

1           BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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5   IN THE MATTER OF:

6   REVIEW OF REMEDIATION COSTS FOR

7   ENVIRONMENTAL REMEDIATION TAX           R98-027

8   CREDIT (AMENDMENTS TO 35 ILL.       (Rulemaking - Land)

9   ADM. CODE 740)

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13           Proceedings held on 27th of February, 1998, at  
14 10:00 a.m., at the Illinois State Library, Room 403,  
15 300 South Second Street, Springfield, Illinois, before  
16 the Honorable Richard R. McGill, Jr., Hearing  
17 Officer.

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21           Reported by: Darlene M. Niemeyer, CSR, RPR  
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A P P E A R A N C E S

Claire A. Manning, Chairman  
Kathleen M. Hennessey, Board Member  
G. Tanner Girard, Board Member  
Marili McFawn, Board Member

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P R O C E E D I N G S

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

HEARING OFFICER MCGILL: Good morning. My name is Richard McGill. I have been appointed by the Illinois Pollution Control Board to serve as Hearing Officer in this rulemaking proceeding entitled, In the Matter of: Review of Remediation Costs for Environmental Remediation Tax Credit (Amendments to 35 Illinois Administrative Code 740). The docket number for this matter is R98-27. Today is the second hearing.

Also present today on behalf of the Board is Kathleen Hennessey to my left, the lead Board Member for this rulemaking.

BOARD MEMBER HENNESSEY: Good morning.

HEARING OFFICER MCGILL: Board Member Tanner Girard, and Board Member Marili McFawn.

BOARD MEMBER McFAWN: Good morning.

BOARD MEMBER GIRARD: Good morning.

HEARING OFFICER MCGILL: By way of background, on January 21, 1998, the Illinois Environmental Protection Agency filed its proposal. The Agency's proposal seeks to amend the Site Remediation Program, or SRP, which is located at 35 Illinois Administrative Code, Part 740. The proposal is required by Public Act 90-123 which amended the Environmental Protection

1 Act last year by, among other things, adding Section  
2 58.14.

3 The proposal sets forth procedures for the  
4 Agency's review of costs potentially qualifying for an  
5 environmental remediation tax credit and provides for  
6 related appeals to the Board. The Board accepted this  
7 matter for hearing by its order of January 22, 1998,  
8 and must adopt on or before July 21, 1998, rules for  
9 second notice that are consistent with Section 58.14  
10 of the Environmental Protection Act. The Board's last  
11 regularly scheduled meeting before this July 21  
12 deadline is July 9, 1998.

13 Please note that sign up sheets for this  
14 proceeding's service lists and notice lists are  
15 located at the back of the room. Those on the notice  
16 list will receive only Board opinions and orders and  
17 Hearing Officer orders. Those on the service list  
18 will receive these documents plus certain other  
19 filings. Also over here at the side of the room are  
20 copies of current notice and service lists. These  
21 lists are updated periodically.

22 As I mentioned earlier, besides the Agency's  
23 witnesses, if you wish to testify today you must sign  
24 in on the appropriate sign up sheet over here at the  
25 side of the room. Time permitting, after the Agency's

1 testimony we will proceed with the testimony of  
2 persons who sign up in the order their names appear on  
3 the sign up sheet.

4 This hearing will be governed by the Board's  
5 procedural rules for regulatory proceedings. All  
6 information which is relevant and not repetitious or  
7 privileged will be admitted. All witnesses will be  
8 sworn and subject to cross questioning. If you do not  
9 wish to give testimony, you may file written public  
10 comments.

11 I will note that we have just been joined by  
12 Chairman Manning.

13 CHAIRMAN MANNING: Hello. Sorry I am late.

14 HEARING OFFICER MCGILL: As for the order of  
15 today's proceeding, we will begin with the Agency's  
16 testimony. Then if time permits after a question  
17 period of the Agency's witnesses, we will proceed with  
18 the testimony of those on the sign up sheet. Anyone  
19 may ask a question of any witness. I ask that during  
20 the question periods if you have a question please  
21 raise your hand and wait for me to acknowledge you.  
22 When I acknowledge you, please state your name and any  
23 organization you are representing here today.

24 Please speak one at a time. If you are speaking  
25 over each other the court reporter will not be able to

1 get your statements down for the record. Please note  
2 also that any questions asked by a Board member or  
3 staff are intended to help build a complete record for  
4 the Board's decision and not to express any  
5 preconceived notion or bias.

6 Are there any questions about the procedure that  
7 we will follow today?

8 Seeing none, I will note that there is currently  
9 one additional hearing scheduled in this matter. It  
10 is scheduled for March 17, 1998. I will discuss that  
11 hearing in more detail at the end of today's hearing.  
12 Also, at the end of today's hearing I will set a  
13 deadline for filing pre first notice public comments.

14 Would any of the Board Members present like to  
15 make any remarks at this time?

16 CHAIRMAN MANNING: No.

17 BOARD MEMBER HENNESSEY: No.

18 BOARD MEMBER McFAWN: No.

19 BOARD MEMBER GIRARD: No.

20 HEARING OFFICER MCGILL: We will now proceed with  
21 the Agency's testimony in response to questions raised  
22 at the first hearing.

23 Mr. Wight, would you like to begin?

24 MR. WIGHT: Thank you. My name is Mark Wight. I  
25 am Assistant Counsel with the Illinois Environmental

1 Protection Agency. I am the Agency attorney who has  
2 been assigned to this rulemaking.

3 With me today, as on the last hearing on the 24th,  
4 on my immediate left is Gary King, who is the Manager  
5 of the Division of Remediation Management within the  
6 Bureau of Land.

7 To Gary's left is Larry Eastep, who is the Manager  
8 of the Remedial Project Management Section.

9 On my immediate right is Doug Oakley, who is the  
10 supervisor of the unit that has been reviewing claims  
11 for payment in the Underground Storage Tank Program.

12 To Doug's right is Shirley Baer, who is a project  
13 manager with the Site Remediation Program. Shirley  
14 was a member of our work group on this regulation and  
15 has assisted in coordination of activities between the  
16 Department of Revenue and DCCA.

17 I think -- oh, one other housekeeping matter. All  
18 copies of the relevant Agency documents are back here  
19 on the table. Anyone who has not received a copy is  
20 welcome to come up and get a copy. These copies  
21 include three documents that will be introduced as  
22 exhibits today, and have not been generally circulated  
23 at this point, so feel free to help yourself to these.

24 Also with me today is Vicky VonLanken, whom many  
25 of you can't see. She is sitting around the corner



1 here. She is assisting with documents. If we do run  
2 out of Agency documents, we have a sign up sheet and  
3 you can sign up with your name and address and request  
4 documents that you have not received, and we will be  
5 happy to send those out to you.

6 With that, I think we will move on to our  
7 responses. It is my understanding that the Hearing  
8 Officer would like to have the witnesses sworn again  
9 for today's proceeding, so if you would like to take  
10 care of that now then I will have our first exhibit to  
11 introduce after that.

12 HEARING OFFICER MCGILL: To clarify for those in  
13 the audience, Mr. King will be testifying, but all of  
14 the witnesses will be available as a panel to answer  
15 questions, is that --

16 MR. WIGHT: That's correct.

17 HEARING OFFICER MCGILL: Okay. Thank you. Would  
18 you swear in all the witnesses, please.

19 (Whereupon Shirley Baer, Larry Eastep, Gary  
20 King, and Doug Oakley were sworn by the Notary  
21 Public.)

