking, and I referenced Section 48, Paragraph 5 of the Act. It is clear if you look at that that the purpose of this rulemaking is not to minimize liability for private industry. The purpose of this rulemaking is to assure that cleanup of sites occurs in a manner that is efficient and is fair to all concerned, both to the public sector as well as the private sector.

In our testimony we recognize that this rulemaking has a lot of difficulties to it. I focused on three

of those difficulties.
One was there is no real model for what we are doing here. The Board is creating a model and hopefully the Board ends up creating a model which is useful not only in this State but beyond this State. I think that -- we believe that our proposal has elements that would be useful in the areas beyond what we have in Illinois. We have tried to answer questions that I think other states are struggling with, as well.
The second area of difficulty was the whole nature that there is a limited number of sites we are dealing with. In our initial testimony we warned against skewered experience causing over generalization based on what has happened. I think to some extent if you reflect on Mr. Howe's testimony, that is what has happened. I mean, Caterpillar has had a lot of experience with cleanup sites around the country and in other states and the Federal government, and yet the experience they have had in Illinois comes down to two sites that they are working with the Illinois EPA program, and those experiences have been -- have had Proportional Share Liability concepts to them. So we have to be careful about not just taking what is a national concern and then just putting that down to a

State level without understanding what the State program is and has been all about.

The third area of difficulty that I had seen initially is how do you interpret a statute which has a lot of incompleteness to it and a lot of ambiguities to it. I testified that I saw that there was four basic principles there.

First there was the notion of liability being based on causation or contribution. That we wouldn't just have the kind of status liability that has happened with some of the elements of liability in the past.

Second, allocation would be based on proportionate share rather than being based on a joint and several concept.

Third, that there would be -- there would not be a disturbance of existing delegated and authorized programs.

Fourth, that the Board would need and was statutorily authorized to develop a workable procedure relative to the whole concept that is outlined in those first three principles.

Mr. Rieser, in his testimony, he agreed with the first three of those. But he took issue with the fourth one, not in terms that the Board should have a

workable procedure, but my emphasis on that. He felt that I over emphasized the need for having a workable procedure. His emphasis there was the emphasis should be on change, changing something. Well, that to me begs the question of what are we trying to change.

I think one of the things that Mr. Rieser was saying was that after hearing how we had implemented many of these principles, proportionate share principles in operating our program already, that the legislature wanted to change that program further, wanted to change the way we actually did things. But if you reflect back to the -- what happened in 1995 when the legislation was passed, there was not a concern at that point about the way the Illinois EPA was implementing the cleanup program. The simple fact of the matter is that nobody asked. Nobody asked in 1995 how we were implementing the program. The legislature didn't ask. The business community didn't ask.

In fact, they didn't ask until we got around to the fall of 1997 and were developing this rulemaking. Now, it is obvious that the legislature still wanted to change something, if they didn't understand our program, they, in fact, wanted to change something. And I think that Mr. Marder and Mr. Howe both spoke to

the issue that they wanted a change, and from our view what the legislature really wanted to change was this perception created by joint and several liability.

As I was talking about earlier, this perception of joint and several liability has been negative, particularly based on the way the Federal government has tended to implement it throughout the country. You know, Mr. Howe I think rightly focused on the fact that the U.S. EPA has taken a deep pockets approach to the implementation of joint and several liability with a focus on a few people and then really shift the burden to those people to bring in everybody else. That simply has not been our approach in Illinois.

So if you think about it, well, if that's kind of what is going on with the Agency's proposal and what we are doing, what does this proposal do to the Illinois program, certainly our proposal, what does it do? Is it going to make radical changes in the way the Illinois EPA has done business under its cleanup program? The answer is, no, it won't. It is not going to make radical changes.

But if you think back, when we went through the Part 740 rulemaking, where the Board was developing a regulatory program for a voluntary program, there was a foundation there. There was a foundation of a

program and that rulemaking process modified it, changed it, but built upon it. And we see Part 741, as we have proposed it, building upon what we have already.

So is it going to make radical changes? No. Is it going to modify it? Certainly, yes. Is it going to make the implicit explicit? Certainly, yes. Is it going to make significant changes? Absolutely. Again, although the changes may not be radical, they are going to be substantial. If you look at the way we really focused a lot on how we -- we talked about how we developed cases that are heading toward litigation. This is going to have a substantial change in how we develop those cases. It is going to have a substantial change in how the whole concept of orphan share is handled. That is going to be much different.

Now, if you go with what SRAC is proposing, they would impose even more stumbling blocks to effective remediation. Their causation requirements, what we perceive is a fingerprinting approach, keeping all of the burdens of proof essentially on the State, those are going to be a -- those would be major stumbling blocks. If you think about that analogy I drew in my first testimony about walking a tightrope, as far as

developing this proposal, if the Board is going to follow what SRAC has suggested, it is going to knock us off that tightrope, from our standpoint. We will end up with a program that I don't think we are going to be able to effectively implement.

So one of the key questions is -- SRAC testified, and I think very directly, that they found our proposal as being essentially joint and several liability under CERCLA, and if the notion was we are going to change joint and several liability, did we change joint and several liability. Their testimony is that, no, we didn't.

Well, we think we have made major changes from that. In a sense the only way you completely change from joint and several liability is you have no liability. Well, that is not going to be acceptable under the legislation either.

I am going to describe six major differences that I see from what we have proposed in Part 741 from the way joint and several liability is implemented under the Federal CERCLA law.

First of all is the real key Brownfields issue, and that's the status liability of current owners. We have eliminated status liability for current owners. That is a major change.

Second, there is not a severability requirement as there is under Federal law as far as proof of proportionate share.

Third, is that the allocation can be based on the type of --

MR. RIESER: Not a severability?

MR. GARY KING: Right, not a severability.

MR. RIESER: Thank you.

MR. GARY KING: The third point is that allocation can be based on the concept of how you are remediating a site.

Four, just because you are liable, that does not translate to an automatic 100 percent share as it does under -- that is kind of the fundamental precept under joint and several liability under CERCLA. Proportional liability under our proposal is going to be the norm.

Fifth, there is an orphan share responsibility, and we recognize the need to incorporate that and to include that as far as our funding aspects.

Then sixth and finally is the concept of no deep pockets approach. Again, as I was saying before, the Federal approach there, and that was something that Mr. Howe rightly complained about on a Federal level, is that they identify a small group of financially

viable PRPs and assert liability against those. And then the expectation is either that small group pays for the entire cleanup or brings in other responsible parties to help address the matter. That is kind of the deep pockets approach that is part of Superfund.

Under our proposal, it has been -- we have not -- in essence, we have never implemented our program that way. Our proposal here makes it -- by going to a proportionate share concept expressly it is clear that we have the incentive out of the box to identify as many PRPs as possible. It makes no sense for us to identify only a limited range of PRPs, because there is not the incentive for everybody else to be brought in as there is on a Federal level. Now, that is -- if you look at either the Agency proposal or the SRAC proposal, they both have that incentive for the Agency to bring in as many responsible parties as possible.

Where we differ is what is the incentive for a PRP to bring forward information about its own liability, about other potential responsible parties. It was very clear from their testimony that they saw that there was not an incentive for that. Under our proposal, yes, there is an incentive for that. We think that is important because as we -- throughout this process of developing our proposal as we have

talked to experts on Superfund allocation, they talked about the need to have as complete as possible a model of site operation in order to understand how allocation was to be accomplished. And that to move that concept forward you have to have incentives for all participants to bring forward information to that end. And so that's why it is important under our proposal that there is some incentive for PRPs to bring information forward.

So I think as I have gone over these six points I think it is pretty clear that we have accomplished that based on a goal of eliminating joint and several liability as part of our proposal and moving to a Proportionate Share Liability concept that the legislature wanted.

There was a couple of areas in SRAC's testimony where I think they misconstrued a couple of the concepts that we had included.

First is related to Section 741.210(b). That's the causation section. What we saw SRAC's testimony as saying was that they were interpreting 210(b)(4), which is the generator liability provision and 210(b)(5), the transporter liability provision, as applying to anyone who brought any regulated substance to the facility from which there has been a release.

They were construing that as being our proposal.
We don't think that is a correct interpretation of our proposal. I think it is important to read the specific words of how we tried to deal with that, and not just make assumptions about what it is saying. We have included some specific words in there to make it clear that our burden of proof goes beyond what SRAC was contending. The State is required to prove that the generator or the transporter arranged for or transported the same regulated substances or pesticides that were identified in the release. That is why the word "such" has been inserted in the phrase, any such regulated substances or pesticides at the end of (b)(4) and (b)(5). The word "such" ties back to the -- ties the release back to the regulated substances for which the arranger or transporter are connected in the earlier portions of these two subsections.
Now, we included -- we further went on and said, the phrase such regulated substances or pesticides is further modified by the word "any," so that we don't end up with a fingerprinting requirement. For us a fingerprinting requirement means that you are saying that the hazardous substance is brought to the site or the hazardous substance is in the release. We don't

think that is -- that things should go that far as far as the burden of proof, and are not required to because of the contribution requirement, liability being based on contribution.

The second area that we thought SRAC misconstrued our proposal relative to the causation and contribution requirements, is the contention that (b)(3), (b)(4) and (b)(5) are status based. We don't think they are status based. We think the liability there is based on either causation or contribution to the release. We think that what SRAC is proposing is going to be a fingerprinting requirement, and we would be required to fingerprint that a hazardous substance that comes to the site is the hazardous substance that is found in the release. We think that is an impossible burden. If somebody -- our proposal allows somebody to prove that was not the case, but it does not mandate that the State prove that up front.

I think that pretty much summarizes the responses to the issues raised by SRAC in their testimony. There were some other issues that were raised by questions at the hearing, and I want to go in and provide a response on those, as well.

The first issue is the nature of private cost recovery actions. And Chairman Manning requested a

response from the State and from SRAC on the legal question of whether there is private cost recovery allowed under the Act. I think Chairman Manning was right to be concerned that we had ignored this issue in our proposal. I won't say that we ignored it so much as we chose to focus on what we needed to assure successful operation of our program. Our concern was not so much whether there was -- those actions existed or did not exist from the legal standpoint, but whether they were going to create a ripple effect that was going to interfere with the administration of our cleanup program under the Act.

There is a couple of issues that we saw as being ripple effects. First, we were concerned that with these third party cases that there could be an orphan share arising out of those. Now, it is not an issue that we would be legally obligated to fund those orphan shares, but it would be a situation where potentially cleanup would not go forward unless the State funding was made available. We are going to be very reluctant to spend State dollars at sites where we have not been closely involved in developing the remediation and oversighting activities and so forth. If there is a third party action and the case goes to a final judgment before the Board and there is a split

on the proportionate share, you know, what happens then at that site after the completion of the case.

Another question is whether the judgment in those third party cases would impose limitations on the Agency filing its own cases at such sites. The Attorney General's office has called our attention to the case of -- it is called People ex rel. Hartigan v. Progressive Land, and the citation for that is 576 Northeast Second, 214, at page 219, where the Court really talked about the State being prevented from proceeding with litigation where there was a very close similarity of interest between the private party and the State in the initial litigation.

The second big concern is that a third party case could disrupt ongoing Agency activities. If we have issued a 4(q) notice and we are trying to proceed to get an entire cleanup at a site and a third party case is filed, that could put our Agency activities at the site in some kind of limbo pending the outcome of that case. Now, we tried to recognize those principles of concern for us when we were drafting Subpart C, and we drafted those in a way that for us avoided them.

We said no Subpart C proceeding may be initiated if an enforcement case is pending at a site. For sites where there has been a 4(q) notice, the

remediation plans must be settled before a Subpart C proceeding may be initiated. So we took some steps to try to diminish that concern for us. In addition, we said that if somehow an orphan share developed out of that Subpart C proceeding then the original people who came into that would have to absorb that share.

If the Board is going to conclude that -- and, again, that is a big if, I think, and it is really an issue for the Board to decide. If the Board is going to conclude that third party actions need to be addressed, then in our view it should not do so in this docket. The appropriate thing to do would be to set up a separate Docket B to look at that issue. I think there is at least three reasons for that.

First, I think that the concerns that we have identified relative to how our program operates are substantial. I don't think you can simply look at Part 741 and just drop some words interspersed somewhere without really impacting the entire nature of our proposal.

Second, it would have a chance, then, to get the issues raised in our proposal at least somewhat settled before opening them up to new issues that might be raised by thirty party complaints.

Third, the inclusion of a third party action in

741 is an issue that may be of interest to a much broader section of the public than the parties interested in the procedures that we have outlined in 741. I am not sure how anybody who has not attended these hearings would even be aware that this was an issue in this docket. Just to give you a little background on this, this was one of the most important issues to the SRAC committee when we were first discussing this issue last fall. When we reached the conclusion -- they reached the same conclusion for different reasons. But we mutually agreed that the proposal that would be presented would not include these third party actions.

I mean, to a lot of people who have a very deep interest in the proposal that had initially been prepared, they kind of dropped out of the discussions. So I think it would be -- if the Board is going to conclude they want to go forward on that issue then I think it should really be reserved for Docket B, so that everybody can look at it in a fairer way that everybody gets their roles heard.

Well, you have heard enough from me. Thank you.

HEARING OFFICER ERVIN: Thank you.

MR. WIGHT: We have just a couple more items for which we owe responses. There was a discussion, I

believe, between Board Member McFawn and David Howe concerning sanctions, and the question asked by Member McFawn was what sorts of sanctions should be used against a dilatory party, whether it should be monetary sanctions or a fee schedule or something like that.

Bill Ingersoll has a few remarks on that point. Excuse me. That was in the transcript at approximately pages 145 and 146.

MR. INGERSOLL: First of all, I would like to let the Board know that Mr. Dunn asked me to advise that he and Ms. Wallace and Mr. Morgan all had previous commitments and they apologize for not being here, but they are still involved.

At any rate, the sanctions that we contemplated are the ones that frankly are currently in Section 101.280. I think there are a list of seven. I mean, those are examples of sanctions that the Board would intend to exercise. We don't agree with the attorney fee suggestion that was within the question, but at any rate, there is a list here and I know that changes are proposed, and those will be worked through as they are. But whatever the sanctions that are in the Board's procedural rules are those that -- are the ones that we contemplate.

MR. WIGHT: And the fourth question for which we owed a response, Member Hennessey had asked generally at approximately page 175 of the transcript what was the Agency's response to Ms. O'Sullivan's testimony regarding inadequate funding sources and where the money is going to come from for funding orphan shares in the future. This discussion took place at approximately pages 162 to 167 in the transcript.