22 HEARING OFFICER MCGILL: All right. Please  
23 proceed.

24 MR. WIGHT: Thank you.

25

1                                   G A R Y P. K I N G,  
2   having been first duly sworn by the Notary Public,  
3   saith as follows:

4                                   D I R E C T   E X A M I N A T I O N

5                                   B Y   M R.   W I G H T:

6           Q     Mr. King, I am handing you a document marked  
7   as Exhibit 2 for identification.   Would you please  
8   take a look at this document.

9           A     (Witness complied.)

10          Q     Do you recognize the document?

11          A     Yes, I do.

12          Q     Could you please tell us what the document  
13   is?

14          A     The document is six pages long, and it is  
15   entitled, Illinois Environmental Protection Agency  
16   Draft of Revisions to Proposed Amendments to Part 740  
17   in Response to Questions from the Pollution Control  
18   Board hearing of February 24th, 1998.

19          Q     Is that a true and correct copy of the  
20   document that the Agency has drafted?

21          A     Yes, it is.

22          M R.   W I G H T:   Okay.   Thank you very much.   I would  
23   ask at this time that you enter Exhibit Number 2 into  
24   the record, and I have extra copies.

25          H E A R I N G   O F F I C E R   M C G I L L:   Thank you.   I have been

1 handed a document entitled, Illinois Environmental  
2 Protection Agency Draft of Revisions to Proposed  
3 Amendments to Part 740 in Response to Questions from  
4 Pollution Control Board hearing of 02-24-98. This  
5 document is dated February 27, 1998. It is a six page  
6 document. Is there any objection to entering as a  
7 hearing exhibit the document I just described?

8       Seeing no objection, I am marking as Exhibit  
9 Number 2 and entering as a hearing exhibit the  
10 document entitled, Illinois Environmental Protection  
11 Agency Draft of Revisions to Proposed Amendments to  
12 Part 740 in Response to Questions from Pollution  
13 Control Board hearing of 02-24-98, again, dated  
14 February 27, 1998.

15       (Whereupon said document was duly marked for  
16 purposes of identification and entered into  
17 evidence as Hearing Exhibit 2 as of this date.)

18       HEARING OFFICER MCGILL: All right. If you would  
19 like to proceed, Mr. Wight.

20       MR. WIGHT: Okay. What we will do then at this  
21 point is -- the document that you have just been  
22 handed as Exhibit 2 is a document that contains raw  
23 language but no context. So for Mr. King's  
24 presentation we recreated the questions from the first  
25 hearing as we understood them, and we will just go

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1 through those in the order that they were received.  
2 And when a language change on Exhibit 2 is relevant,  
3 Mr. King will point that out and direct your attention  
4 to the language change that you see in Exhibit 2. So  
5 hopefully we can coordinate that with the questions as  
6 Mr. King goes through his testimony.

7 HEARING OFFICER MCGILL: Thank you.

8 MR. KING: At the hearing on February 24th, the  
9 Board asked a number of very pointed and very precise  
10 questions relative to the consistency or inconsistency  
11 relative to various provisions in our proposal. And  
12 some of those questions I thought we answered  
13 adequately and some of them I thought we could have  
14 answered a little better. And others we just pretty  
15 much deferred to be able to give some additional  
16 thought to.

17 So in actually less than 72 hours we have done the  
18 following. First, we went back and compiled the  
19 questions into a written format from what we heard at  
20 the hearing. That took us Wednesday morning. Then on  
21 Wednesday afternoon we went ahead and reviewed the  
22 questions and developed -- figured out what we thought  
23 we had answered properly and developed answers for  
24 questions that we didn't think we had answered quite  
25 as completely as we could have. Then also on

1 Wednesday afternoon we set about the task of trying to  
2 figure out what kind of modifications to the proposal  
3 would be appropriate in light of the answers that we  
4 were prepared to give.

5       And Thursday we ended up writing -- that was  
6 yesterday. I guess that was yesterday. We ended up  
7 writing the modifications to the proposal and  
8 discussed with DCCA a couple of the issues that were  
9 outstanding relative to their involvement on this.  
10 And then Thursday afternoon we went through the  
11 process of reviewing what we put together. So it was  
12 a lot to get done given a very short time frame, so we  
13 have attempted to clarify these things as best we  
14 could, and hopefully we are in the right direction.

15       I am sure if there is some other issues that are  
16 raised by these changes or if there is an indication  
17 that it is still, you know, not as complete we  
18 certainly would be willing to evaluate things further  
19 and make sure that the Board is clear at least on what  
20 we believe this rule should include.

21       Let me go through the -- this is going to be kind  
22 of a little bit of jumping around as to what is in  
23 Exhibit 2, but I think if we go through it -- we will  
24 try to go through it somewhat carefully. Just a  
25 minute, please.

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

2 MR. KING: It may be good as we are going through  
3 this explanation if the Board wants to interpose  
4 questions at that time rather than us going through  
5 the entire thing and then trying to jump all the way  
6 back. So if that is -- if the Board wants to do that,  
7 it is certainly -- that would be okay with us.

8 BOARD MEMBER HENNESSEY: We will try.

9 MR. KING: The first issue that was raised that I  
10 think was really kind of an overriding issue was one  
11 of why are there appeals of budget plans if the  
12 Agency's decisions are really nonbinding. And we  
13 don't have a real good response to that other than to  
14 say, you know, that's the way it is. You know, if you  
15 look at the legislation, it really -- it sets forth  
16 that these budgets are preliminary decision points  
17 which typically is not the kind of thing that goes to  
18 the Board for review, and yet there is provision for  
19 Board review of those preliminary decisions. I think  
20 the Board correctly pointed out that that is kind of  
21 an awkward procedure, but I am not sure that there is  
22 a real good way to answer that.

23 If somebody is going to appeal a preliminary  
24 determination, it appears that that was a statutory  
25 right created and I think the Board would follow that

1 along. I am not sure what -- since it is a  
2 preliminary determination, I am not sure what kind of  
3 binding affect it would have on a final decision. I  
4 think it would almost be more of a guidance relative  
5 to what would happen on the final review. You know,  
6 it would have value in that sense, but it is a  
7 difficult concept and I am not sure that there is a  
8 very easy way to resolve it. It is just the way the  
9 statute is set up.

10 The next question that came up was related to  
11 whether there should be a definition of enterprise  
12 zone or there should be some kind of cross reference  
13 to what DCCA's statute or regulations are relative to  
14 the enterprise zone issues. What we did, rather than  
15 putting in a definition, is we have a cross reference  
16 which you will see. This is in 740.720(c)(2) which is  
17 on page four. It just references there -- it says, as  
18 defined in the Illinois Enterprise Zone Act. Our  
19 conversations with DCCA were such that their  
20 conclusion was that this would be the best way to  
21 reference this at this point given the fact that their  
22 rules are not final given the fact that it is really  
23 the entire Act that is dealing with the definition of  
24 Enterprise Zone.

25 The next issue, there really was a number of

15

1 questions related to how the time deadline process  
2 worked with budget plans and Remedial Action Plans.  
3 And rather than try to go through each of those  
4 questions and try to answer them, what I would like to  
5 do is explain what changes we made in Section 705(d).  
6 That appears on page one of Exhibit 2. We did -- what  
7 we tried to do initially is -- the first sentence is  
8 really kind of the baseline kind of what I think was  
9 really the intended outcome for people to follow, and  
10 that is that if somebody is going to submit a budget  
11 plan, they should submit it with the Remedial Action  
12 Plan. And that if that occurs then there is a total  
13 of 120 days to do a combined review of both  
14 documents. That is what is contained in the first two  
15 sentences there.