John Sherrill is going to provide some follow-up testimony on funding issues. In support of that we have an additional exhibit which I will go ahead and ask John to identify now and then he will provide additional testimony, and then perhaps Gary King will have some follow-up remarks to John's testimony, as well.

John, I have handed you a document that has been marked Exhibit 15 for identification. Would you please take a look at the document. Do you recognize the document?

MR. SHERRILL: Yes.

MR. WIGHT: Please tell us what it is.

MR. SHERRILL: It is a document that I prepared earlier this week to discuss projections for remedial work that will tie together some funding issues also.

MR. WIGHT: Okay. Thanks very much. At this time

I move to admit this document as Exhibit Number 15.
HEARING OFFICER ERVIN: Any objections to the admittance of this document?
MR. RIESER: May I see it, please? Thanks.
HEARING OFFICER ERVIN: Do you have some additional copies?
MR. WIGHT: Yes, there are copies. I guess there have already been copies placed on the back table. Does anyone else need a copy?
HEARING OFFICER ERVIN: Are there any objections to the admittance of this document?
Seeing none, then the document entitled, Hazardous Waste Fund, Fiscal Years 1998 through 1999, Projections for Remedial Work, will be admitted into the record as Exhibit Number 15.
(Whereupon said document was duly marked for purposes of identification as Hearing Exhibit 15 as of this date.)
MR. SHERRILL: What I would like to discuss -- the question was regarding funding sources, and that was on Gary King's prefiled written testimony on page 11 where he discusses cost recovery litigation which changes from year-to-year. Our solid waste fund transfer, that is 2 million dollars a year, the hazardous waste disposal fees and penalties that we

ensue. So Gary King had addressed that on page eleven of his written testimony.

One of the Board Members last week at the last hearing had asked about monies, and I wanted to elaborate on that question and then also do some follow-up to some comments that David Howe made.

In this table that you are looking at, the fiscal year runs from -- will be ending here, the fiscal year of 1998 will be ending June 30th, and the fiscal year of 1999 will be started July 1. And there was a question asked how much of the Hazardous Waste Fund money is spent on contractors versus salaries and so forth, salaries of State personnel.

What I have done here is I have listed these sites. This first category, Hazardous Waste Funded remedial investigations that are or will undergo Illinois EPA contractual work, there is nine in fiscal year 1998 and eleven in 1999, for a total of 20 distinct sites. That is monies that -- I want to make clear that that is money paid directly to contractors for investigative work at sites. So we are not talking about money paid for salaries or any of the other uses of the Hazardous Waste Fund.

Site cleanup activities, Hazardous Waste Funded remedial cleanups that are or will undergo an Illinois

EPA led contractual work, there are six in fiscal year 1998 and twelve in fiscal year 1999. As you can see, for our fiscal year 1998 we plan on 3.250 million dollars. For fiscal year 1999, 6.435 million dollars. So these are monies paid to contractors for cleanup activities.

This third category is sites under Illinois EPA review to determine if remedial action is warranted. In my original testimony when I went through the whole process of how a site progresses to eventually warranting a 4(q), in fiscal year 1998 there were five sites that we are reviewing that are at the final stages of being issued a 4(q). They have not incurred contractual money, but they have, as you can see the little asterisk, there has been considerable IEPA personnel and laboratory expenses to get it to that point. So when I responded last week where I said, well, all of the money on this Hazardous Waste Fund is going toward these type of sites, that is what I meant by that. Then in fiscal year 1999 I plan on ten sites being under a more intense review.

This fourth category, sites funded by a responsible party, typically under a consent order, I wanted to bring this into this chart to let you know that there is 48 sites that we are working on this

year that we did not have to hire a contractor, but these were sites that were brought right to the precipice of being issued a 4(q) and the responsible party finally did cleanup.

So when you look at all of these sites, and there is 46 next year, when you look at all of these sites, there is 94 distinct sites, and these are currently being managed by what is called the State Site Unit. The State Site Unit is the unit within the Bureau of Land that handles the type of sites that these hearings have been discussing. So I would say these 94 sites are in the queue or they are on the radar screen for an Illinois EPA directed Hazardous Waste Funded remedial action. Or they, for several of these in 1998, they are currently undergoing an Illinois EPA directed remedial response, or some of them have actually been finished in this fiscal year.

So I wanted to give you the two years to let you see to kind of contrast one year to another year. For example, like, in the second category, the site cleanups, there is an overlap with seven of the sites from the first category. In other words, some of the sites that we are investigating this year, we are going to be doing a cleanup this year, in the next fiscal year. So I wanted to let you see these are the

kind of magnitude of dollars that we are talking about that are out-of-pocket dollars for spending on some of these sites.

I wanted to bring that up first before I touched on a couple of remarks that David Howe remarked at the last hearing about newer contamination and older contamination. The remark was made that we are addressing primarily -- by David Howe -- sites with older contamination. Well, I was going through our records, and if you look at this chart, of these in fiscal year 1998 and fiscal year 1999, I estimate that ten sites are from newer contamination and ten sites are from older contamination, in looking at the site investigation and site cleanup categories. And so I would take issue with saying that these are all old contamination sites.

By newer contamination I would -- I am saying activities or contaminations or releases, I just picked a number let's say from 1985 to the present. For example, two sites in this cleanup category are sites that are what I would call newer open dumps, and I am calling them open dumps, but actually they are several acres from a party who would go around various states and say he was an environmental contractor and then he would clean up people's waste and take it to

this piece of property that he had bought under a false name, and this was a person who was doing this in the 1990s. So, yes, what I am trying to say is, yes, we do have new contamination type sites.

And then tying another remark that David Howe made about there is no evil intent on these parties that get tied into this, one of the very first sites that I worked on when I was hired at the Agency was a post 1990 cleanup site, and three individuals were found guilty by a court, and they were either handed a class three or class four felony for illegally burying hazardous waste on one of the individual's mother-in-law's property. So I won't characterize it as evil intent. I would say that on several sites that we deal with a court has found these individuals guilty of environmental crimes. So not only violations of the Act, but environmental crimes.

Kind of to further elaborate on that, in my -- you could take this as anecdotal information, but in my meetings with the SRAC and the Illinois Environmental Regulatory Group personnel and the businesses that they represent, I would say that in whole that they do respond to their environmental responsibilities. So most of the sites on this chart that you are looking at, where I have these 94 sites that I am talking

about, most of the sites that I would think that the State would be responding to are not business interests represented by SRAC and IERG, because the members that I have met in IERG, when I see the businesses that they represent or the companies that they represent, they do respond to their environmental concerns.

Yes, there are a few, two or three sites in here that they were a generator at, but I would say most of these sites that I have on my list that we are going to be working on are not sites totally represented by IERG or SRAC. But if I were to name names, and I am not, they are people you have never heard of, sites you have never heard of.

Like this one individual, this guy who would say that he was an environmental contractor, and there was an open arrest warrant for him for two different states for several years. When they finally caught up with him, he served time in a correctional institute for environmental crimes.

So I just wanted to make that point, that that individual and those kinds of individuals are not at these hearings. I mean, they are not going to show up. I mean, with him having an outstanding arrest warrant, he would be unwise to show up. So we may not

be seeing the type of sites -- I wanted to bring that up to say that these kinds of sites and the earlier exhibit that I had on the type of sites, very many of those sites do act environmentally irresponsible. So that's all I wanted to say about that.

MR. INGERSOLL: May we have a moment?

(Mr. Ingersoll and Mr. Sherrill confer briefly.)

MR. SHERRILL: What Bill was asking me, on this chart, this category of sites funded by a responsible party typically under a consent order, not all of those sites -- a few of those -- several of those sites have 4(q)s, and that gets back to my earlier definition. When we issue a 4(q) it is the trigger to let parties know that we are going to spend State funds. So a lot of these sites may be under let's say -- are in the stages of a consent order or actually under a consent order, and they do respond to their -- the responsible party does perform the remedial work. But it is not uncommon that we will issue a consent order with someone and they still don't do their work, and then we will issue a 4(q) notice. That is just to further explain on that.

I didn't know if Gary wanted to respond.

CHAIRMAN MANNING: I just had a couple of questions so that I understand this exhibit, Mr.

Sherrill. You are talking about 94 sites, but as I add up the column there are 69 for 1998 and 79 for 1999, I think. What you are saying with the 94 number is that some of these sites appear in different categories at different times --

MR. SHERRILL: Exactly.

CHAIRMAN MANNING: -- so there is 94 distinct sites for FY '98 and FY '99?

MR. SHERRILL: Yes, as a cumulative. The reason I say that is -- to kind of get back to my earlier testimony, is that I don't suddenly just hear about a site today and the next day we issue a 4(q). It is a time element there of days, weeks, months, and years. And so while we are currently -- I have 94 sites on my radar screen that could be issued a 4(q). Because it is kind of hard to just look at one slice in time at one particular point because it is hard to say, well, is this site actually at the stage where you need a 4(q). Well, it is a cumulative effort gaining information.

CHAIRMAN MANNING: And your FY '99 numbers would be projections, would they not?

MR. SHERRILL: They are projections, but our fiscal year 1998 starts in less than a month, and I would say that these are -- the first, second, and

third category are pretty firm. We already know which sites we plan on working on. Then this last category, sites funded by a responsible party, more than half of these sites are carryover from the previous year. So it would kind of get more complicated if I tried to break up the numbers anymore than that.

So I wanted to present this to show, again, we know which sites we are going to be working on in 1998 and 1999 and we kind of know how much money we are going to be expending out of the Hazardous Waste Fund.

HEARING OFFICER ERVIN: Does this conclude the Agency's testimony?

MR. WIGHT: Yes, it does.

HEARING OFFICER ERVIN: Thank you. Then we will open it up for questions for the Agency.

Are there any questions for the Agency at this time? Mr. Rieser.

MR. RIESER: Yes, I have some questions on Exhibit 15, as long as we are here.

Mr. Sherrill, in your testimony on May 27th, specifically at page 202 of the transcript, you testified that the 4.216 million dollars was the Bureau of Land remedial related expenses from the Hazardous Waste Fund. For fiscal year 1998 was the

same number -- was approximately the same number allocated to Bureau of Land remedial related expenses?

MR. SHERRILL: I didn't bring that figure with me, but it would be much higher because, as you can see in fiscal year 1998, we are allocating -- if you add these, the $1,115,138 and the 3.2 million dollars, that is money that we are actually issuing to contractors.

MR. RIESER: Right.

MR. SHERRILL: So whereas I testified before that I would also consider under the term remedial is Agency payrolls for project managers and our Agency laboratory. So I would say we are spending more in 1998.

MR. RIESER: I hate to send you back to the books especially since this is the last hearing. But could you say what percentage for fiscal year 1998 of funds allocated to the Bureau of Land remedial related expenses what percentage this 4.3 million dollars in Exhibit 15 represents?

MR. SHERRILL: That I don't know, but this --

MR. GARY KING: I think another way to look at that, the figure that we gave at the last hearing was looking at FY '97. We gave a figure of approximately

4.2 million dollars that went to the Bureau of Land for remedial activities, and then I believe it was .8 million went to the Bureau of Water for groundwater protection activities. In FY '98 the Bureau of Water, groundwater protection activities would have remained approximately the same at about .8 million, whereas the Bureau of Land allocation will have gone up significantly out of that total. So it will be -- it would be -- if that was about 84 percent in FY '97 that was going to the Bureau of Land it would be considerably higher than that for FY '98.

MR. RIESER: And considerably higher still for FY '99?

MR. GARY KING: Correct, yes.

MR. RIESER: What accounts for these increases in funding for these activities?

MR. SHERRILL: What would account for it is when we have meetings on deciding what sites --

MR. WIGHT: John, hold on a second.

MR. GARY KING: Let me enter before John gets too deeply involved in that. If you recall the 2 million dollars that was transferred from the Solid Waste Fund to the Hazardous Waste Fund, that began in -- the first initial quarterly transfer began in July of 1996, and so there has been -- that money did not get

spent immediately in 1997, so there has been an accumulation of some of that money from that first year or so. So that's allowed for a rise in that. And also we were -- we have had some significant cost recoveries in the last couple of years that has allowed us to provide this money.

MR. RIESER: Those were the cost recoveries that were in your original table in your testimony?

MR. GARY KING: That's correct.

MR. RIESER: Okay. Thank you. And just to clarify and to follow-up on Chairman Manning's questions, what you are saying is that there are sites listed for fiscal year 1999 that are also listed for fiscal year 1998. So of the eleven sites listed for investigation under 1999, some of these also had investigations funded for fiscal year 1998; is that correct?

MR. SHERRILL: Actually, the site investigation row, that site investigation, those are -- the nine and eleven are two -- those are 20 distinct sites.

MR. RIESER: Okay.

MR. SHERRILL: The six is a distinct number in the second for site cleanups, but then this number of sites where it says twelve, seven of those are overlapped from the site investigations, some from

fiscal year 1998 and some that -- that is what is maybe kind of confusing. Some of the investigation and cleanup we will do in the same fiscal year and some we won't.

MR. RIESER: Okay. Thanks. Turning to Gary King's testimony, looking at the SRAC proposal, what is the specific language that you contend requires the State to fingerprint the waste?

MR. WIGHT: Bear with us just a few moments.

MR. RIESER: Sure.

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

MR. GARY KING: What we were reflecting on is the draft of the language in 741.210(a) under the Exhibit D to Mr. Rieser's testimony, and how that we saw that being interpreted in response to the questions that we raised at the last hearing.

If you look at 210(a)(1) and (2), what we saw that as doing is creating a two part requirement relative to establishing liability. First you have to meet the causation requirements under 22.2(f) and then once you have established that, then you have to show that those -- there was a specific connection between those materials and the release. And that's what we were reflecting on, and that's what appeared to be also the responses to the questions at the last hearing.

MR. RIESER: Okay. It is your contention that your proposal in 210(b)(4) and (5), where the State has to demonstrate that the party arranged for the disposal at a site where there was a release of such regulated substance does not require fingerprinting?
MR. GARY KING: Right.
MR. RIESER: So it is the difference between such regulated substance in yours and that regulated -- that substance in the SRAC proposal? Or in or under the site that was identified and addressed by the remedial action taken pursuant to the --
MR. GARY KING: Well, we didn't say any such regulated substances.
MR. RIESER: So let me make sure I understand. When you say any such regulated substance, for a person to be liable as a, quote, generator under (b)(4), if the site is a site -- if the contaminant of concern at the site is benzene and that person takes Xylene to that site, is that person a liable person under 210(b)(4)?
MR. GARY KING: And benzene is the release?
MR. RIESER: Yes, benzene is the release.
(Mr. Wight and Mr. King confer briefly.)
MR. GARY KING: I just want to restate it for the record so we don't have a yes or a no, and no one

remembers what the yes or no was answering.
If you had a situation where the release was benzene, and let's use a totally different class of compound to make it real clear, and the PRP sent lead to the site, that would not -- that would be not enough to show liability.
MR. RIESER: Okay. Now, taking that same hypothetical, if there were two separate releases on the site -- well, let me put it this way. If there was a separate -- if the facts of the site demonstrated that there was a separate operable unit and there was one set of tanks on the north end of the site and another set of drums on the south end of the site, what the person did was send the material, the benzene to the north end of the site, but the benzene release that you are concerned about was from the drums on the south end of the site. Would that person still be a liable party under (b)(4)?
(Mr. Wight and Mr. King confer briefly.)
MR. GARY KING: Okay. I will restate the example once again just for clarity on the issue. If you had a site that had two distinct operable units, and there were releases from both units, but the releases themselves were -- let me go back. I am not sure. I am going to give you the wrong example. That is not

going to be the right example. Let me go back.
If you had a site that had two operable units, okay, and let's say a north unit and a south unit, and there is a release discovered from the south unit, but there is no release from the north unit, and the responsible party sent benzene to the north unit, and the release at the south unit was benzene, the responsible party would not be liable as to that benzene that was sent to the north unit relative to the release from the south unit.
MR. RIESER: Because it was not involved in the release that was the subject of the work that you were doing at the site?
MR. GARY KING: Right, that is correct.
MR. RIESER: Thank you.
HEARING OFFICER ERVIN: Mr. Rieser, did you have a follow-up question? I think Mr. Rosemarin had one.
MR. ROSEMARIN: I was going to ask a question with Mr. Rieser's permission. If you want to continue --
MR. RIESER: That is okay. I was going to go to a different area.
MR. ROSEMARIN: I would like to pursue that --
HEARING OFFICER ERVIN: Could you state your name for the record.
MR. ROSEMARIN: I am sorry. My name is Carey S.

Rosemarin. I am an attorney with Jenner & Block, representing Commonwealth Edison.
Mr. King, in taking that example one step further, what would be the result if the PRP at issue was unable to, in your example, carry his burden of showing that that benzene was not his?
(Mr. Wight and the IEPA panel of witnesses confer briefly.)
MR. GARY KING: Based on the information that you have provided in the hypothetical that responsible party could be liable.
MR. ROSEMARIN: Thank you.
MR. RIESER: I am sorry. Which is -- is that an answer to Mr. Rosemarin's question where there was not sufficient information to document whether -- that party did not have sufficient information to document whether it sent benzene to one unit or the other unit?
MR. GARY KING: Yes, that's correct.
MR. RIESER: Okay, just so I understand the question. Thank you.
HEARING OFFICER ERVIN: Mr. Rosemarin, did you have any other questions?
MR. ROSEMARIN: No, I yield to Mr. Rieser.
BOARD MEMBER HENNESSEY: I have a question.

HEARING OFFICER ERVIN: Sure.
BOARD MEMBER HENNESSEY: Mr. King, whose burden would it be in this situation to show that -- I will start over.
You are assuming that it would be the -- once you had shown that the generator had sent benzene to the site, the burden would shift under the Agency's proposal to the generator to show that the benzene released was from the south operable unit and not the north operable unit?
MR. GARY KING: I think in effect that is what would happen, because what the -- again, what was being emphasized to me as we were talking about this, you know, there is lot of missing information in these hypotheticals. The information that we would have in approaching the site was that there had been material sent to the site. There is some record of the hazardous substance benzene having arrived at the site.
Now, we may not know directly where it went, but we have evidence that that regulated substance is in the release that this person sent to that site. So the presumption here then would be that that is part of the release and was a contribution to the release. The respondent then certainly would be fully entitled

to show that, no, that benzene went to a different part of the site, that they can -- that they establish that it did go to another part of the site, that it does not have a nexus relative to the release. Then there would be a disconnect, that there would be a severability issue there at that point. You have proven a disconnect between what happened and what material you sent to the site where the release occurred.

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

MR. GARY KING: It would also -- it also could be the case, although I would not see this as generally happening that often, that the records might be that clear as to where the material went to at a site in which case, you know, that would be information in our records and we would make a decision based on that information. And generally if we can exclude somebody as far as being a part of the process we will.

BOARD MEMBER HENNESSEY: But your burden is basically carried, though, at least under your proposal, if you can prove that somebody sent benzene to the site, and then if the PRP wants to argue and dig up the witnesses to show that it only went to the north unit rather that the south unit, that is their problem or their burden?

MR. GARY KING: I think that's a fair interpretation.
BOARD MEMBER HENNESSEY: Okay. Thank you.
HEARING OFFICER ERVIN: Are there any additional questions for the Agency? Mr. Rieser.
MR. RIESER: Mr. King, I want to go back to something else. You identified as a difference between -- there are many differences you identified between the Agency's position and SRAC's position. Was the incentive for the -- that under the Agency's proposal PRPs had larger incentives to bring forward information about the site; is that correct?
MR. GARY KING: That's correct.
MR. RIESER: Am I correct that the incentive for PRPs to bring that information forward is contained in 741.210(d)(3)?
MR. GARY KING: That is correct that there are incentives contained there. And I think it is also contained in the nature of the information order capability as well.
MR. RIESER: The information order is a matter of having the Board order people to present information, but the incentives in the process for PRPs to bring it forward is contained in 210(d)(3)?
MR. GARY KING: Right, coupling that with the

burden shifting as well. That is part of that issue.
MR. RIESER: Right. So the incentive for PRPs to bring information forward is the possibility that they don't -- that if they don't, they may get stuck with a larger share than their own records would document, assuming that they had any?
MR. GARY KING: Right.
MR. RIESER: Okay. So the threat is that they get a larger share than whatever the proportion of the responsibility might be at a site?
MR. GARY KING: I don't think that is fair to characterize it that way. Just because their evidence shows one thing, that does not mean that the share that they get is not a proportionate share. It still is a proportionate share. It is proportionate share based on the facts as introduced and understood in the record of the case.
MR. RIESER: Is it your position that a PRP looking at this program, this regulation, if the Board should adopt the SRAC proposal with respect to burden of proof and causation, that PRP would not have the same information to bring forward, whatever information they had with respect to the site?
MR. GARY KING: I think certainly the incentive is it not as great. I think that is what you testified

to. I think in response to the questions from the Board that's what I understood you saying.

MR. RIESER: All right. I understand your answer. I disagree with it, but I understand it. Thank you.

Looking at the Errata 1, Exhibit 14, with respect to the applicability issue, the language you propose is different in some respects from the language that SRAC proposed. My question is what the -- whether that was intentional or whether you thought it was more editorially clear or what was the purpose of that.

MR. GARY KING: We conceptually agreed with what you had. We thought our changes were editorially better. We thought that your proposal had some wording in it that to us seemed to be redundant, and there was some issues as to whether this should be placed in a separate subsection or should be grouped with some of the other applicability provisions. So we put those together. I think that the changes are basically editorial in nature.

MR. RIESER: Okay. Under your proposal, this would not apply to the owner or operator of a TSD site, a permitted TSD site, whether or not the Agency was bringing an action against that owner for

violation of TSD regulations; is that accurate?
MR. GARY KING: Right, that owner or operator could not raise proportionate share as a basis for not complying with RCRA requirements.
MR. RIESER: Well, that's the question. To say one of the differences I see, and this is why I asked the question, is that in the proposal that we had we talk specifically about actions in which those violations are alleged and the requirement that this be an action which those violations are alleged is not in your -- isn't in your proposal. I am wondering if that was a substantive difference or an issue on which there just wasn't sufficient clarity.
MR. GARY KING: Well, as we look at that State alleges language, and probably that was our original language back in the fall of 1997, we looked at that and concluded that it was just setting up a condition for this to operate that didn't -- that was more confusing than clarifying. And that to -- it made more sense to simply say that this part does not apply.
MR. RIESER: Is it your position that if the State brought an action to recover its costs against an owner of a TSD facility, that proportionate share would apply even if there were no allegations or proof

that that owner had violated RCRA regulations with respect to that facility?
(Mr. Wight and the IEPA panel of witnesses confer briefly.)
MR. GARY KING: I am not understanding the hypothetical.
MS. ROSEN: Let me try to rephrase the issue in a different light. This may just be a miscommunication.
Is it your position that these proportionate share procedures would not apply to any instance where the State is bringing an action against an owner of a permitted TSD facility even when the costs that you were seeking to recover were spent in regard to a release from something other than what was actually required to be permitted as the TSD? That is not making it any clearer.
MR. INGERSOLL: I think you are talking about a facility that has a RCRA permit that may be remediating an historical release -- Caterpillar, okay. They have RCRA units, they have historical contamination. Is that the issue?
MS. ROSEN: That's one of the -- that could be the issue.
MR. INGERSOLL: Okay. So they have a release that

didn't occur from the RCRA units?
MS. ROSEN: Correct.
MR. INGERSOLL: Is that the hypothetical that you want to --
MS. ROSEN: Let's focus on that, because --
MR. INGERSOLL: That's one we know.
(Mr. Wight and the IEPA panel of witnesses confer briefly.)
MR. GARY KING: The way this is drafted, the owner or operator would not be able to assert proportionate share in that situation.
MR. RIESER: So this is solely an owner or operator of a TSD facility that never gets to take advantage of proportionate share even if the claims being alleged have nothing to do with violations of RCRA regulations?
MR. GARY KING: That's correct.
MR. RIESER: And the same would be true of an owner or operator of an Underground Storage Tank System?
MR. GARY KING: That's correct.
MR. RIESER: Thank you.
CHAIRMAN MANNING: If I might ask Mr. Rieser, that is different than your proposal?
MR. RIESER: Yes, I would interpret that as being

different than my proposal which was designed to say when the State is bringing an action under -- alleging that there are violations of RCRA regulations for which that owner or operator is responsible under those regulations, that person can't use proportionate share to get out from those regulatory responsibilities.

But, for example, I don't think there is any -- well, I know there is no right of -- well, there is no right of cost recovery under RCRA or under the UST. So our proposal was definitely focused on the issue of when -- on the specific issue that the State has raised, which is when they bring a RCRA action they have to be able to enforce RCRA regulations against those people responsible for it, but --

CHAIRMAN MANNING: And you don't believe your proposal cuts into that?

MR. RIESER: No, no. I think that is the importance of why it is written the way it is in terms of actions alleging violations of RCRA or the Underground Storage Tank regulations for exactly that purpose. It is as narrowly focused as it could be, in our opinion, and as it should be in order to accomplish that end. I am not -- although I appreciate what the Agency has done, my questions were

designed to find out whether that change from that narrow focus was intentional or a miscommunication on all of our parts.

HEARING OFFICER ERVIN: While we are on that session on the Errata Sheet I have a question. In 741.105 --

MR. WIGHT: Excuse me.

HEARING OFFICER ERVIN: Oh, I am sorry.

MR. WIGHT: Could we confer just a moment? We may have some follow-up before we leave this subject.

HEARING OFFICER ERVIN: Certainly. I am sorry.

(Mr. Wight and the IEPA panel of witnesses confer briefly.)

HEARING OFFICER ERVIN: Okay. Mr. Wight.

MR. WIGHT: We have nothing to add. We may add some material in the comments.

HEARING OFFICER ERVIN: Okay. Thank you. I had a question on Section 741.105(4)(b) on your Errata Sheet. It is my understanding that the Agency believes that Section 58.9 is limited by Section 58.1; is that correct?

MR. GARY KING: That's correct.

HEARING OFFICER ERVIN: Okay. Section 58.1 only talks about sites that are subject to closure and not corrective action, but your (4)(b) talks about sites

that are subject to closure or corrective action. How do you reconcile those two?

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

MR. GARY KING: We are trying to recall whether that is the phrase that we used in Part 740, which right off the tops of our human heads we don't recall if that is.

MR. WIGHT: Immediately where that came from was from Mr. Rieser's proposal. That was the language that -- we were working his language into our proposal in a different fashion and we lifted that language from Mr. Rieser's proposal.

HEARING OFFICER ERVIN: So it is the Agency's position that it does not apply to sites that are subject to corrective action?

MR. GARY KING: No, I think the converse. I think it is just -- we took it from their language, and I think they pulled it from something else, and now we are just trying to remember where it comes from exactly. But if you look at the 58.1, a lot of times what happens in legislative language is that a general term is used like closure, that is not intended to be used in the strict regulatory sense.

You can have a site that is subject to closure or corrective action requirements for purposes of RCRA

although there is -- it has a meaning. There is a difference in meaning, but for purposes of what we are talking about here it does not seem like it is a difference with a lot of significance.

HEARING OFFICER ERVIN: So it would be your position that closure or corrective action means basically the same thing?

MR. GARY KING: Yes, for purposes of Section 58.1.

HEARING OFFICER ERVIN: I think we have a couple more questions on the applicability.

CHAIRMAN MANNING: Mr. King, in our last meeting Member McFawn asked Mr. Rieser a series of questions related to 58.9 and its potential applicability to allegations of violations of Section 9 or Section 12 of the Act. I don't know if you recall that, but it was in terms of air pollution violations or water pollution violations. And I believe Mr. Rieser's response, and I might ask him these questions as well to follow-up later, was that indeed I believe 58.9 could be utilized in proportionate share. In other words, could be utilized in the context of an air pollution violation or a water pollution violation.

Does the State agree with that response? I guess then I would ask as well in terms of the nature of

58.9 being the question of remediation, are we only talking about the connection with Section 9 and Section 12 if we are actually talking a lot of remediations conducted pursuant to Section 9 and Section 12, which is hard for me to envision, actually. The reason I think probably this comes under the land division and your auspices more generally is that remediation is more obvious in the land area than it is in the other two.

I guess what I wanted to do is get the Agency to speak on the record about that issue, if you would.

MR. GARY KING: The connection is to the remediation aspect, and it has to be distinguished from a situation where there is an attempt to prove noncompliance with a specific requirement that grows out of either the Clean Air Provisions or the Clean Water Provisions of the Environmental Protection Act in which case the Proportional Share Liability concept would not apply.

Now, there would be a potential -- if you think back, and this kind of goes back to kind of the TACO concept, one of the pathways of risk is inhalation of contaminants, and contaminants are inhaled via an air situation. So there would be a potential for us as part of a remediation of a site to allege that Section

9(a) was being violated because the contaminants would be getting in the air and being inhaled at a level that was not healthful for humans.