16 Then the next question really revolved around,  
17 well, what happens if they don't submit it with the  
18 Remedial Action Plan. Our conclusion which is  
19 expressed in the next sentence is that if they don't  
20 submit the budget plan with the initial Remedial  
21 Action Plan then they need to wait until after the  
22 Remedial Action Plan has had a final determination,  
23 and then they can submit the budget plan. And then  
24 there would be a 60 day review period on that budget  
25 plan. We struggled with other versions of that and

16



1 they seemed to -- they became more and more complex as  
2 you thought through the process of amending things and  
3 carrying things out. This seemed to be the simplest  
4 way to handle that issue. The total time frame would  
5 still add up to 120 days. We have 60 plus 60.

6 The next sentence deals with the situation as to  
7 whether -- if the amended Remedial Action Plan is  
8 submitted or an amended budget plan is submitted once  
9 the initial documents come in there we are saying  
10 that, again, there is a restart on the 120 day time  
11 frame for that combined review.

12 Then the final sentence deals with if there is an  
13 amended budget plan that is submitted without an  
14 amended Remedial Action Plan after we have made a  
15 final determination, then there is an additional 60  
16 days to review that amended budget plan. I am sure  
17 there are other scenarios that could be developed from  
18 this. We tried to be as -- think this through as  
19 comprehensively as we could. The language is still --  
20 it is precise, but it is sometimes a little bit  
21 awkward on this. But we gave it our best shot at  
22 trying to come up with something, and I think -- at  
23 least we think we are working in a meaningful sort of  
24 way. Then the final provision there, we just deleted  
25 that last sentence because we tried to cover it with

1 the previous sentences.

2 The next issue was relative to -- this is in  
3 705(e)(1). It is the issue of whether there was some  
4 language missing relative to disapproving of Remedial  
5 Action Plan as opposed to just approving it with  
6 conditions. We went ahead and are suggesting that  
7 change be made in 705(d)(1) with the language that we  
8 have suggested there on page two of Exhibit 2.

9 The next issue that came up was related to the use  
10 of the concept of a default, why we did not use the  
11 concept of a default approval. We did that to be  
12 consistent with the other parts of Part 740, and I  
13 think there was a question of why we did not describe  
14 it as default denial. We did not describe it as a  
15 default denial because that's not the way the statute  
16 handles their terminology. So we used the same  
17 terminology that is used in the statute and is used  
18 through the remainder of Part 740. So we really  
19 didn't see a need to make a change in the proposal  
20 relative to that point.

21 BOARD MEMBER HENNESSEY: Mr. King, just to  
22 clarify, the -- if there is a failure to approve  
23 within the specified time it is considered a denial;  
24 is that correct?

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

18

1 MR. KING: I think, as a practical matter, it ends  
2 up being a denial, but it is not a denial in the sense  
3 that there is a substantive issue that goes up to the  
4 Board for review. It is more what goes up to the  
5 Board for review is the need for the Agency to be  
6 ordered to complete its review. I think that's the  
7 way that is anticipated to work. So practically it  
8 works as a denial, but there is no real substantive  
9 issues raised by that.

10 MR. EASTEP: Can I confer a second?

11 HEARING OFFICER MCGILL: Sure.

12 (Mr. Eastep and Mr. King confer briefly.)

13 HEARING OFFICER MCGILL: I have a question. You  
14 refer to the statutory language. Are you referring to  
15 58.7 of the Act or the way the Act was amended?

16 MR. WIGHT: I can tell you where it appears  
17 earlier in Part 740. It is at 740.505(h) which is a  
18 slight modification of the statutory language, but I  
19 don't have the statutory cite.

20 HEARING OFFICER MCGILL: Yes, I think (h) does  
21 refer to the 58.7. I just wanted to make sure you  
22 were not referring to the recent amendment that added  
23 58.14 to the Act.

24 MR. WIGHT: No, we weren't.

25 HEARING OFFICER MCGILL: Okay. Thanks.

1 MR. KING: The next issue that came up was whether  
2 the operation of law issue could be satisfied --  
3 excuse me. Let me restate that. Let's look at  
4 740.710(a)(2). The question was whether there could  
5 be the affidavit option which is an option in addition  
6 to the NFR letter concept that could be used in lieu  
7 of submitting an NFR letter for purposes of the  
8 application process for credit. We have added  
9 language to allow that to occur.

10 The next issue concerned -- and this is looking at  
11 710(a)(4). If you look at the certification language,  
12 it starts out at the bottom of page two and then runs  
13 on to the top of page three. There was language about  
14 the -- it says none of the costs included in this  
15 application have been or will be reimbursed from  
16 any -- we have added federal or, those two words,  
17 state government grant, the Underground Storage Tank  
18 Fund or any policy of insurance. That language was  
19 added to be consistent with parallel language that  
20 occurred in ineligible cost provision in 740.730(e).

21 There was also a question that the Board raised as  
22 to why we selected these three examples and why we  
23 didn't select others and should this list be broader.  
24 The reason why we picked these three is that they  
25 really grew out of discussions that we had with the

1 Department of Revenue last fall. Those seem like ones  
2 that were appropriate to put in. We had discussions  
3 with them. They requested that we provide information  
4 relative to the certification on whether those --  
5 there had been reimbursements relative to those items  
6 that we knew about.

7 I am not sure that it is absolutely necessary to  
8 be in our rule here. We did it for purposes of  
9 cooperation with the Department of Revenue. Whether  
10 we have that entered in there or not, you know, the  
11 Department of Revenue is still entitled to make a  
12 review under the tax code as to whether something has  
13 been unreimbursed or not. As we discussed at the last  
14 hearing, really the statutory provision that this is  
15 coming out of to do this is really the state tax  
16 code.

17 The next issue that was brought up was whether we  
18 should include the term pesticides with the term  
19 regulated substances in order to remain consistent  
20 with the rest of Part 740. We have done that at the  
21 various places that it has appeared. I will just note  
22 for the record where that is occurring in Exhibit 2.  
23 The first place is at 740.705(a)(3) and then at  
24 710(a)(4) and then at 725(a)(7) and the next at  
25 725(a)(8) and then finally 730, Subsection (f). Those  
21

1 changes are changes that should show up through the  
2 modified language here.

3 The next issue that was raised was whether the  
4 related party language from the state tax code should  
5 be included in language here, and we have made that  
6 change. That is in 710(c). That is on page three of  
7 Exhibit 2. And also in 730, Subsection (c) which  
8 appears on page five of Exhibit 2.

9 The next issue that we discussed at the hearing on  
10 Tuesday was concerning the certification relative to  
11 line items on the budget plan. Our original concept  
12 there was the certification, you submitted it, and if  
13 you were showing that all of the line items had been  
14 met relative to the final submission and the question  
15 was raised whether there should be a certification  
16 allowed for individual line items or something that  
17 was less than the complete list, and we have concluded  
18 that that is a sensible approach. You know, we have  
19 included language in 740.715(c) to accomplish that  
20 end. You will see that starting on the bottom of page  
21 three and then going on to the top of page four.

22 The next question was whether the word "estimated"  
23 in 715, Subsection (d), whether the word "estimated"  
24 in that section should be deleted. We reviewed that  
25 and agreed that it should be deleted and we have

1 indicated that on page four of Exhibit 2.

2 MR. WIGHT: Could we take a brief break and go off  
3 the record here for a moment?

4 HEARING OFFICER MCGILL: Sure. Let's go off the  
5 record.

6 (Discussion off the record.)

7 HEARING OFFICER MCGILL: Okay. Let's go back on  
8 the record. I believe at this point, Mr. Wight, we  
9 are going to swear in Melissa Pantier from DCCA for  
10 the purpose of introducing an Agency exhibit.

11 MR. WIGHT: That's correct.

12 HEARING OFFICER MCGILL: Okay. Ms. Pantier, if  
13 you would step up here and be sworn in by the court  
14 reporter.

15 (Whereupon the witness was sworn by the Notary  
16 Public.)

17 M E L I S S A P A N T I E R,  
18 having been first duly sworn by the Notary Public,  
19 saith as follows:

20 DIRECT EXAMINATION

21 BY MR. WIGHT:

22 Q Melissa, this will just take a moment.

23 A Okay.

24 Q I am handing you a document that has been  
25 marked as Exhibit 3 for identification. I would like

23

1 you to take a close look at that document.

2 A (The witness complied.)

3 Q Do you recognize the document?

4 A Yes.

5 Q Could you please tell the Hearing Officer  
6 what the document is?

7 A Yes. This is a draft of the administrative  
8 rules which the Department of Commerce and Community  
9 Affairs has prepared to submit to the Joint Committee  
10 on Administrative Rules in order to help our agency  
11 comply with the law which you are currently  
12 considering, regarding our implementation of the  
13 Environmental Remediation Tax Credit.

14 Q Is this a true and correct copy of that  
15 document as it currently exists in DCCA's control?

16 A Yes, as a draft form, that is correct.

17 Q Okay. Thank you very much.

18 A You are welcome.

19 HEARING OFFICER MCGILL: Ms. Pantier, this has not  
20 yet been submitted to JCAR; is that right?

21 MS. PANTIER: That's correct.

22 HEARING OFFICER MCGILL: Okay. Thank you.

23 BOARD MEMBER McFAWN: Has it been sent to the  
24 Illinois Register for first notice?

25 MS. PANTIER: No, it has not. We are currently

24



1 having several enterprise zone administrators review  
2 it because it will help us to implement the rules as  
3 they stand. We wanted to make sure that they had the  
4 opportunity to comment on it before we submitted it  
5 officially to JCAR.

6 BOARD MEMBER McFAWN: Okay. Before you go to  
7 JCAR, you have to send it to first notice?

8 MS. PANTIER: Right.

9 BOARD MEMBER McFAWN: Okay. So you have not gone  
10 to first notice either?

11 MS. PANTIER: No.

12 BOARD MEMBER McFAWN: Okay. I just wanted to make  
13 sure I understood. Thank you.

14 HEARING OFFICER MCGILL: Thank you.

15 MS. PANTIER: Thank you.

16 MR. WIGHT: You will note that the document is  
17 stamped draft on each page. I request that Exhibit  
18 Number 3 be entered into the record.

19 HEARING OFFICER MCGILL: Okay. I have been handed  
20 the --

21 MR. WIGHT: Excuse me. I have copies for anyone  
22 who needs one.

23 (Mr. Wight passed copies to the Board Members.)

24 HEARING OFFICER MCGILL: I have been handed a  
25 draft of Department of Commerce and Community Affairs

1 Proposed Rules for Part 520 Enterprise Zone Program.

2 Is there any objection to entering this document as a  
3 hearing exhibit?

4 Seeing none, I am marking as Exhibit Number 3 and  
5 entering as a hearing exhibit the Draft Rules of the  
6 Department of Commerce and Community Affairs regarding  
7 Part 520 Enterprise Zone Program.

8 (Whereupon said document was duly marked for  
9 purposes of identification and entered into  
10 evidence as Hearing Exhibit 3 as of this date.)

11 HEARING OFFICER MCGILL: Why don't we continue  
12 with the Agency testimony.

13 MR. WIGHT: Okay.

14 MR. KING: The next issue that we were talking  
15 about at the last hearing was the language in  
16 740.720(c)(2). The question revolved around whether  
17 it should be clarified as to who was doing the  
18 certification as to the Enterprise Zone, and the issue  
19 was whether the remedial applicant was doing the  
20 certification or the Department of Commerce and  
21 Community Affairs was doing the certification and the  
22 RA was submitting the written certification. The way  
23 we had intended that to be read was that -- and that  
24 was based on our current understanding of where the  
25 DCCA regulations are at, was that DCCA would be going

1 through the process of developing a certification.  
2 They would be certifying that a site was within an  
3 enterprise zone and that certification was based on an  
4 application that would be made to them.

5       It is a little tricky for purposes of the Board  
6 rulemaking because we are kind of running parallel  
7 tracks between two state agencies. And that's the way  
8 I think that the DCCA rules are headed. The Board may  
9 be able to glean some additional information when they  
10 read that draft, of course, recognizing that DCCA has  
11 to complete their rulemaking process on that.

12       The next issue that was raised was talking about  
13 the -- we had a series of questions come up relative  
14 to eligible and ineligible costs. One of those was  
15 related to costs relative to applications for  
16 environmental remediation tax credit. If you look  
17 at -- this is on page five, 740.725(a)(11). There is  
18 not much left from the original there, so what we are  
19 trying to do is wrap a number of issues into there.  
20 One of them we have is the term engineering costs.  
21 That is related to consistency with some other issues  
22 that we will talk about later. We have broken things  
23 apart in terms of whether somebody is making a budget  
24 plan application or an application for the final  
25 review.

1           The budget plan is -- that is going to be  
2 submitted before the remedial action takes place,  
3 obviously. The application for the final review may  
4 not occur until after the NFR letter has been issued,  
5 and by statute costs that are incurred after the NFR  
6 letter is issued cannot be included as part of the  
7 credit. So we have tried to make that clarification  
8 here to make consistency with both the definitions and  
9 the other provisions dealing with the budget and with  
10 the final application process.

11           BOARD MEMBER HENNESSEY: Mr. King, should that  
12 section also include a reference to the affidavit that  
13 may be issued or that may be filed in lieu of an NFR  
14 letter?

15           MR. KING: That would seem like it could, and I  
16 think we had suggested earlier some fairly simple  
17 language to make that kind of a change on page two of  
18 Exhibit two. That kind of language could be  
19 incorporated here as well.

20           The next provision that I wanted -- the next issue  
21 that we discussed at the last hearing revolved around  
22 740.725(a)(12) and how that related to 740.730 (k). I  
23 want to go back and look at that. We have not made  
24 any changes to that provision because we concluded  
25 that it was correct the way it was set up. Again,

28

1 just going back over that provision, it states as an  
2 eligible cost the removal or replacement of concrete  
3 asphalt or paving necessary to achieve remediation  
4 objectives pursuant to an approved Remedial Action  
5 Plan in accordance with Section 740.450 of this part.

6       What we had envisioned was that -- to give you an  
7 example, if you had contamination under an existing  
8 parking lot, let's say, and the conclusion relative to  
9 the Remedial Action Plan was that that contamination  
10 needed to be removed, breaking up and removing the  
11 concrete, and then removing that contamination  
12 underneath, that would be all part of remedial action  
13 and that would be an eligible item as would  
14 backfilling. Backfilling would also be an eligible  
15 item. However, the paving would only become eligible  
16 if it was necessary as an engineered barrier. If it  
17 was not needed as an engineered barrier then the  
18 replacement of the paving would not be an eligible  
19 item.

20       The issue of -- again, if you want to turn and  
21 look at 730(k), this is an ineligible item. It is  
22 saying costs associated with the replacement of  
23 above-grade structures destroyed or damaged during  
24 remediation activities. There again, is the notion  
25 that you are -- if you are building a building above

1 that pavement grade, that barrier grade, we want to  
2 make it clear that you cannot build a building and  
3 take that as a tax credit, as an environmental  
4 remediation tax credit.