If we then went ahead and did a remediation to address that inhalation risk, then I think this -- these provisions could apply. That would be much different from correcting in a pollution control facility so that emission standards are met, in which case it would not apply. It would not be related to the remediation at that point.

CHAIRMAN MANNING: Thank you. Another question on that, is it the State's position, and I think I heard this more from the Attorney General's office than I did the EPA, but in terms of the applicability of Section 58.9, is it the State's position that it is only applicable to actions brought under 22.2(f) and, if so, doesn't 22.2(f) pretty specifically limit itself to questions of cost recovery and not questions of remediation? And could you, if you would, expand on the State's position regarding the connection between 22.2(f) and 58.9?

(Mr. Wight and the IEPA panel of witnesses confer briefly.)

MR. GARY KING: I am not sure if this is going to directly respond to the question, but then it wouldn't

be the first time I have not responded directly. I will try to give the best answer I can.

In a complaint -- when the Attorney General is filing a complaint seeking remediation of a site, okay, normally what is going to be alleged is a combination of violations of the Act. There is -- typically there is going to be a 12(a) count, a 12(d) count, potentially a 21(a) count, and in some instances this would be much more rare, there would be a 9(a) count. And then if we have expended any money doing preliminary investigative work then that would include the 22.2(f) count. And I think all of that would get rolled into a Proportionate Share Liability proceeding. That's the way I would see it.

HEARING OFFICER ERVIN: Mr. King, did you have a question?

MR. CHARLES KING: Yes. To expand on that question of Chairman Manning's, in Exhibit B to Mr. Rieser's testimony, their proposed language for Section 741.210, Part (a)(2) of that, it says the State can only recover its costs from or with regard to the performance of remediation by any person that demonstrates the following, one, that that person is liable pursuant to Section 22.2(f) of the Act.

So then it would be the Agency's position that --

I know that you didn't bring it into yours through the Errata Sheet. But do you think that is an inappropriate condition to put on liability?

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

MR. GARY KING: Yes, we would disagree that it should be laid out that way. We have laid things out in our draft of 22.2 -- excuse me -- of 741.210 in terms of five categories of liable parties.

MR. CHARLES KING: All right. On the general applicability, the way you have it laid out is in terms of seeking to require or seeking to recover. Is that different from an action that is brought seeking an order to cease and desist from violating, for example, Section 12(a)?

Or maybe to explain that a little more, under Section 12(a) or other sections with general prohibitions on pollution, no person shall cause or allow, for instance, water pollution. So is that obligation or that prohibition impacted by the provisions that say that no -- that you can't bring an action to seek to require someone to remediate something beyond their proportionate share for it?

MR. GARY KING: I think that is one of those issues where the parties and the Board will have to look at what the specifics of the complaint and the

fact situation are. If it is a case where somebody is alleging a violation of a surface water quality standard from a discharge from some kind of a wastewater treatment plant, and somebody is looking to make sure that that wastewater treatment plant is meeting the property standard so that there is not a surface water violation, then that is not a removal or a remedial action, I don't think, within the context of the way it is defined in Title 17. And I don't -- this is more general language but, you know, at some point it is difficult to try to make things real specific without causing other difficulties, I guess.

CHAIRMAN MANNING: If I might follow-up on the question that I asked, because I think this is kind of getting to the same issue. If the State has filed a complaint against two or more parties and it alleges a 9(a) violation, a 12(a) and (d) and a 21(a) violation, but does not allege a 22.2(f) -- in your example back to me you were alleging part of it as a 22.2(f) because I believe some money had been expended.

But let's say that with all of the violations alleged that the relief being sought by the State was a remediation and not just penalties, or maybe not penalties at all but maybe the relief being sought in the enforcement action was a remediation of the site.

It is the State's position, then, that even though you have not expended any money yet the Proportionate Share Liability as set out in 58.9 would be applicable in that matter?
MR. GARY KING: Yes.
CHAIRMAN MANNING: Okay.
HEARING OFFICER ERVIN: Chuck King.
MR. CHARLES KING: Then if I could just expand a little bit on the other issue that I was asking about, if a person -- say you have a situation where there is a piece of property and there is something leaking into the groundwater into a stream off of it, such that the property owner could arguably be liable for allowing water pollution. Would Proportionate Share Liability be a defense or could that be interposed to obviate that party's obligation to not allow water pollution, if they can come in and say, well, we were not the ones who proximately caused it or we are not completely responsible for it?
MR. INGERSOLL: I think that they could appropriately be required to stop the continuation of the release. Whether or not there is enough evidence to warrant them being required to do the entire cleanup, that probably is going to need a lot more facts.

MR. CHARLES KING: Okay. Thank you. Then also on the issue of applicability, Section (c)(6) of your revised revision 741.105, which I understand was taken from Mr. Rieser's suggested language, limits -- appears to me to limit the other conditions to places where Federal law conflicts with the application of the proportionate liability proceeding. However, under Subsection (4) above that, in Paragraph (4) above that, it appears that a person could be excluded based on State permitting requirements. Are those -- do you see that that might present an inconsistency? How are you envisioning paragraph (6) there operating?

MR. GARY KING: Our intent with (c)(6) was to provide a -- I hate to use this term because I used it earlier in a different context, but I will use it again anyway. That is to provide kind of a safety valve provision. We included something similar to that in our Part 740 rules, so that if we get in situations where the Federal government decides to approve something as proceeding in a different fashion than what they currently allow that there will be a mechanism to deal with that and to allow that to occur.

MR. CHARLES KING: So under paragraph (4) above

someone who is, for instance, subject to closure and corrective action requirements under state laws or has a permit issued under state laws, and the Federal laws are silent on it, would still nevertheless be excluded notwithstanding paragraph (6)?

MR. GARY KING: That's right.

MR. CHARLES KING: Okay. Finally, one other thing on this subject. I believe you had mentioned earlier that five categories of parties. Is it your position that the people listed in 241.210(b)(2) through (5) are as a matter of law -- that people in those categories as a matter of law would have proximately caused or threatened releases or substantial threats?

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

MR. GARY KING: As we see it, there is two distinct concepts here. There is the nature of cause and proximate cause, and then there is also the context of contribution where there has been a proximate cause. So, in essence, if you have -- if somebody has proximately caused a release, they are liable. But if somebody has also contributed to the release they are also liable. So I guess I was -- I would be reluctant to say that (b)(2) through (5) means that there is a legal finding of proximate cause, because the statute talks in terms of both

causation and contribution.
MR. CHARLES KING: Where are you getting the contribution part of that?
MR. GARY KING: If you look in 58.9(a)(1) the phrase -- the word contributed is used in 58.9(a)(2)(a). It is used in 58.9(a)(2)(b). It is used in 58.9(c). It is used in 58.9(d).
MR. CHARLES KING: You say it is used in (a)(1)? I am looking at (a)(1).
MR. GARY KING: (a)(2).
HEARING OFFICER ERVIN: Chuck, did you have a follow-up question?
MR. CHARLES KING: No, that is it for now.
BOARD MEMBER HENNESSEY: I had a question on incentives, the incentives of PRPs under the various proposals to identify other PRPs.
One of the things you have said, Mr. King, is that under Mr. Rieser's proposal you don't think that PRPs have an incentive to identify PRPs other than those that the State has identified in the suit? Do I read you correctly on that?
MR. GARY KING: Right, that's correct.
BOARD MEMBER HENNESSEY: I am wondering if some of the principles of due process and res judicata do give PRPs an incentive to try to identify all of the PRPs

so that they litigate these things only once. I am thinking in particular of the general principle, which is a complicated one, but generally a judgment is not binding on a person who was not a party to the action.

So if -- assume that you have three parties at the site, A, B, and C. The State only knows about A and B. The State sues A and B and obtains a judgment that each of them are 20 percent liable. That leaves a 60 percent share, an orphan share at that time. The State later learns that C is out there. Then the State sues C. C is not going to be bound by that judgment against A and B that they were each 20 percent liable. So C could turn around and bring a contribution action against A and B for whatever its share happened to be.

Doesn't that give parties A and B the incentive to try to bring all of the parties to the table once they have been brought into an action?

MR. GARY KING: You know, I think that's clearly something that occurs on a Federal level. There is that kind of incentive to do that. I guess I am not quite sure how those contribution actions would factor in relative to a Board proceeding. I guess I am not seeing that there would be that much incentive in that

situation. I would see it almost as being -- there being a converse to that in the sense that party A and B are going to hold that judgment in their favor, hold that up as a defense against any further contribution.

BOARD MEMBER HENNESSEY: As I understand the law, I don't think that A and B could assert that judgment against C in a contribution action. They cannot say we have previously been adjudicated to be only 20 percent liable, because C was not a party to that previous action.

MR. GARY KING: I mean, they certainly could say that. I mean, I think whether that -- again, in a lot of these in terms of incentives and leverages and that kind of thing, I think clearly A and B will say that stands for something, those determinations.

BOARD MEMBER HENNESSEY: Well, I still think that they might be forced to relitigate the issue, which the question is as to whether that is a sufficient incentive. But I guess it really comes down to the need for finality. Doesn't everybody want finality from these actions, and doesn't that, in and of itself, give the parties an incentive to try to bring everyone to the table once one of these cases have been brought?

MR. GARY KING: You know, contribution protection

is one of those -- I mean, it is just not provided for in Section 58.9. It is a different scenario that occurs under Federal law where they do have that contribution protection. You know, it kind of -- if you reflect on what the Site Remediation Program is all about, we make decisions that represent a prima facie decision that the State agrees that a remediation is complete. Well, that doesn't prevent somebody else from contending that that determination was insufficient because clearly they would have the right to do that.

But from a practical standpoint, people accept that determination when the State either -- the Agency in the context of the SRP program or the Board in terms of a litigated action, people are generally accepting that when those decisions are made they stand for something.

John, did you want to add something?

MR. WIGHT: There was some discussion also that at least in the Superfund context the judgments may not be binding. They are given great weight, and I think that is what Gary was just saying with his last comment, that people would look very carefully at those before they would try to reopen a previous judgement.

The other thing that I would like to add to that, Gary has already cited the Hartigan versus Progressive Land case, and our concerns about the private party enforcement actions and cost recovery, and one of our concerns about whether there would be limitations on our ability to bring additional actions. You may want to take a look at that case.

It was called to our attention by the Attorney General. We have not had a chance to discuss it with them yet. But it talks about it is true that res judicata applies to parties, but also to parties that are -- but to people in privity with the parties. And this case is about what constitutes privity, and when the State may have been in privity with a private plaintiff. And there are some reasons why that case might be distinguishable on its facts.

But you might want to take a further look at that, because they do kind of discuss the issues about when you are in privity, and it may be as simple as that you had notice and an opportunity to assert your claim in the earlier proceeding rather than being a full party. You know, you may be cut out or prohibited from relitigating the issue. That is one of the things we are concerned about in the third party context, and may have some applicability in terms of

the question you just raised.
BOARD MEMBER HENNESSEY: There could certainly still be situations in which C did not have notice or an opportunity to participate.
MR. WIGHT: Certainly, yes. But you could also see situations where they did or at least were aware that it was a site that they had been involved in or, you know, just -- again, it would raise all sorts of questions about how formal that notice has to be and whether you would actually receive pleadings or not receive pleadings or to what level you were involved in the case.
In the Progressive Land case it was a case where the Attorney General had received copies of the pleadings and didn't pursue the action at the time, and then later brought a subsequent action and was prohibited from doing so.
CHAIRMAN MANNING: I have some of the same questions as Member Hennessey, I mean, not necessarily for the same reasons in terms of her couching it as the incentive, but this whole question of the missing party and what happens when the missing party shows up later and either with an action someone else files against him or they file any.
It would seem to me to behoove all of the parties,

SRAC included, that everybody would want as many parties that are potentially liable there in that first instance and if anybody -- in fact, if SRAC has some input on this question as well, and would want to either provide it now, Mr. Rieser, or later in post hearing comments, the fact of the matter is we should be developing a process that tries to get everybody there and everybody's share allocated and that sort of thing as opposed to leaving someone out.

MR. RIESER: Right. I mean, I think the reasons that we have said and the reasons that Board Member Hennessey identified, I think that people are interested and would be interested in doing this. As David Howe testified, what people want most out of the world with these situations is for them to be over and done with, and over and done with as soon as possible. And over and done with means trying to bring as many people in as you possibly can and making sure that they are all in the same proceeding. Everybody from the State on down has an interest in that.

Now, the interest shifts slightly under proportionate share and some of that burden goes more, and correctly, to the State, in that the individual members may not have the same type of contribution

action, because if they are adjudged to have a proportionate share then that's their share, that is what the Board has found that they are responsible for, and so --

BOARD MEMBER HENNESSEY: That's what I am just not clear on, as a matter of law is that true that that is going to be binding on others who were not a party to the original proceeding.

MR. RIESER: Well, but that other party A has to talk about what its share is. And that may or may not impact on what other parties shares are. That is just a very fact specific, fact driven thing. But, again, I come back to what our experience is in representing the people that we do which is that people want these things over with. I think there are strong incentives that people will bring the people in. I think people generally have the same instincts and will continue to have the same instincts for handling these cases under proportionate share as they do under joint and several, which is I don't want to face -- if there is other people in here I shouldn't have to face the Agency by myself. I am going to tell them about as many people as I can. Everybody is going to have to suffer the way I am suffering now. So I just -- I think this is -- I think, as your questions have

indicated, I think the incentives are towards bringing people in.

As to the impact of -- I am not familiar with the case which Mr. King and Mr. Wight alluded to. It is the impact, the res judicata impact that somebody would have to research.

CHAIRMAN MANNING: Sort of in a similar vein of sort of the missing party, I had a question about Subpart C. I am going to ask it first directly to Mr. Rieser, because I think the Subpart C issue is more directly related to him. And if the Agency has any comment on it, go ahead.

Let's say you had four parties in a Subpart C proceeding and there is a fifth party out there but you don't care. The four parties come forward and say we are going to assume 100 percent of the liability. But it doesn't shake out the way the four parties thought it was going to. Perhaps party A got stuck with 50 percent. Party B gets 10. Party C and D each get 20. Does party A have the ability to come forward and appeal the Board's order allocating the shares saying there was a missing party, and that if the other party was -- and if so, why not, because the statute says the Board has to determine what was proximately caused. Doesn't the missing parties --

HEARING OFFICER ERVIN: You have been sworn in before, but let's go ahead, since there are going to be a number of questions for you, go ahead and swear you in at this time.

(Whereupon Mr. David Rieser was sworn by the Notary Public.)

CHAIRMAN MANNING: Thank you. Do you need me to update anymore?