5 The next provision I wanted to talk about was  
6 740.725(a)(15). That's on page five of Exhibit 2.  
7 The Board had asked questions about lack of  
8 consistency with the language that we had in our  
9 initial draft. We have gone back and tried to correct  
10 those inconsistencies as they related to 725(a)(12)  
11 through (a)(14) and also to resolve any  
12 inconsistencies with the existing LUST regulations.  
13 There was a question raised about what "permanent"  
14 meant in that context. We just took that term out.  
15 That should resolve that issue.

16 The next issue raised was consistency of use  
17 relative to the term remedial action. We went back  
18 through Part 740, Subpart (g) and also through other  
19 parts of 740 to see how we were using that, and we  
20 believe that where we have used the term remedial  
21 activities as opposed to remedial action that we have  
22 done that in a correct descriptive sort of way and we  
23 don't see any need for change in terminology here.

24 The next issue related to 740.725 -- actually, the  
25 questions related to 740.730 (h) which is the

1 provision that deals with vandalism, theft,  
2 negligence, and fraudulent activity. You see that is  
3 on page six of Exhibit 2. What this is saying is that  
4 costs incurred as a result of vandalism, theft,  
5 negligence, or fraudulent activity by the remedial  
6 applicant or the agent of the remedial applicant,  
7 those are ineligible costs.

8 In addition we have put a provision into 740.725  
9 as a new (a)(17) that says that where costs due to  
10 those types of activities have been incurred as a  
11 result of actions by a party other than the RA or an  
12 agent of an RA, those costs then would be an eligible  
13 item. We have tried to cover it from both ends. So  
14 if you had a vandalism activity that was the result of  
15 actions by someone who was not the RA or an agent of  
16 the RA, those would be eligible. But if there was an  
17 action by the RA or an agent of the RA, then that  
18 would be an ineligible item.

19 There was a group of questions related to how -- a  
20 consistency between 730(p) which is a provision that  
21 talked about costs being -- costs incurred through  
22 delays being ineligible except if it was due to an act  
23 of God, act of war or similar type of circumstances,  
24 there was a question about how was that consistent  
25 with 730(j). There was another question how was that

1 consistent with 730(t). The more we thought about  
2 what we had in Subsection (p), we concluded that it  
3 was not necessary to be in there. It was causing some  
4 inconsistency and we could not think of a reasonable  
5 situation where that would become applicable. So we  
6 concluded that the appropriate solution was to delete  
7 Subsection (p).

8       The next -- we had a series of questions raised  
9 about how the attorney fee provision would work and  
10 whether there was authority. We put in an exception  
11 clause so that certain attorney services could be  
12 eligible costs and the Board was questioning where the  
13 legal authority came to do that. We concluded that  
14 there was not any direct legal authority for that, so  
15 we deleted that exception. We also went back and  
16 we -- there was a concern raised about whether certain  
17 activities, for instance, like developing of  
18 contracts, whether that would be an attorney service  
19 and should that be an allowed cost. Again, there was  
20 an inconsistency issue there so we went back and  
21 deleted 725(a)(1) to be consistent with what we had  
22 done with 730(m).

23       The Board raised questions in Section 730, in  
24 Subsections (u), (v), and (w), where the terms direct  
25 cost and indirect cost are used. We went ahead and



1 made a -- there is a definition in the existing part  
2 of 740 as to indirect costs. We proposed a change in  
3 that. You see that on page one of Exhibit 2. That  
4 concept as it originally appeared in 740, the concept  
5 of indirect cost as to Agency review and oversight  
6 costs and what we were entitled to be reimbursed for.  
7 So that's why we had the term incurred by the Agency.  
8 We changed that and just dropped -- we dropped the  
9 reference to just the Agency. We did that because I  
10 think there is a lot of good description language in  
11 there as to what an indirect cost really covers. We  
12 thought that would be appropriate to have a broader  
13 reference to it.

14 As far as direct costs there is no definition of  
15 direct costs in 740. There is a definition of costs,  
16 and if you want to -- if you have a copy of 740 with  
17 you, if you want to -- if you could turn to that or I  
18 will go ahead and read that definition, the definition  
19 of cost there states as follows: Costs means all cost  
20 incurred by the Agency in providing services pursuant  
21 to a review and evaluation services agreement. You  
22 know, obviously, costs in the context of Subpart (g)  
23 means something different than that, but we felt that  
24 the context was clear that once you moved into Subpart  
25 (g) when you are talking about costs, you were not

1 talking about things that were incurred by the Agency  
2 under an oversight agreement. You were talking about  
3 things that had been incurred by the remedial  
4 applicant. You know, there is a provision that, you  
5 know, talks about these definitions being used unless  
6 the context is clear. Otherwise, that's part of the  
7 introductory language of 740.120. We felt that it was  
8 reasonable to rely on that at this point.

9 The next issue was related to obtaining a special  
10 waste generator number.

11 MR. WIGHT: Excuse me. Could I interrupt here?  
12 We have another exhibit at this point and so maybe it  
13 would be better to introduce the exhibit and then let  
14 Gary explain why we did what we did on that.

15 HEARING OFFICER MCGILL: That's fine.

16 D O U G L A S O A K L E Y,  
17 having been previously duly sworn by the Notary  
18 Public, saith as follows:

19 DIRECT EXAMINATION

20 BY MR. WIGHT:

21 Q Mr. Oakley, I am handing you a document that  
22 has been marked as Exhibit 4 for identification.  
23 Would you please take a look at the document?

24 A Okay.

25 Q Do you recognize the document?

1 A Yes, I do.

2 Q Would you please tell us what the document  
3 is?

4 A It is a document issued by the Agency in  
5 order to obtain a generator ID number.

6 Q Would that be the hazardous waste generator  
7 ID number?

8 A Yes, it is.

9 Q Okay. Is that a true and correct copy of the  
10 form that the Agency uses for that purpose?

11 A Yes, it is.

12 Q Okay. Thank you very much.

13 MR. WIGHT: I would ask that Exhibit 4 be entered  
14 into the record. I can pass out copies.

15 HEARING OFFICER MCGILL: Mr. Oakley, this proposed  
16 Exhibit 4, this is a document that is --

17 MR. OAKLEY: Obtainable from the Agency.

18 HEARING OFFICER MCGILL: Okay. The generator  
19 would fill this out and submit it to the Agency?

20 MR. OAKLEY: Yes.

21 MR. KING: Just the one middle paragraph. I mean,  
22 it is not the entire document that needs to be filled  
23 out.

24 HEARING OFFICER MCGILL: Okay. I have been handed  
25 a document entitled, Bureau of Land Inventory Data

1 Input Form, and the witness has explained that this is  
2 a document that a generator would fill out to obtain a  
3 generator identification number.

4 Is there any objection to entering this document  
5 as a hearing exhibit? Seeing none, I am going to mark  
6 it as Exhibit Number 4 and enter this document as a  
7 hearing exhibit.

8 (Whereupon said document was duly marked for  
9 purposes of identification and entered into  
10 evidence as Hearing Exhibit 4 as of this date.)

11 HEARING OFFICER MCGILL: Why don't we now proceed  
12 with the Agency testimony.

13 MR. KING: As we explained at the hearing on  
14 Tuesday, the provision in 740.730 that corresponds to  
15 this, that this -- let me start over.

16 If you look at 740.730, Subsection (1), this --  
17 that is on page six, our proposed revision there.  
18 Under the LUST Program we have -- we have just always  
19 denied after the first initial year or so when we  
20 started seeing abuses with people generating excessive  
21 costs for filling out this form and we decided it was  
22 such a simple form that, you know, it really  
23 shouldn't -- to cut down on the abuse there shouldn't  
24 be any payment for it. So that is contained in the  
25 LUST rules. We carried over that same provision into

1 these rules.

2       However, based on the questions that we got on  
3 Tuesday we thought that, well, let's go ahead and  
4 consider it an eligible cost but let's put a cap on it  
5 based on what we think the cost should be as far as  
6 preparing it. So we have put together language, and  
7 this is 740.725(a)(16). This is on page five of  
8 Exhibit 2. And what we say there is that costs would  
9 be associated as long as they don't exceed \$25.00. So  
10 we would anticipate allowing a cost for that up to  
11 that amount.

12       The final provision that we have wasn't really in  
13 response to an issue raised by the Board but it was  
14 based on our concurrence with RCGA that some  
15 additional language should be included and you will  
16 see that change on 740.730(n). That's on page six of  
17 Exhibit 2. That language corresponds to language that  
18 we have in the LUST Program rules.

19       With that final provision, I believe that we  
20 concluded our discussion of Exhibit 2 and questions  
21 that we saw that the Board had raised at the last  
22 hearing.

23       HEARING OFFICER MCGILL: Does the Agency have any  
24 additional testimony at this time?

25       MR. WIGHT: No.

1 HEARING OFFICER MCGILL: Why don't we go off the  
2 record.

3 (Discussion off the record.)

4 HEARING OFFICER MCGILL: We are going to take a  
5 ten minute break and give us a chance to look at the  
6 questions we had and see if they have all been  
7 addressed and also so other people present can take a  
8 look at the copies that the Agency has provided to see  
9 if they have any questions. When we go back on the  
10 record we will have a question period for the Agency.

11 Again, I believe the Agency has copies of the  
12 exhibit over on the table if anyone would like to take  
13 a look at that. It is five after so at a quarter  
14 after 11:00 we will go back on the record.

15 (Whereupon a short recess was taken.)

16 HEARING OFFICER MCGILL: All right. Back on the  
17 record.

18 I believe at this point the Agency would like to  
19 introduce an additional exhibit.

20 MR. WIGHT: We do have one final exhibit. This is  
21 something that is more or less spontaneous and  
22 probably for the most part is only of passing  
23 interest. But it is an exhibit that involves the  
24 forms of the Department of Revenue as they have  
25 developed them to this point for the use of the

1 Environmental Remediation Tax Credit. Because it is  
2 spontaneous we have no additional copies of it.

3 Q (By Mr. Wight) Mr. King, I am handing you a  
4 document marked Exhibit 5 for identification. Would  
5 you please look it over?

6 A (Witness complied.)

7 Q Could you describe what the document is and  
8 how it came into your possession?

9 A Exhibit 5 is a -- there is a brief cover memo  
10 that was prepared by the Department of Revenue and  
11 attached to that are various tax schedules which were  
12 prepared -- this whole document was prepared last  
13 fall. The Agency and the Department of Revenue were  
14 cooperating on developing this program, and they sent  
15 this to us as the final schedules that would be used  
16 for this tax credit beginning with current calendar  
17 year 1998. And we certainly -- we certainly can't  
18 vouch for whether they are consistent with the statute  
19 or not. This is something that was prepared by the  
20 Department of Revenue, and we received a copy of it  
21 from them.

22 Q Does the document contain both schedules and  
23 instructions or --

24 A Yes, it does have instructions as well as the  
25 schedules.

1 Q All right. Thank you very much.

2 MR. WIGHT: At this time we would ask that you  
3 enter Exhibit 5 into the record.

4 HEARING OFFICER MCGILL: I have been handed a  
5 document with an Illinois Department of Revenue cover  
6 memo directed to Shirley Bauer and Melissa Pantier  
7 from Julia Launerd (spelled phonetically) dated  
8 November 18, 1997, regarding finals of schedules,  
9 1299-A, 1299-C and 1299-D. Attached to the memo are  
10 various schedules and instructions.

11 Is there any objection to entering as a hearing  
12 exhibit the document I just described? Seeing none, I  
13 am marking as Exhibit 5 and entering as a hearing  
14 exhibit this described document.

15 (Whereupon said document was duly marked for  
16 purposes of identification and entered into  
17 evidence as Hearing Exhibit 5 as of this date.)

18 HEARING OFFICER MCGILL: Okay. At this point we  
19 will proceed with questions for the Agency's  
20 witnesses. As I mentioned earlier today, if you have  
21 a question, please raise your hand and wait for me to  
22 acknowledge you. When I acknowledge you please state  
23 your name and any organization you are representing  
24 here today.

25 Before the Board proceeds with its questions, does



1 anyone else have any questions for the Agency's  
2 witnesses?

3 Yes. If you would state your name and who you are  
4 representing.

5 MR. SCHMITTGENS: My name is Gene Schmittgens with  
6 the Casserly, Jones Law Firm out of St. Louis. I am  
7 representing the Regional Commerce and Growth  
8 Association.

9 HEARING OFFICER MCGILL: All right. Thank you.

10 MR. SCHMITTGENS: Do you want me to go ahead and  
11 ask my questions?

12 HEARING OFFICER MCGILL: Yes, whatever questions  
13 you have.

14 MR. SCHMITTGENS: I just have a couple of really  
15 quick questions. They relate primarily to the  
16 proposed revisions dealing with Section 740.710(a)(4)  
17 specifically with the certification language regarding  
18 what the Agency has dubbed "double dipping."

19 I guess my first question is in Chicago, I  
20 believe, it was Mr. King who pointed out an example  
21 whereby under the LUST -- if you had two tanks at a  
22 given site that was being remediated, one was eligible  
23 under the LUST fund and the second was ineligible  
24 under the LUST fund, that it was the Agency's intent  
25 that that cost could still be eligible for

1 consideration as an eligible cost for purposes of  
2 receiving a tax credit.

3 I note that there is no change in that particular  
4 section from the Chicago meeting. I am wondering if  
5 the Agency's intent remains the same with respect to  
6 that particular example?

7 MR. KING: Yes, our intent is the same.

8 MR. SCHMITTGENS: Okay. Let me take that one step  
9 further, if I may, and just ask a hypothetical  
10 question. If we were to assume a three million dollar  
11 clean up of a site, and if we were to assume that a  
12 remedial applicant received a million dollars from an  
13 insurance policy, and if we were to assume further  
14 that there was an ineligible tank -- or there was an  
15 eligible tank under the Leaking Underground Storage  
16 Tank Fund, that they received a reimbursement of  
17 \$25,000.00, that would be unreimbursed costs still in  
18 excess of a million and a half.

19 Would it be the Agency's position that a remedial  
20 applicant would be eligible for the full remediation  
21 tax credits?

22 MR. KING: They would be -- those costs that are  
23 not reimbursed through the insurance policy or through  
24 the UST Fund, those would be eligible costs  
25 considering everything else. I mean, this provision

1 that we were just talking about would not act as a bar  
2 relative to those costs.

3 MR. SCHMITTGENS: So it is not intended to be a  
4 bar if you would still otherwise -- you know, as if  
5 you had a million dollar site?

6 MR. KING: Right.

7 MR. SCHMITTGENS: With no other sources or no  
8 other opportunities for reimbursement?

9 MR. KING: The fact that a site would receive one  
10 dollar in insurance money as a repayment would not  
11 make all the costs relative to that site ineligible.  
12 It would only make that one dollar ineligible.