MR. RIESER: No. Subpart C envisions people -- a group of people who have decided that among themselves they are going to share the entire cost of the thing, and they commit to doing that up front. I think it is actually a regulatory requirement that they do so, that it is part of filing a Subpart C proceeding that they sign as part of their petition that the four of them agree that between themselves they are going to allocate the cost of whatever it is they are doing between themselves. And so it is essentially a binding allocation, a State funded binding allocation process, a binding arbitration process, let me put it that way, where at the end of the day you get a Pollution Control Board determination that as between these parties these are the appropriate shares.

So in the situation that you have suggested, I don't think that -- while an individual party could

appeal the decision based on a factual issue as between the four of them, I don't think that that party would have a right to appeal based on a factual decision as to a fifth person, because in bringing the petition he has basically already given up the right to do that in the Board proceeding. Now, I suppose that theoretically that person could go off under CERCLA and do something but, again, you have got a national contingency plan, compliance issue that would probably interfere with the ability to do that.

But I think the expectation of Subpart C is it is for people trying to solve their problems and are looking for a venue to go to to get the problem solved, and they are making a decision up front that this is the decision making process that they have decided to use, and they are going to accept the results of the decision making process. Again, with the right to appeal based on only the possibility of arbitrated decision making within that narrow decision making process that they brought before the Board.

CHAIRMAN MANNING: Okay. Thank you.

HEARING OFFICER ERVIN: Chuck King.

MR. CHARLES KING: I have a couple of questions about opening up the determination under Subpart C, and I think I asked Mr. King about this at one of the

earlier hearings and he said that that language had come from SRAC, so maybe you could address this.

What is the logical basis for Section 741.335(a)(2) which is the one that provides where it ends up costing more than everybody expected they can come back in?

MR. RIESER: Well, what you want to do -- one of the problems in all of this, and something we really wrestled a lot with when we were drafting all of these regulations is the possibility that you might well be doing this allocation prior to the time that the money is actually spent. And that you might not understand -- and that in the process of performing the remediation at the site facts may come to light which change totally what everybody's assumptions were when they made the allocation. That is not uncommon that the costs for dealing with one issue were far larger than they expected or that something else came up when you were doing the remediation work that was totally unexpected and unaccounted for. And that it would be fundamentally unfair for people who were in that situation to have done this allocation prior to doing any of that type of remedial work, where that if those -- if that remedial work demonstrated that there were really substantially different issues at the site

that really changed things in a substantive way and a substantial way, that people ought to be able to go back and relook at those things.

Now, it is expressed in terms of dollars because that is probably the easiest way to talk about those things. It is also done in that fashion because, again, given the model of what we have here is a group of private parties using this dispute resolution mechanism. The only reason to go back and redo things is because the thing that they resolved, that is the allocation of money, was not resolved accurately given what they now know about the site.

And so the numbers that were chosen were purely arbitrary based on, I suppose, my own personal biases about at what point does it make it worthwhile for somebody to go back and redo these things, and at what point is it worth the Board's while to go back and redo this stuff. So there is no magic to the numbers. But I think the concept is important, because it may be that people do these things prior to doing this work and that they ought to have the right to relook at this issue after doing the work and after actually spending the money, and they made the determination that what they spent it on was totally not what they thought they were going to spend it on

when they originally went through the allocation.
MR. CHARLES KING: Wouldn't that scenario you described be covered by language like that that is under 741.220 which is more of just a blanket where new information comes to light that would have brought about a different result, you can come back and revisit it?
MR. RIESER: Well, yes and no. You have got two conflicting goals here, and trying to balance those goals. On the one hand, you want finality. But on the other hand, you want fairness. And you are making a decision not in an information vacuum, but in the situation of incomplete information. And given that you are working with incomplete information, you still -- but fundamentally at a very basic level you want the process to be fair. You want people going into the process to think it is going to be fair. So you have all of these different issues to weigh.
You don't want somebody reopening this thing or having the ability to reopen the thing or having people think that they can reopen this thing just because of slight differences in end result, where the change was from ten to five percent, and that was all of $10,000.00. You never know what people are going to think is worth fighting over, especially in the

situation where somebody thought they really got a horrible decision to start with. That five to ten percent difference may mean a lot to them.

But you don't want this State organized process to get going again unless you have got a situation where you can say, boy, we really have a result that is not reflective of the situation, that is not fair, and it is not fair in a way that is so important and crucial that we really need to start thinking about going through it again. So I think you do need that level of -- and the easiest and most objective way to talk about that is in terms of the money. Because that is what the issue is.

MR. CHARLES KING: Where you have a proceeding where the Board has gone through and heard -- where not all of the parties have agreed. Say you have these two parties who have agreed, and these three parties are fighting like cats and dogs. They are coming under Subpart C, but as far as who gets what percentage that is heavily disputed. And then the Board has, you know, an evidentiary hearing and figures out the allocations of everything, and then later it ends up costing more, not based on necessarily some bizarre circumstance involved in the actual site, but some external factor. Do you believe

that that should still be opened up again?
MR. RIESER: Well, it is hard for me to imagine, given the levels of dollars that we talked about here, an external factor that was not related to the site. I mean, I suppose you could have a strike. You could have something like that. But I guess you also have to look at why the parties would bother to reopen it. I mean, people have reasons to do everything, of course. But if the things that raise the price of the site don't really go to the issues among the parties, then it is probably not worth doing.
Yes, I mean, I suppose you could nail it down more closely to issues relating to the parties, but then you get into a real drafting issue about how you express that. I think my assumption was that anything that increased the cost of the site by these types of amounts, changed people's position by these amounts, would be something that was related directly to the site and something that meant that there was a difference that they had discovered about the site that had not been known at the time that they originally did the allocation.
MR. CHARLES KING: So it was your purpose in putting this language in rather than providing for a reopening, a decision based on factors other than

newly discovered information about the site, rather your concern was to set a floor, sort of a level of significance below which it would not be worth reopening?

MR. RIESER: Yes.

MR. CHARLES KING: Okay.

HEARING OFFICER ERVIN: Could we go off the record for a second, please.

(Discussion off the record.)

HEARING OFFICER ERVIN: We will break for lunch and reconvene at 1:30.

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

AFTERNOON SESSION

(June 10, 1998; 1:30 p.m.)

HEARING OFFICER ERVIN: Back on the record. We are beginning with questions for the Agency. Are there additional questions for the Agency at this time?

I know I had a couple of questions on the information orders on your Errata Sheet. Under Section 741.115 of the errata sheet, I think it is E, that provides that if the respondent fails to comply with the information order, the Agency may seek enforcement under Section 42 of the Act. Section 42 only deals with penalties. Did you mean that the Agency could seek penalties under Section 42 of the Act?

MR. INGERSOLL: Injunctive relief. Under 42(e) we would contemplate, anyway, that if the circumstances are warranted, that we would ask the Attorney General to pursue an injunction to require the information be provided.

HEARING OFFICER ERVIN: Rather than saying you seek enforcement, you could seek penalties or injunctive relief under Section 42?

MR. INGERSOLL: Right.

HEARING OFFICER ERVIN: In that same section, it

has that penalties may be imposed if respondent fails without sufficient cause to comply with the information order. Were you contemplating that the Board would still look at the 42(h) factors in determining the appropriate penalties?
MR. INGERSOLL: Yes.
HEARING OFFICER ERVIN: A question that came up at the last hearing, Elizabeth Wallace from the AG's office, asked a question regarding what needed to be included in a complaint. Specifically it was regarding whether or not there had to be a specific number regarding the proportionate degree of responsibility. What is the Agency's position on what actually would have to be included in a complaint?
MR. INGERSOLL: I think it would be the allegation necessary to show liability, not proportionate share.
HEARING OFFICER ERVIN: I think the question was kind of directing to do you need to include a specific percentage.
MR. INGERSOLL: No.
HEARING OFFICER ERVIN: Looking at the statute under Section 58.9(a)(2) there is a list of people whom the State or any person can't bring an action against. I think Chuck King asked a question -- I am not sure if it was at the last hearing or the hearing

before, about what you actually did with these people if you brought an action against them and they raised as a defense that they fell within one of these categories.

Just to understand, is it the Agency's position that these type of people could never proximately cause a release, or is it that these people could proximately cause, but they are exempted from being held liable under Section 58.9(a)(2)?

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

MR. GARY KING: Each of the subsections under (a)(2) is a little bit different, but I think the question really particularly focuses on (c), (d), (e) and (f). And I don't -- I think for an entity to fit within one of those frameworks it means the causation framework is irrelevant, because it is kind of a legislative statement that they are not to be responsible relative to that correction of that release.

HEARING OFFICER ERVIN: Maybe if I can provide an example it will help you understand where I am coming from. Say there are four PRPs that have been identified and you bring an action against those. And PRP A brings the defense that he falls within Subsection C. Then is it that he can never

proximately cause the release so that we would still apportion 100 percent liability between the other three, or is it that his share basically would become an orphan share?

MR. GARY KING: It would seem to us that if someone is not a liable party then whatever his contribution may have been relative to that site it would not be included within the general allocation parts. The allocation would go as to those people that are liable.

BOARD MEMBER HENNESSEY: So they would not become orphan shares then?

MR. GARY KING: Right. If I could add one point to that. There may be alternative bases for showing liability, and a person may fall within one of these and say, well, I am not liable because C says I am not liable. But there might be some other reason that that person is liable that does not allow him to assert C, in which case then if they were held to be liable then they would be included within the allocation process.

HEARING OFFICER ERVIN: Mr. Rieser.

MR. RIESER: What would that be? Because it says notwithstanding anything in the Act, as a preface.

MR. GARY KING: Well, to give you an example,

let's just say it is the State of Illinois under C, and the State of Illinois has involuntarily acquired ownership of a site. It would seem it would go to the ownership issue. But if the State of Illinois at the same time had sent hazardous materials to that site as a generator, then that would be a different basis for liability. It wouldn't relate to the ownership.

MR. RIESER: I see what you are saying. I understand. Thank you.

HEARING OFFICER ERVIN: Could you still bring a cost recovery action against them based on their ownership?

MR. GARY KING: Yes, but then they would raise that as a defense.

HEARING OFFICER ERVIN: Except that (a)(2) deals with you can't require performance of remedial action. It does not say anything about cost recovery.

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

MR. GARY KING: We really haven't thought through the context of the difference between performance of remedial action and cost recovery in this context, and we will address that in our written comments.

HEARING OFFICER ERVIN: Thank you. Are there any other questions for the Agency? Mr. Rieser.

MR. RIESER: Yes. I just had a question which is sort of off a little bit of this particular topic. It is something that I thought about before. It has been asked in private, so I will ask in public. How many sites have come into the site remediation program since its inception under 740?

MR. EASTEP: Hopefully I have got that. In 1997 we had 198 sites in the program. Well, July was the effective date, right?

MR. RIESER: Yes.

MR. EASTEP: So probably about half of that was -- they bounce around a little bit, but it is pretty typical, so I would say probably there would have been 100 that came in since July of last year. There might have been a few that came in pursuing -- they entered the SRP, but they might have been pursuing 4(y)s. That would have been much less common than say a year ago.

MR. RIESER: Would that represent an increase over prior years under the --

MR. EASTEP: In 1996 we had 149 applications in the voluntary programs overall. In 1995 we had 102. In 1994 we had 54.

MR. RIESER: Okay. Thank you.

BOARD MEMBER HENNESSEY: I had a question on

Subpart C. As I understand the Agency's position, 58.9 does not create a new cause of action. If that's true, I am wondering how the Board has jurisdiction over Subpart C actions. If there is no cause of action, where does the Board's authority to decide these disputes come from?

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

MR. GARY KING: I am not sure we focused on -- when we were involved in preparing Subpart C I am not sure that we really focused on the issue in the terms that you placed the question. We were looking at 58.9(d) and it requires that the Board's rules meet certain requirements. One of the things that these rules are required to have is if you look down through there, it says, procedures to establish how and when such persons may file a petition for determination of such apportionment. So that was -- we felt that was the authority for the Board to have these rules. And we saw this as more of a, I guess, a dispute resolution context among persons who would have potential liability under other parts of the Act.

BOARD MEMBER HENNESSEY: Does Subpart C implicitly assume that there is a private cost recovery action under the Act?

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

MR. GARY KING: We didn't -- from our standpoint we didn't contemplate it in the context of a third party relief. What we were contemplating was in the context of somebody resolving potential liability vis-a-vis the State. That is why we structured the entry requirements into Subpart C the way we did, in 741.105 where it talks there about an Agency approved remedial action plan under either 740 or pursuant to a 4(q) notice. So we were not presuming that that third party right existed when we were doing this. We were presuming that there was a potential liability to the State that would need to be resolved, at least in our drafting process and in our thought process.

BOARD MEMBER HENNESSEY: One other question. In 58.9(d) the language that you have cited requires the Board to establish procedures on how people may file a petition for determination of apportionment. Did you contemplate that setting up a procedure where someone could come in and petition, bring a petition for an apportionment, where basically the Agency would be the respondent? That seems to be -- that is a potential that that is what that language could be referring to. That is not real clear. I wondered if you contemplated that.

MR. GARY KING: No, we did not contemplate that.

BOARD MEMBER HENNESSEY: It was not an alternative that you considered at all?
MR. GARY KING: No, it really never crossed our minds to address it in that kind of way. We wanted to address the cases that we were involved with in terms of us being plaintiffs as opposed to us being defendants.
BOARD MEMBER HENNESSEY: Well, just for the record, do you have any reaction to -- do you think that such a procedure would be permissible under 58.9, and do you think it is a good idea or a bad idea?
MR. GARY KING: Well, I think it would be a bad idea from our perspective, and I think it goes to some of the reasons that I talked about earlier in terms of how it would influence our process in how we go about committing money or allocating money to sites. John Sherrill talked about how we have gone through a process and we have allocated money to do remediations in the next fiscal year, and we have done that recognizing what we believe are the most important environmental issues to deal with.
If you have a -- one of these third party procedures where all of the sudden the Agency is being drawn in and now we are potentially forced to allocate money towards cleanup of a site, which is not so much

of a pollution control threat or a pollutional threat but more of a situation where it is private parties that want to get out about building a factory there and just making sure that their liability concerns are straightened away, we don't think that is the best use of State resources in terms of cleaning up the sites that pose the most risk to human health and the environment.

BOARD MEMBER HENNESSEY: Also, I assume that it could conceivably take up a lot of Agency resources simply to respond to those petitions, aside from cleanup, all the costs to be involved in litigation.