13 MR. SCHMITTGENS: Okay. Now I am switching  
14 gears. I am still on the same issue but changing  
15 gears a little bit. Does the Agency take the position  
16 that the language in Section 201(1) of the Income Tax  
17 Act is to be -- which refers to -- well, let me read  
18 you directly what it says. Subparagraph (1) says, for  
19 purposes of --

20 MR. KING: Could you just hang on a second. Let  
21 me get it so that I can read with you.

22 MR. SCHMITTGENS: Okay.

23 MR. KING: Okay.

24 MR. SCHMITTGENS: For purposes of this section,  
25 quote, unreimbursed eligible remediation costs, end

1 quote, means costs approved by the Illinois  
2 Environmental Protection Agency under Section 58.14 of  
3 the Environmental Protection Act that were paid in  
4 performing environmental remediation at the site for  
5 which no further remediation letter was issued by the  
6 Agency and recorded under Section 58.10 of the  
7 Environmental Protection Act, and does not mean  
8 approved eligible remediation costs that are at any  
9 time deducted under the provisions of the Internal  
10 Revenue Code. And then it goes on to say, in no event  
11 shall unreimbursed, eligible remediation costs include  
12 any costs taken into account in calculation an  
13 environmental remediation credit granted against the  
14 tax proposed under the provisions of the Internal  
15 Revenue Code.

16 Is it your position, then, that those two clauses  
17 are separate and distinct and that the first clause  
18 refers to something other than a tax credit that you  
19 might get under the Internal Revenue Code? And I am  
20 sure I didn't ask that question real artfully.

21 MR. KING: Well, let me answer it the way I am  
22 going to answer it anyway.

23 MR. SCHMITTGENS: Okay.

24 MR. KING: What our understanding was, the term  
25 unreimbursed eligible remediation costs, that term

1 would include items in addition to what was deducted  
2 under the Internal Revenue Code. And we had put in  
3 the provisions that we had proposed in 710(a)(4) based  
4 on our discussions with the Department of Revenue last  
5 fall.

6 MR. SCHMITTGENS: Okay. So it is --

7 MR. KING: It is our understanding that they  
8 interpret unreimbursed eligible remediation costs as  
9 governing more than just the Internal Revenue cross  
10 items.

11 MR. SCHMITTGENS: So it is your position that  
12 that's the provision that allows you to define  
13 unreimbursed costs?

14 MR. KING: As I said earlier --

15 MR. SCHMITTGENS: It is not in any way tied to the  
16 Internal Revenue Code?

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

18 MR. SCHMITTGENS: Okay. If I could, just a couple  
19 more questions, and this is out of Section 740.715(c),  
20 and it is the language contained at the top of page  
21 four of what would be Exhibit 2. Of particular  
22 interest to us is what is the last clause, "as if no  
23 budget plan had been approved." Does that mean that  
24 the Agency is going to retreat from its position which  
25 was stated in Chicago that you are not going to

45

1 revisit the reason behind the cost?

2 In other words, if the Remedial Action Plan  
3 approved includes digging up 120 cubic yards of dirt  
4 and taking it off site, and there was a cost overrun  
5 with that line item dealing with the removal of the  
6 120 cubic yards of that dirt, does that mean the  
7 Agency is going to revisit whether or not another  
8 remediation technology should have been considered or  
9 should have been undertaken?

10 MR. KING: No, that's not what that language is  
11 intending.

12 MR. SCHMITTGENS: Okay.

13 MR. KING: You would still have the Remedial  
14 Action Plan as we approved it. That would still be in  
15 place.

16 MR. SCHMITTGENS: Then could you explain what you  
17 mean by, "as if no budget plan had been approved?"

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

19 MR. KING: What we are trying to do there is to  
20 distinguish the situation. If you have a budget plan  
21 and there is six line items and you have met those  
22 line items in five of those, but the sixth one you  
23 have not met it, we were just -- we were trying to  
24 give an indication there as to how the review would  
25 take place.

1 MR. SCHMITTGENS: Okay.

2 MR. KING: So we would simply review it as if  
3 there was not a budget on that one line item. It  
4 would just be reviewing that as if it were just a new  
5 item coming in.

6 MR. SCHMITTGENS: Okay. This is a rhetorical  
7 question. I don't expect you to answer it. But  
8 wouldn't it be easier just to have a remedial action  
9 applicant just provide you information to justify the  
10 reasons for the overrun rather than undertaking what  
11 the courts would term a de novo review of that line  
12 item?

13 MR. KING: Well, in practice I think that's what  
14 will happen.

15 MR. SCHMITTGENS: Okay.

16 MR. KING: Again, you know, we are kind of  
17 struggling with trying to, in a very short time frame,  
18 come up with the most appropriate language for this.  
19 This was the language that we chose.

20 MR. SCHMITTGENS: I understand. I appreciate it.  
21 That's all I have.

22 HEARING OFFICER MCGILL: Thank you. Does anyone  
23 else have any questions for the Agency's witnesses?

24 All right. Seeing none, the Board has a few  
25 questions. Chairman Manning, did you want to pose a

1 question or --

2 CHAIRMAN MANNING: No, I really don't have a  
3 question. I just would like to say I thank the Agency  
4 for getting all the answers to us in such a short  
5 period of time. You did a nice job of doing that.  
6 Richard is going to ask most of our questions, I  
7 think.

8 HEARING OFFICER MCGILL: Just a follow-up from the  
9 last hearing. Referring to Section 740.105(a)(3), in  
10 Part 740, I have a copy of Part 740 if you need it.  
11 But that subsection excludes from the SRP those  
12 investigative and remedial activities required under  
13 UST laws. I was wondering, in light of that, does the  
14 Agency believe it is necessary to refer to the UST  
15 fund in the certification in 740.710 or as a listed  
16 ineligible cost in 740.730?

17 MR. KING: It is difficult to argue relative to  
18 the logic of the question you have raised in how that  
19 interrelates. We simply have continued to include it  
20 just because that is what we kind of worked on with  
21 the Department of Revenue last fall. I think the  
22 Board's question points out that there may be a little  
23 bit of a logic gap in there. It does put people on  
24 notice, you know, to the extent that they are trying  
25 to do something like that, they are trying to get

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1 costs from both programs. I am not sure what I really  
2 can add to that.

3 HEARING OFFICER MCGILL: Thank you. There is a  
4 question about the certification, and this is in  
5 Section 740.715. If the remediation applicant  
6 certifies that a given line item -- that the actual  
7 cost for a line item were less than the approved  
8 budget plan line item, what further review might the  
9 Agency conduct at the final application stage for that  
10 line item?

11 MR. WIGHT: Excuse me? That was if they have  
12 certified that the costs were within the amounts  
13 approved in the budget plan what further review might  
14 be done?

15 HEARING OFFICER MCGILL: Correct. As I understand  
16 it, the Agency may conduct further review but does not  
17 have to. If the Agency were to conduct further  
18 review, what would the Agency be looking for?

19 MR. KING: Sometimes what happens with these types  
20 of cases or situations is information reaches us in an  
21 independent sort of way, either through some review of  
22 something under another program or somebody is going  
23 out and inspecting a site. You know, it could turn  
24 out that based on that additional information there is  
25 some reason to believe that the costs that are

1 indicated in that line item were not actually  
2 incurred. In that case we would take a look at it.  
3 Generally the way things work, like in our tank  
4 program, is if it is within the line item, I mean,  
5 that's okay. Then it is an okay thing. We just pass  
6 on it for that reason. But even there we reserve the  
7 authority to look back at it if there is some  
8 information that we have gained from another mechanism  
9 that indicates that there might be a problem relative  
10 to that line item.

11 HEARING OFFICER MCGILL: So like a fraud concern?

12 MR. KING: I could have used the word fraud, but I  
13 didn't want to use it because it is kind of a strong  
14 term and it might not even be a fraud situation. It  
15 might be some information that indicates that a work  
16 element was not completed when it should have been or  
17 et cetera.

18 HEARING OFFICER MCGILL: Might that further review  
19 also entail to see that the documentation is there of  
20 the costs having been incurred?