MR. GARY KING: That is absolutely correct. One of the reasons why we don't have that many cost recovery actions and we talked about the number of those before, is that they are very resource intensive, and we want to make sure that it is an appropriate use of our resources.

BOARD MEMBER HENNESSEY: Thank you.

CHAIRMAN MANNING: If I might continue with the Subpart C dialogue just for a second, and perhaps ask SRAC as well, it is my understanding that Subpart C is envisioned as not being an adversarial process, but a process where -- that is seeking a Board determination.

MR. RIESER: It is a process seeking a Board determination that may well be adversarial with respect to the specific and narrow issues that the parties are not able to otherwise resolve, and in that context it may be very adversarial. But it is adversarial to a narrow set of issues with respect to who did what at the site and what -- who contributed to what. But the parties involved have all agreed that among themselves all of them will share in the cost, and they have agreed on this as a resolution mechanism for taking care of that issue.

CHAIRMAN MANNING: And you did not envision it being an adversarial procedure in that not one would come forward and sue the other three?

MR. RIESER: No, exactly.

CHAIRMAN MANNING: That all four of them would agree. Do you envision this process being well utilized? I mean, what is your theory on who and under what circumstances Subpart C might be utilized?

MR. RIESER: Well, that, too, is a good question. We have talked about that and it may not be well utilized. It may be that for a variety of reasons people don't use it. I think the situation where people would use it is where you do have a limited group of people, and they are all embroiled in a

discussion about how they are going to resolve it, and they want to find a mechanism to resolve it.

I could see circumstances where the Board having this Board mechanism it would be a very attractive thing. You get -- you have this impartial decision maker with some experience in the area. You have got various specified due process procedures in terms of how the hearings are handled. You get a determination at the end by this decision maker that has a great deal of weight in terms of the process that you are engaged in.

So, you know, it is hard to say. I mean, it is hard to know exactly how many cost recovery actions are brought in toto and what percentage of those would be brought to the Board. But it strikes me that it is an opportunity for those situations where you do have this sort of narrow group of people wrestling with the idea of how they are going to resolve this issue that it may be attractive to them. We would have to see. It has never been done before, so we would have to see what utility it has in practice. Excuse me.

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

MR. RIESER: And then the other issue is having the Board determination of liability. That would have a weight and formality to it and an official

determination that would, in itself, carry some weight. And maybe this gets into the third party issue that you were asking earlier about whether that would be good as to other third parties. But there may be circumstances where people really want that Board determination on what they are doing and what decision is made, and that in itself has a great deal of weight.

CHAIRMAN MANNING: You would agree with the Agency that it is within the Board's authority, if you contemplate the provisions of Section 58.1 and the rulemaking sort of obligation where we are asked to assume under 58.1 in conjunction with our general authority found under Section (5)(d) which readily allows us to have other hearings as may be provided by rule? Would you agree that there is no question of authority under Subpart C?

MR. RIESER: I don't think there is a question on authority. As Gary says, it is not something that we focused on specifically. I mean, the language of 58.9(d) that we were just reading talks about people going to the Board and having these decisions made and for the reasons we have discussed, how implementing that legislative charge got done, a lot of different issues at a lot of different levels for different

people and people viewed it differently. This struck us as the most appropriate way, given all of our issues that we have already talked about to fulfill that requirement. Because it is plainly not solely in the context of Agency enforcement actions.

But as we talked about, we don't see this -- as we talked about and the reasons that we have talked about, we don't see it as a private cost recovery action. But we also don't see this as a cost recovery action. We see this as an allocation determination pursuant to this legislation. These are people, again, who have agreed that we are going to share, we are going to put up the money. We have agreed on the remedial action plan that has already been submitted to the Agency. The only question is among us who is going to pay what.

That is a very different issue than dragging somebody kicking and screaming in front of the Board by filing a complaint and serving them with process and all of the rest of it. So, yes, I do think that -- I do think that the Board has authority to handle those types of cases.

CHAIRMAN MANNING: Thank you.

BOARD MEMBER HENNESSEY: Do you think that the Board has -- do you think that the Board has that

authority whether or not these private parties would have any actions against each other?
MR. RIESER: I am not sure I understand the question.
BOARD MEMBER HENNESSEY: If there is no private cost recovery action --
MR. RIESER: Yes.
BOARD MEMBER HENNESSEY: -- there is basically no claim that these parties have against each other, correct?
MR. RIESER: Under State law that is true, correct.
BOARD MEMBER HENNESSEY: Okay.
MR. RIESER: Under the Environmental Protection Act, I should say, that's true.
BOARD MEMBER HENNESSEY: So I am troubled by what is the Board's authority. How do we have jurisdiction over something like this when these parties wouldn't ordinarily have a case against other?
MR. RIESER: Again, I am not saying it creates a cost recovery. Maybe another way to look at this is something that -- the way Chairman Manning suggested which is that this is not an action in the sense of a coercive action where somebody is filing process and requiring them to appear before a tribunal for a

determination to be made. That, in my mind, is a legal action. What we have here is an --

BOARD MEMBER HENNESSEY: A rulemaking.

MR. RIESER: I am sorry?

BOARD MEMBER HENNESSEY: In a sense an administrative rulemaking with a very narrow rulemaking.

MR. RIESER: Well, I suppose you can call it that. I am not sure -- you know, it is a quasi judicial, quasi legislative determination, I suppose, although it strikes me as being more quasi judicial. But it is quasi judicial only in the sense that you are making a determination on a set of facts. But you are making it among people who have voluntarily decided to come to you and say can you make this decision.

And it is a decision that this legislation calls for you to be making in some context. And I think this is what private persons and persons come to. So this strikes us as being the most appropriate, if not the only context, where that can be fulfilled. And that is how we came to this.

BOARD MEMBER HENNESSEY: And if these decisions can be appealed to the Appellate Court, on what grounds can they be -- I mean, on what grounds would

they be appealed?
MR. RIESER: Well, the only grounds I would think would be the grounds that are the same grounds for appeal on any Board decision, which is the Board's determination was arbitrary, capricious, or in some measure not based on the facts that were presented to you.
BOARD MEMBER HENNESSEY: Okay. Thank you.
HEARING OFFICER ERVIN: Are there any other additional questions for the Agency at this time?
Seeing none, did you have any further comments that you would like to make, Mr. Wight?
MR. WIGHT: No.
HEARING OFFICER ERVIN: We appreciate all your testimony and the time that you have taken in this matter.
Mr. Rosemarin, do you still want to provide testimony today?
MR. ROSEMARIN: Yes, I do.
HEARING OFFICER ERVIN: Is there anybody else that would like to provide testimony today?
Seeing none, would you like to move down, or are you comfortable?
MR. ROSEMARIN: I am comfortable where I am. Thank you.

HEARING OFFICER ERVIN: Okay.
CHAIRMAN MANNING: Could you use the microphone?
MR. ROSEMARIN: Yes.
HEARING OFFICER ERVIN: If the court reporter could swear the witness, please.
(Whereupon Mr. Carey Rosemarin was sworn by the Notary Public.)
HEARING OFFICER ERVIN: Proceed whenever you are ready, Mr. Rosemarin.
MR. ROSEMARIN: Thank you. My name is Carey S. Rosemarin. I am an attorney with Jenner & Block in Chicago. I represent Commonwealth Edison in these proceedings.
Initially, our view is that the rule proposed by the Illinois Environmental Protection Agency can advance the purposes of Section 58.9 of the statute and represent a positive advancement in administrative rulemaking in Illinois with the critical caveat that some crucial modifications are effective.
Com Ed's central position is that Proportionate Share Liability, as mandated by the statute, requires that each party pay no more than the portion of remediation costs attributable to its respective wastes and/or actions. We also believe that there is a fatal flaw in the IEPA proposal which causes it to

contravene the statute. Section 741.210(d)(3) allows all unapportioned shares to be imposed upon a PRP, whereas the rule allows -- and that rule, that characteristic, allows the imposition of disproportionate liability notwithstanding the statute's mandate of Proportionate Share Liability.

Quoting from 58.9, the pertinent part, and I will -- well, although I say that, let me paraphrase a bit here. The operative provisions of 58.9 reads as follows: Notwithstanding any other provision of this Act to the contrary, in no event may any person, paraphrasing, be held responsible to conduct remedial action or pay for cost of remedial activity beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission or beyond such person's proportionate degree of responsibility for costs of remedial action.

I think that the clearest example of the fact of how the proposed rule contravenes the statute lies in Agency's -- the IEPA's Exhibit Number 7. I refer the Members and other persons present to that exhibit, Scenario 2, Example 1, parties B and C may end up paying a total of 75 percent, although this exhibit says that there exists no proof that either party

contributed more than 25 percent of the wastes.
Scenario 2, Example 2, parties B and C pay a total of 50 percent. But there exists no proof that either party contributed more than 20 percent of the wastes.
Scenario 3, Example 1, parties B and C pay a total of 75 percent, but there exists no proof that either contributed more than 25 percent of the wastes.
Our analysis focuses on the Restatement, and in going through this we asked the question, we asked ourselves how did we end up at this result of having a rule which the Agency advances as being consistent with the statute, which is blatantly inconsistent with the statute. The Agency relies on Section 433(b)(2) of the statute to support 210(d)(3). And, of course, that is the section, as I said, that would allow the Board to hold any respondent unable to prove the degree to which respondent caused or contributed to the release liable for, quote, all unapportioned costs.
Our analysis, in conclusion, is that the IEPA has taken 433(b) entirely out of context and grossly misapplied that section. The Agency, in our opinion, has confused the separate issues of divisibility and apportionment. Those are two separate issues. And we refer to the case of, In the matter of Bell Petroleum,

3 F 3d 889, a Fifth Circuit Case from 1993, which contains an excellent discussion of these concepts.

433(b)(2), as the Agency represents, does, in fact, say that with respect to injuries that are caused by joint tort feasors, then, yes, the defendant does have the burden of proving that the harm is divisible, in other words, that it is capable of apportionment. And it also supports the view that a defendant's failure to show that harm is divisible results in the imposition of joint and several liability.

What the Agency overlooks is the fact that the question asked by 433(b), that is, is this harm divisible, has already been answered by the legislature. It is divisible. 58.9 says it is divisible. By enacting 58.9 the General Assembly has already determined, as a matter of law, that environmental damages caused by hazardous substances are divisible, and that cannot be questioned.

I refer to Section 434 of the Restatement, Comment D, which clearly makes the distinction between the question of divisibility, which is a matter of law, and the question of apportionment, which is a question of fact for the jury, no statute or where we are not talking about the statute. Therefore, there is really

no need for any party to show that the harm is divisible. It is already shown. And, therefore, joint and several liability cannot be a consequence of failing to show divisibility.

Looking at the Restatement in context, we also look at 433(a). That section requires that damages be apportioned when there are distinct harms or when there is a reasonable basis for determining the contribution of each cause to a single harm. Similarly, we refer to the Restatement of Section 881. That section states that in cases of harms, for which there was a reasonable basis for division, as there is as dictated by 58.9 in the present case, when there is such a reasonable basis for division, according to the contribution of each, each party is subject to liability only for the portion of the total harm that that person has caused.

Even if there is issue taken with our interpretation of 58.9, and let us assume that a party does have to show divisibility, then we can refer to 433(b) itself which indicates that in certain situations joint and several liability does, in fact, not obtain. And that is precisely the view that was taken in A&F Materials, and I will give you the cite in a second, as well as Allied v. Acme. U.S. v. A&F

Materials, focusing on the Restatement, cited at 578 F Supp. 1249, a case out of the Southern District of Illinois, 1984. Allied v. Acme, 691 F Supp. 1100, a case from the Northern District of Illinois, 1988. Both of those cases focus on comment E which state that even in cases in which a PRP, or in our case a defendant, is forced to show divisibility, has that burden of proof, there are certain cases the Restatement recognizes in which the imposition of joint and several liability would be unjust. That is precisely what the legislature has said in here, especially considering what the change was. Section 58.9 was enacted against the back trap of years and years of joint and several liability. The legislature has said that that was intolerable, and that is why the statute was changed.

We are of the view that adoption of 741.210(d)(3) may be subject to valid challenge. There is simply no authority to enact that section of the Rule as proposed. Under Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d 541, 4387, Northeast 2d, 258, from 1978, the Illinois Supreme Court clearly held that if the Pollution Control Board lacks the authority to promulgate certain rules, those rules are void.

There is similar authority, Biomedical

Laboratories, Inc. v. Trainor, 68 Ill. 2d, 540, a 1977 case, and yet again, Waste Management of Illinois, Inc. v. Pollution Control Board at 231 Ill. App. 3d, 278 at 288-89.

Now, at this point I will progress into the three issues that have dominated these proceedings. Obviously, taking the first one, the burden of proof, given the fact that 241 -- excuse me -- 741.210(d)(3) is in the context of burden of proof, I will focus on that section initially.

The Agency says that on the initial showing, fundamental showing of liability by the Agency then the burden of proof shifts. And a PRP's failure to carry that burden may thus result in the imposition of disproportionate liability, again, a derogation of the statute.

We propose that 210(d)(3) be -- excuse me -- we propose that Section 210(d)(1) through (3) be deleted and that a new section be added, which I would like to read into the record. But actually before I do so, I have a number of copies of it which I would be pleased to distribute.

MR. GARY KING: We will just read it in the record. We don't need a copy of it.

HEARING OFFICER ERVIN: Were you wanting to make

this an exhibit?
MR. ROSEMARIN: Sure.
HEARING OFFICER ERVIN: After you have finished why don't you offer it then.
MR. ROSEMARIN: All right. Our proposed section reads as follows. This would be a new Section 210(d).
210(d)(1) would read: Subject to Subsection 210(d)(2) following a determination of liability, the Board shall, based on equitable principles and the facts before it, allocate remediation costs, or responsibility to conduct remedial action, that are the subject of the complaint, to respondents which caused the release or releases addressed or to be addressed by such remediation costs or remedial action.
(d)(2) would read as follows: Notwithstanding any other provision of this Title, in no event shall any respondent be required to pay remediation costs or be allocated a responsibility to conduct remedial action in an amount exceeding such respondent's proportionate degree of responsibility for the incurrence of such remediation costs, or the necessity to conduct such remedial action.
That is the entirety of our proposed section.

Now, Com Ed does agree that the burden does rest with the State to show liability in the first instance. Com Ed also supports SRAC's proposed Section 741.210 which would require that to be held liable the person must be within the scope of 22.2(f) and must also be shown to have materially caused the release.

We also take issue with the statement of Mr. King earlier today -- that is Gary King, as opposed to Mr. King at my left -- that the statute does not provide for liability based on status. We believe that in its present form the Rule does allow for that, in particular, 210(b)(3). A landlord who is aware, for example, of hazardous waste handling by a tenant would nonetheless be liable as the landlord even though that person may have had nothing to do with any release of hazardous substances.

Progressing to the other issues, we also believe that as to applicability, that -- well, let me paraphrase the IEPA's position. As we understand it, that position is that the U.S. EPA will withdraw the delegation of RCRA and the RCRA program if the Rule interprets 58.9 to apply to the sites listed in 58.1, and we have gone through those on a number of occasions in these hearings.

Com Ed's position is simply that in 58.1 -- excuse

me -- our position is that 58.9 is not controlled by 58.1, and our proposal is that Section 741.105(c) should be deleted. The basis of this position are initially statutory construction, the plain language rule. 58.9 commences with the phrase, notwithstanding any other provisions of the statute to the contrary.

The IEPA has referred to absolutely nothing in the statute or the legislative history to indicate that Section 58.9 should be interpreted with references to any consideration of the potential withdraw of delegation of RCRA authority. Our position is further that IEPA's position amounts to mere speculation. The U.S. EPA has not indicated any possibility of withdrawal of RCRA authority and the IEPA has not asked the U.S. EPA about its position on this issue. The IEPA has referred to other states having Proportionate Share Liability, and has not indicated in any event that the U.S. EPA has raised the indication, raised the possibility of withdrawal of Federal authorization.

Additionally, 42 USC 6926(b), cited by Mr. Dunn, states that the U.S. EPA may authorize the State to administer the RCRA program upon a finding of what is referred to collectively as stringent as, the State must be as stringent as -- excuse me -- the statute,

the State program must be as stringent as the Federal program.

In fact, there are three factors listed in 6926(b). One, the State program must be equivalent to the Federal program. Two, it must be consistent with the Federal program. And, three, it must be shown that the State has provided adequate enforcement of compliance with hazardous waste management requirements. The State has offered no legal support for its conclusion that Proportionate Share Liability does not satisfy these requirements.

We also believe that 741.105(c) may also be subject to challenge. Initially referred to the standard by which rules are challenged in Illinois at 415 Ill. CS5/29 which says that any person who is, quote, adversely affected or threatened by any rule or regulation the Board may obtain the determination of the validity or application of such rule or regulation by a petition or review referring to 415 Ill. CS5/29. That is particularly -- Section 5/29 is particularly relevant in the present context. Because it states that any final order of the Board shall be based solely on evidence of the record. There is no evidence in this record of any possibility of withdrawal of the program by the U.S. EPA. The only

thing that has been discussed is mere speculation.
Additionally, the Board's consideration of the possibility of withdrawal of Federal RCRA authority absent any indication that such consideration is required by 58.9 and absent any evidence to the possibility of withdrawal is arbitrary -- we believe would be arbitrary and capricious.
In Illinois an administrative agency's actions are contrary and capricious if the Agency relies on factors which the Agency -- excuse me -- which the legislature did not intend for the Agency to consider. There is no indication that the legislature has suggested that the Board consider withdrawal of RCRA authorization in the context of deciding on the present rule. For the same reason, we believe that it is improper for the Agency to consider the funding which has been a significant part of the testimony of the Agency in these proceedings. We offer Waste Management of Illinois v. Pollution Control Board, 231 Ill. App 3d. at 278, 285 as authority. An alternate cite is 585 Northeast Second 1171 and 1174.
Progressing to the issue of information orders, the third and final issue, the IEPA argues that the rule must contain the authority for the Board to issue orders for the production of information before a case

is filed, because absent joint and several liability, PRPs have no incentive to produce information. They also acknowledge -- the IEPA also acknowledges that there exists no express authority but suggests that 58.9 provides the necessary and statutory authority for information orders.

I want to focus initially on incentives. We believe that the Agency's premise is entirely wrong. The fact is from our standpoint, and we believe from any PRP's standpoint, that there is ample incentive to go forward and produce information under a proportionate liability scheme. The fundamental complaint and criticism of the Superfund process as it has existed at the national level and reflecting the State level prior to 58.9 is the lack of certainty.

The reason that there has been so much contention over this issue over these proceedings and the reason that they last so long is the fear of being saddled with liability to which one has no nexus. The genius of 58.9 is that it puts an end to those proceedings. It states very clearly that there is Proportionate Share Liability and under that system we submit that people, that PRPs, persons who are potentially liable will gladly come forward with the information if they are sure that they are not going to have imposed upon

them liabilities to which they have no nexus and did not cause.

Additionally, the Agency has talked about its need extensively for information orders. The issue is not need. It is statutory authority. We believe that there simply exists no authority for the Board to issue the information orders. And we also believe that, therefore, Section 741.115 should be deleted. There has been a great deal of discussion about this issue. We add our voice to those persons who suggest, including SRAC, of course, that there exists ample authority for the Agency to get the information it requires through existing means.

That was amply and eloquently demonstrated by Mr. Sherrill on the first day of these proceedings in the transcript at 47. It was clearly shown that the Agency has numerous means at its disposal to acquire information. We also believe that in its present form 741.115 may be subject to challenge. Again, referring to the previously cited authorities, an agency, an administrative agency is a creature of the legislature and possesses only such powers as the legislature has granted it. I have cited the Biomedical case. Similarly, I cited authority on Landfill, Inc.

We believe that with respect to information orders

there is yet an additional dimension which makes this issue particularly serious. The issuance of an information order under the Rule as if it had been -- as it is proposed, if that Rule is adopted and if an information order is issued there under, we believe that such an order, if carried out, would violate Fourth Amendment rights. Because the legislature has not granted the Board the authority to force persons to produce documents, as clearly shown and has already been noted in these proceedings in Section (4)(d) by comparison -- excuse me -- to Section (4)(d), issuance of an order requiring the production of documents may be unreasonable because it is absent statutory authority. And in support of that proposition we cite Oklahoma Press Publishing Company v. Walling, 327 U.S. 186. That is a Supreme Court case from 1946. I think the date of that opinion shows how fundamental that issue is.

I also wanted to add one other point concerning the incentive and the issues raised by Mr. King this morning. Initially referring to the Restatement issue, Mr. King has noted on several occasions that the Rule does not relate to -- does not require a finding of divisibility. We believe -- we agree, and we believe the reason for that is obvious. Again,

divisibility is already mandated by this statute and it is not a subject for this rule.

With that, I think that I will close. We believe, as I emphasized at the outset, that this rule can be amended so that it can be consistent with the statute and be a positive advancement of Illinois administrative rulemaking. Thank you very much.

HEARING OFFICER ERVIN: Thank you, Mr. Rosemarin. Do you want to move at this time to have your alternative language entered into the record as an exhibit?

MR. ROSEMARIN: Yes, I do. I so move it.

HEARING OFFICER ERVIN: Is this a correct and accurate copy?

MR. ROSEMARIN: Yes, it is indeed.

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

Seeing none, then the Commonwealth Edison's alternative language for 741.210(d) will be entered into the record as Exhibit Number 16.

(Whereupon said document was duly marked for purposes of identification as Hearing Exhibit 16 as of this date.)

HEARING OFFICER ERVIN: Are there any questions for Mr. Rosemarin at this time?

MR. INGERSOLL: You expressed some concerns about landlord liability for a situation where, in fact, the tenant had been conducting the waste handling activities on the site. What duty, if any, do you believe the landlord has to manage the operations on his or her property?

MR. ROSEMARIN: I think that there is often, having worked on situations and transactions in which hazardous substances handling is at issue, I think the common-law provides evidence of some suggestion of knowledge of the duty of knowledge by the landlord. I think that that is going to differ from case to case. There may be situations in which a landlord has -- there may be certain situations in which a landlord is an absentee landlord and perhaps has little or no duty.

MR. INGERSOLL: So there may be some duty if they know?

MR. ROSEMARIN: Well, I think knowledge -- the reason I refer to knowledge is I think that is referred to in 59(a)(2)B which reads that notwithstanding the landlord's rights against the tenant, if the landlord did not know and could not reasonably -- could not have reasonably known of the acts or omissions. So I was referring to knowledge

merely based on the fact that it is cited in the statute.

MR. INGERSOLL: And you contend that the Agency proposal bypasses that?

MR. ROSEMARIN: I think that there are situations in which the section that I cited could render a landlord liable on his status as a landlord without more.

MR. INGERSOLL: Is that 22.2(f), liability?

MR. ROSEMARIN: Well, in that case 22.2(f), liability would come under (a)(1), because the landlord would be an owner. Now I am saying that there are situations in which it amounts to the same thing.

MR. INGERSOLL: Okay. Then the landlord arguably has status liability under 22.2(f)?

MR. ROSEMARIN: Yes. I think that is amended and will change by 58.9.

MR. INGERSOLL: I am not talking about allocation, what the final amount they pay is. I am talking about 22.2(f), liability.

MR. ROSEMARIN: I agree.

MR. INGERSOLL: So you contend that 58.9 amends 22.2?

MR. ROSEMARIN: Well, I think it says that on its

face.
MR. INGERSOLL: Okay. I don't have any further questions.
CHAIRMAN MANNING: I had a question, Mr. Rosemarin, based on your proposed language. And I have a hypothetical that I want to give you.
Let's say the Board has three parties before us, party A, party B, and party C. Party A is the oldest party of all three of them. We have B and C, and B and C are the most recent, the good guys, the guys that come forward and have every incentive to show us that they only have a 10 percent degree of liability on both of their parts. And in that case I agree with you that perhaps they have incentive to come forward, and they cough up all the information in the proceeding, and they present everything. And it is clear on its face that their liability, both B and C, don't go beyond 10 percent.
However, party A has lost its memory. There is no Agency records that can be found regarding party A, because perhaps the historical nature of the contamination. For whatever reason, party A presents very little, if any, information regarding any of the contamination. But we do know that only three of these parties are liable, and there is no other

question of orphan shares, there is no question of any other generator or any other owner or anybody. There is just A, B and C.

Given your language as you proposed in terms of the Board shall, based on equitable principles, and the facts before it, given those are the only facts before it, allocate remediation costs and the responsibility, and then given your number two as well, is there no presumption that the Board can make vis-a-vis party A, who has presented us with no information or little information that there is a presumption, perhaps, that he is the other 80 percent in terms of liability?

MR. ROSEMARIN: I thought your facts in your hypothetical presumed that he was the other 80 percent, because you said there are only three parties, and B and C are only liable for ten percent. Therefore, under the facts, as presented, A can only be liable and I believe would be liable for the remaining 80 percent.

CHAIRMAN MANNING: Okay. You say the facts would show that regardless of whether there is no affirmative facts showing A's proportion -- what A did or didn't do, the fact that there are no affirmative facts vis-a-vis A, because there is only three parties

and there is facts enough for B and C, there is sort of circumstantial evidence enough for us to conclude that A is only 80 percent liable.

MR. ROSEMARIN: Maybe I am misreading your question. When you say there are only three parties, does that presume that it is known that party A is the remaining 80 percent?

CHAIRMAN MANNING: Yes, it is known that party A is liable to some degree. To what degree, we do not know.

MR. ROSEMARIN: Oh. So then -- okay. It is known that there may, in fact, be more than three parties?

CHAIRMAN MANNING: No, there are only three parties.

MR. ROSEMARIN: Three parties before and only three persons who may be liable?

CHAIRMAN MANNING: That's correct.

MR. ROSEMARIN: Then I think that's -- I don't have much trouble in saying that if B and C prove their share, and it is known that there are -- there is only one other person who could have caused the contamination, then I think the natural result is that A is liable for the remaining 80 percent.

CHAIRMAN MANNING: Then if there was an unknown party who was not presented, however, we could not

make that presumption vis-a-vis number A?
MR. ROSEMARIN: That is a different set of facts. Indeed, I think that would qualify as an orphan share.
CHAIRMAN MANNING: Okay.
MR. WIGHT: Excuse me. A would qualify as an orphan share or the unknown party or both?
MR. ROSEMARIN: I think we are talking about both one and the same thing. I think the facts are that a situation is known to where there is totality of -- there is some totality of contamination. It is known that B is responsible, and the cause of 10 percent, and C is responsible and caused 10 percent, and it is simply unknown who caused the remaining 80 percent. I think that defines an orphan share of 80 percent.
CHAIRMAN MANNING: And if there is one party there that we know is liable, but there is a potentially -- and that is the only other -- and we know as a fact that there is only three potentially responsible parties, you are willing to presume that the 80 percent goes to A, but if we don't know that there is a -- that these are the only three responsible parties, we can't jump to the conclusion that A is 80 percent responsible.
MR. ROSEMARIN: In the latter case in which it is

simply not known how many parties there are, but it is known that a proportionate share of B is 10, and the proportionate share of C is ten, then all that has been shown in this proceeding, and all that B and C can be held liable for is 10 percent each.

CHAIRMAN MANNING: I understand B and C. That is easy. I am worried about A that doesn't come forward with any information at all. The Agency has no information on A.

MR. ROSEMARIN: But A is liable so --

CHAIRMAN MANNING: A is liable, but we can't come up with a percentage.

MR. ROSEMARIN: Well, that hypothetical has come up in these proceedings on a number of occasions in which A is known to be liable, but not for how much. I think that there may be -- that may not be as much of a problem as it has been made out to be, to some extent. If it is known that A is liable, it is known that there is some nexus to the site.

So it can be extrapolated that there is at least some share which this 58.9 would hold A liable for. We may not be talking about, therefore, the full 80 percent. The question, thus, will become the degree to which the 80 percent can be imposed upon A within the confines of 58.9. It may be some or it may be

all. But I don't believe, given the fact that it has been shown that A is, in fact, liable that it is going to be zero.

CHAIRMAN MANNING: It is your position that it would always be in A's best interest to come forward with whatever information it has?

MR. ROSEMARIN: Given the hypothetical that you just posed, I believe that it certainly would be in A's interest to do that. It has no memory in your hypothetical. A is going to come forward and resolve liability irrespective of whatever it is.

HEARING OFFICER ERVIN: Any other questions for Mr. Rosemarin?

BOARD MEMBER HENNESSEY: I do. Mr. Rosemarin, you discussed to what extent the fact that the U.S. EPA may withdraw Illinois RCRA authority, should it influence the Board's decision. I just want to make clear that if -- you pointed out two things. That the legislature didn't intend us to consider that fact, and also you didn't believe that there were any factual support in that for the record that they actually would withdraw that authority.

Would your belief change at all if we do end up getting a letter from the U.S. EPA during the public comment period stating that they do intend to withdraw

Illinois RCRA authority if your proposal or Mr. Rieser's proposal is adopted?
MR. ROSEMARIN: It would not. I still maintain that there is no authority for the Board to consider that factor. I see nothing in the statute, and I don't see anything in the record that the Agency has advanced to suggest that the legislature intended that to be a factor within the Board's gamut of responsibility in adopting the present Rule.
BOARD MEMBER HENNESSEY: That's what I thought, but I just wanted to clarify that. And then also if you can just briefly discuss 433(b) and 433(a), the Restatement of Torts. As I understand your testimony, you believe that the legislature has decided that releases of hazardous substances create a harm that is divisible as a matter of law. And, therefore, no burden shifting as of the type that is provided for in 433(b)(2) and (3) Restatement of Torts can occur under 58.9?
MR. ROSEMARIN: Yes.
BOARD MEMBER HENNESSEY: Okay. Are you aware of any other situations in which a legislature has decreed a type of harm to be divisible?
MR. ROSEMARIN: It has been noted in these proceedings that the Michigan statute comes pretty

close to that. I have not considered that in that particular light. At this time I can't name any other examples.

BOARD MEMBER HENNESSEY: Thank you.

MR. ROSEMARIN: Thank you.

MR. WIGHT: I have a follow-up question on that. As a practical matter, what does it mean to say that a harm is divisible as a matter of law if the problem before the Board is a problem of fact in determining allocation? I mean, what does that help the Board in reaching its determination to say that a harm is divisible as a matter of law?

MR. ROSEMARIN: I think that's a crucial first step, and I think, that, as I said, is the genius of this statute. We have before us a statute in which the legislature has mandated a system which we have referred to as TACO. We get out of the way initially all of the arguments concerning divisibility. Is it divisible? Is it not? The legislature has said it is divisible as a matter of law.

Now fact comes in equitable principle. We have this wonderful system in Illinois known as TACO which enables us to use that, to use a vehicle for allocation. Where is the risk presented by this particular site. We are going to devote our

remediation resources to where that risk is, and the persons who are responsible for creating that risk, as defined through the TACO system, are the persons who are going to be paying for that.

Now, in some situations, that is going to be pretty easy. Maybe there is only one party. Maybe there are ten parties who sent the same hazardous substance in known quantities. Then it is going to be a pretty easy decision. In other cases we may get back to some of the same allocation problems that we have had for the past 15 years in Superfund, but nobody says that proportionate share rulemaking is a panacea. It is an improvement over what we had previously and that is all.

Indeed, the Restatement comments clearly note throughout consistently of the difficulty in apportioning shares. But they also consistently state that merely because it may be difficult is not a reason to deny the fact that apportionment must occur.

MR. WIGHT: So are you saying the Board always much reach an apportionment decision?

MR. ROSEMARIN: Yes.

MR. WIGHT: As matter of law, whether it feels it has evidence on which to base that decision or not or

if it just doesn't have that evidence then that becomes an orphan share?

MR. ROSEMARIN: I think that's a correct analysis under 58.9.

MR. WIGHT: One other question on a little different issue. On your suggested language here you are referring to using equitable principles?

MR. ROSEMARIN: Yes.

MR. WIGHT: What would an example of those principles be?

MR. ROSEMARIN: We talked about one earlier with Mr. Ingersoll's question, knowledge. In the case of the allocation with equitable principles, obviously, the Gore factors. But I think perhaps the greatest one is the degree to which a person's wastes caused the costs, as indicated under TACO, to be incurred.

One of the cases -- one of the examples that came up in Mr. King's testimony was that of the differentiation between lead in the soil and TCE in groundwater. If TCE in groundwater is the driver of the remediation, then the person who is responsible for the lead in the soil does not pay for that remediation. I think we have that vehicle in TACO which enables the allocation to occur.

MR. WIGHT: Given the limitation of (d)(2) on

(d)(1) so then would you be saying that equitable principles -- I guess what I am struggling with is that I don't see that the statute authorizes the use of equitable principles, because I am not sure how they relate to determining proportionate share.

On the other hand, you place a limitation on (d)(1) with (d)(2), so are you, in effect, saying that equitable principles could be used to reduce a share but not to increase a share?

MR. ROSEMARIN: No, I am not saying that. I am saying that allocation, again, I believe that Bell Petroleum discussed this particular issue and there is an article by Carver, which I believe I have it with me, and I can give you the cite. It indicates that allocation is an equitable process. And we struggled with that issue, whether to include equitable principles or not. Our conclusion was that because allocation is an equitable process, the legislature in determining, in mandating proportionate share, must have intended equitable principles to apply.

MR. WIGHT: So you would say, for example, if the Agency had included the Gore factors in its proposal under the allocation factors that that would have been perfectly acceptable under 58.9, that the Gore factors may just as easily have been listed as the ones we

ultimately did?
MR. ROSEMARIN: I would agree that the Gore factors are equitable principles that can be considered in allocations.
MR. WIGHT: Well, in allocations in Illinois under 58.9?
MR. ROSEMARIN: I am sorry?
MR. WIGHT: They are factors that can be considered in allocations in Illinois under Section 58.9?
MR. ROSEMARIN: Yes.
BOARD MEMBER GIRARD: I have a question. I would like to go back to the hypothetical where you have -- let's say this time we have four parties, and we have evidence that they have all contributed to the chemical of concern at this one particular site which is creating a problem.
We have two parties that come forward with information which shows the Board that each one of those parties contributed 10 percent each, so we have 20 percent of the liability determined.
Are you saying that the other 80 percent, then, if we have no other information, would be an orphan share?
MR. ROSEMARIN: Isn't that the same hypothetical

as posed by Chairman Manning?
BOARD MEMBER GIRARD: Yes, only now we have four parties instead of three. So we have two parties that have contributed an unknown amount of that 80 percent.
MR. ROSEMARIN: I guess I don't see how my answer is different in any respect merely because there are two parties in formerly A's position under Chairman Manning's hypothetical, rather than only one.
BOARD MEMBER GIRARD: So then the Board could determine that each one of those parties is liable for 40 percent of the costs?
MR. ROSEMARIN: Not if there is no evidence to show that.
BOARD MEMBER GIRARD: Well, we know that they contributed to that site, we just don't know how much. We don't know how much of the 80 percent each one of those two parties contributed.
Are you saying -- how do we deal with that cost, that 80 percent?
MR. ROSEMARIN: Look at information that is produced in discovery and make a reasonable determination of how much the evidence shows each of -- in this case I will label them imaginatively C and D, might be responsible for, and perhaps it equals the remaining 80 percent, and perhaps it does not.

BOARD MEMBER GIRARD: Well, I am saying what if they come forward with no information at all?
MR. ROSEMARIN: But it is known that they are liable?
BOARD MEMBER GIRARD: We know that they are liable. We know that they contributed that particular chemical to that site. We just don't know how much.
MR. ROSEMARIN: Well, then my answer is the same as in the hypothetical proposed by Chairman Manning that the determination that they are liable and they have some nexus at the site will produce some information and some modicum of information to determine some percentage. It may be a very low percentage under the statute, but we have no choice but to live with it. It may be less -- if your question is could it be less than the remainder 80 percent, my answer is yes.
BOARD MEMBER GIRARD: Why would any party bring the information before the Board to begin with? Why not just assume that the Board will use what little information it has and most likely it will come up with a lower percentage?
MR. ROSEMARIN: To make sure that the other 80 percent is not poised upon them. That is precisely why C and D would come running into this proceeding.

I know if I am C or D, C or D says, okay, I cannot challenge your finding of liability, that is true. But I simply have no information. And the Board says we have no information other than that tying you to the site. C now has the advantage under the statute of saying I know I can't be liable for the remaining 80 percent, because the statute does not allow it. C gets certainty.

BOARD MEMBER GIRARD: Well, I am still not sure there would be an incentive for parties to bring information forward.

MR. ROSEMARIN: Well, I can only tell you that as a veteran of numerous Superfund cases that the greatest fear of any PRP is that the PRP is going to be stuck with the share far in excess of the amount of damages caused by its waste in the case of generators.

BOARD MEMBER GIRARD: But you just said there is no other information, the Board cannot stick that PRP with the share.

MR. ROSEMARIN: That's why they are going to come in and finalize their finding.

BOARD MEMBER GIRARD: We may be speaking past one another. I am not sure. Until we have an actual case before us, it is hard to say how the Board would rule.

MR. ROSEMARIN: Well, all I can do is repeat what I have said, is that the Board does not have any choice but to assign solely the proportionate share of C and D, the other two parties that you are referring to in your hypothetical. The Board would not have -- I think you have put your finger on precisely the fallacy of 210(d)(3). Under this statute the Board does not have the authority to impose upon C and D the remainder absent evidence of C and D's proportionate share. It is simply not there.

BOARD MEMBER GIRARD: Well, the evidence may be that they contributed to the site. I mean, that may be all the evidence we need to make a determination.

MR. ROSEMARIN: And that will have to suffice to be translated into some percentage allocation.

BOARD MEMBER GIRARD: In that case I am not so sure under your language and under the language from the Agency that the Board would make a different determination with the same set of facts.

MR. ROSEMARIN: I am sorry. I don't see how that conclusion can result if there is virtually no information. What I am saying is in our language, in Com Ed's proposed language, the result cannot be that whatever is unknown gets dumped on C and D. That is an unlawful result. That would be the result, we

believe, under the Agency's proposal. That result is prohibited under Com Ed's proposal.
BOARD MEMBER GIRARD: Well, I guess I don't have any other questions. I will take a look at it.
MR. WIGHT: Just a follow-up on that. Didn't you also just testify that equitable factors could be used as part of the allocation?
MR. ROSEMARIN: I did.
MR. WIGHT: So could equitable factors in the absence of evidence to proportionate share be used to allocate some share?
MR. ROSEMARIN: Equitable factors have to come in as evidence.
MR. WIGHT: Although they are not necessarily evidence tied to the volume or the toxicity or those issues that we would typically think of when we are thinking about allocations?
MR. ROSEMARIN: Equitable factors is a term of art. That has been amply defined in case law, but they still have to come in as evidence.
MR. WIGHT: I am not quarreling with that. I am saying if there were none of the types of evidence that Dr. Girard was talking about, you would -- you had testified that equitable factors could be considered by the Board. I thought I understood you

to testify that they could be used in determining the proportionate share.

MR. ROSEMARIN: I did.

MR. WIGHT: So is not the technical, numerical type factors that one might use, for example, volume, toxicity, and that sort of thing, equitable factors such as Gore factors? And I believe one of those have the degree of cooperation with the government. Could that be a basis for allocation of some percentage of share?

MR. ROSEMARIN: That's one, the Gore factors. And Gore factors are among the equitable principles that can be examined. I can't imagine any of the volume, slash, toxicity factors being responsible to fill the void of the remaining 80 percent. I can't imagine a situation in which that would occur, other than perhaps some extreme situation in which we have a bad actor encouraging all persons to place their hazardous substances illicitly on a site or something strange like that.

MR. WIGHT: There might be some share based on equitable factors, not necessarily the entire remaining share but some lesser share?

MR. ROSEMARIN: In the abstract I think that is conceivable.

MR. WIGHT: Okay.
HEARING OFFICER ERVIN: Any additional questions for Mr. Rosemarin?
MR. ROSEMARIN: If I can add one point?
HEARING OFFICER ERVIN: Certainly.
MR. ROSEMARIN: One issue that I did want to raise in response to Member Hennessey's comment earlier, I think one of the cases that is particularly instructive with respect to proportionate share may be the Supreme Court case which I failed to cite earlier, McDermott v. AmClyde, 511 US 202, which talks about settlements and talks about the difference between pro tanto settlement and proportionate share settlement. That is really what is at issue here.
HEARING OFFICER ERVIN: Any additional questions? Thank you.
MR. ROSEMARIN: Thank you.
HEARING OFFICER ERVIN: One final matter before we adjourn.
Public Act 90-489, which became effective on January 1st, 1998, requires the Board to request the Department of Commerce and Community Affairs to conduct an economic impact study on certain proposed rules prior to the adoption of those rules. DCCA has 30 to 45 days after such request to produce a study of

the economic impact of the proposed rules.

In accordance with this Public Act, the Board has requested, by a letter dated February 5th of 1998, that DCCA conduct an economic impact study on this rulemaking. In the request letter the Board asked that DCCA notify the Board within ten days of receipt of the request if DCCA was going to conduct an economic impact study.

The Board further stated that if it did not receive such notification, the Board would rely on the January 26, 1998 letter in which DCCA notified the Board it would not be conducting economic impact studies on rules pending before the Board for the remainder of FY '98 as the required explanation for not conducting an economic impact study.

The ten days for DCCA to notify the Board has expired, and the Board has not received any notification from DCCA that it would be conducting an economic impact study. Accordingly, the Board will rely on the January 26, 1998 letter as DCCA's explanation for not producing the study.

Under Public Act 90-489 the Board is also required to hold a hearing on DCCA's explanation for not conducting a study. So I would ask at this time if there is anyone who would like to comment regarding

DCCA's explanation for not conducting an economic impact study for these proposed rules?

Seeing none, then we -- the Board has requested an expedited transcript of this hearing. The transcript should be available in the Chicago office on Monday, and in the Springfield office on Tuesday. If anyone would like a copy of the transcript from today's hearing, you can speak to the court reporter directly. It will not be -- you will not be able to get it off the web site. You can get a free copy by contacting the Clerk's office in Chicago or by contacting me. The copies of the transcripts from the other hearings are also available.

Due to the statutory deadline the Board is operating under, public comments must be received by the Clerk of the Board no later than 4:30 on July 14th, 1998, to insure that the comments will be considered by the Board in its deliberations as to how the proposed rule should read at the first notice publication. The mailbox rule does not apply to this filing.

Anyone may file public comments. These public comments must be filed with the Clerk of the Board. If you are on the service list your public comment must be simultaneously delivered to all persons on the

service list. You should contact the clerk's office to make sure that you have an updated service list.

Please note that there will be additional time to file public comments. This time period will last 45 days commencing on the date the first notice appears in the Illinois Register.

Are there any other matters that need to be addressed at this time?

Seeing none, then I would like to thank you all for your patience and participation at these hearings, and this hearing will be adjourned.

(Hearing Exhibits 15 and 16 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 141 pages comprise a true, complete and correct transcript of the proceedings held on the 10th of June A.D., 1998, at 200 South Ninth Street, the 2nd Floor, Springfield, Illinois, In the Matter of: Proportionate Share Liability, 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 12th day of June A.D., 1998.

Notary Public and
Certified Shorthand Reporter and
Registered Professional Reporter

CSR License No. 084-003677
My Commission Expires: 03-02-99