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

22 HEARING OFFICER MCGILL: If the Agency does not  
23 conduct that further review then you would not even  
24 look at cost documentation? You could take that  
25 approach?

1 MR. KING: Yes, that's true.

2 HEARING OFFICER MCGILL: Thank you. There is a  
3 question under 740.725. We were talking earlier about  
4 Subsection (a)(12). I think you had mentioned that  
5 clean backfill is considered -- may be considered  
6 eligible. Assuming that no engineered barrier is at  
7 issue, would the costs of compaction and density  
8 testing of such backfill be ineligible?

9 MR. KING: The compaction and density testing  
10 would -- the reason why we allow the backfill is  
11 because otherwise you have a big hole there that  
12 collects water and then, you know, causes further  
13 environmental problems. If it is backfilled, in  
14 essence, you have eliminated that problem. If you are  
15 doing compaction, if you are doing density testing or  
16 trying to compact the material then in our view that  
17 is not a remediation element. That's an element that  
18 is preparing it for holding a structure. So that  
19 would not be an eligible activity.

20 HEARING OFFICER MCGILL: Okay. The last few  
21 questions I had are -- it started out based on review  
22 of the proposed Subsection (a)(15) within 740.725.  
23 Maybe the Agency could explain why -- now, this is now  
24 referring to Exhibit 2 -- why the term "relocation"  
25 has been stricken from the newly proposed Subsection

1 (a)(15)?

2 MR. WIGHT: It will take a minute or two.

3 HEARING OFFICER MCGILL: That's fine.

4 MR. KING: What we did here was we went back and  
5 kind of looked at what we had done with (a)(12)  
6 through (a)(14) and also went back and looked at what  
7 we did in the LUST regulations. If you look at  
8 732.605(a)(18), in that section it talks about  
9 destruction or dismantling and reassembling and it does  
10 not use the term relocation there. You know, it was  
11 really -- as we thought about it, it was -- to be  
12 consistent between the two we thought we should try to  
13 use the same language to the extent we could. That's  
14 why relocation dropped out.

15 HEARING OFFICER MCGILL: Okay. Referring to  
16 Exhibit 2 in the proposed 740.725 (a)(15), does the --  
17 this is a follow-up from the last hearing. Does each  
18 individual activity have to be necessary to achieve  
19 the remediation objectives? By that I mean does the  
20 destruction, the dismantling, and the reassembling,  
21 does each individual activity need to be necessary to  
22 achieve remediation objectives to be eligible?

23 MR. KING: We have a little bit of a typo here.  
24 The way this should read is destruction or dismantling  
25 and reassembling. Okay. So if you think about it

1 those are really two activities. One is destruction  
2 and the other one is you dismantle something and you  
3 reassemble it. You have to -- if you are -- if you  
4 say it is okay to dismantle, it is okay to  
5 reassemble. So if you conclude that it is to achieve  
6 the remediation objectives we have to dismantle  
7 something, it would be okay to reassemble it.

8 HEARING OFFICER MCGILL: Okay. So to restate a  
9 hypothetical from the last time, if an above-grade  
10 structure is dismantled to allow contaminated soil  
11 beneath it to be removed up to Tier I residential TACO  
12 remediation objectives so that there would be no need  
13 for an any engineered barrier once the soil is  
14 removed, would the cost of reassembly of that  
15 structure on that spot be eligible?

16 MR. KING: Yes.

17 HEARING OFFICER MCGILL: Presumably, then, if the  
18 structure is dismantled to allow that clean up to  
19 those levels of soil beneath it and then the  
20 dismantled structure is disposed of off site, is the  
21 dismantling, the cost of dismantling eligible?

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

23 HEARING OFFICER MCGILL: And would the cost for  
24 transport of disposal of those dismantled materials be  
25 eligible, off site disposal?

1 MR. KING: Yes, that would be.

2 HEARING OFFICER MCGILL: I assume the answer would  
3 be the same if it were destruction or demolition?

4 MR. KING: That's correct.

5 HEARING OFFICER MCGILL: Just a couple of  
6 hypotheticals. Assume you have an above-grade  
7 structure that is located above contaminated soil and  
8 needs to be moved to excavate the contaminated soil,  
9 and also assume the structure will continue to be used  
10 at the site once it is relocated from its current spot  
11 "A" to spot "B" at the site. Is the cost of moving  
12 the structure from spot "A" to spot "B" at the site  
13 eligible even though the structure is not going to be  
14 serving as an engineered barrier at spot "B"?

15 (Mr. King and Mr. Oakley confer briefly.)

16 MR. KING: We were just discussing briefly whether  
17 we have encountered that as part of the tank program  
18 in the seven years and in the 6,000 sites that we have  
19 reviewed. It does not appear that we have had  
20 anything quite like that come up. I don't know if it  
21 is because we don't have that relocation term in the  
22 existing tank rules or what, but it has never really  
23 come up before. So I guess I am kind of at a loss to  
24 explain based on experience.

25 HEARING OFFICER MCGILL: If it did come up --

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1           MR. KING: I think it probably would be okay. The  
2 thing is, again, you have to -- I am trying to be a  
3 little careful on this kind of stuff, because if  
4 somebody is picking up a permitted structure and  
5 moving it somewhere else on the site they are probably  
6 not doing that to get to the contamination. They are  
7 probably doing it for some other business reason, you  
8 know, and in that case it should not be allowed.

9           HEARING OFFICER MCGILL: If you had a situation  
10 where a structure just needs to be temporarily  
11 removed, say you -- let's stick with this example, if  
12 you move something from spot "A" to allow contaminated  
13 soil that needs to be cleaned up to Tier I residential  
14 TACO levels, and then move the structure back to spot  
15 "A" afterwards, do you have any sense of how -- how  
16 the Agency would come out on that as to whether the  
17 cost of moving it back to spot "A," for example, would  
18 be eligible?

19          MR. KING: I think that is probably -- that  
20 probably would be okay. That is getting close to that  
21 dismantling and reassembling. I guess I was thinking  
22 of a situation where we might have some kind of shed  
23 out behind the building that is not really -- it is  
24 there, but it is not quite a permanent structure. So  
25 rather than taking it down and reassembling it, it

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1 might just be easier to move it over a little bit and  
2 proceed. It is pretty close to a dismantling and  
3 reassembling in that kind of scenario.

4 HEARING OFFICER MCGILL: Would the Agency take the  
5 same approach for site investigations? For example,  
6 if a structure needs to be dismantled or moved or  
7 demolished to allow for soil borings to be put in or  
8 an installation of a groundwater monitoring well as  
9 part of a site investigation?

10 MR. KING: I don't think so because it is just  
11 a -- in that situation you can put wells in all sorts  
12 of different places. In fact, when we were going  
13 through the regulatory proceeding for the LUST rules,  
14 that issue came up in the context of where the --  
15 where you had to put things relative to the setback,  
16 and people didn't want to put it in the middle of a  
17 building. So we worked out an arrangement so that  
18 they could go on the other side of a building to avoid  
19 that kind of situation.

20 HEARING OFFICER MCGILL: In the context of SRP,  
21 are site investigations reviewed and approved in  
22 advance by the Agency or no?

23 MR. KING: They can be. That's the preferred  
24 approach is for somebody to submit a site  
25 investigation plan and you would go through that kind



1 of exercise to determine whether samples should be  
2 taken or not taken.

3 HEARING OFFICER MCGILL: But the site  
4 investigation wouldn't have to be approved in advance  
5 by the Agency?

6 MR. KING: No. That is correct.

7 HEARING OFFICER MCGILL: The last question along  
8 these lines is what is meant by the use of the term  
9 above-grade in Subsection (a)(15)? Let me just throw  
10 out an example. What if a below grade structure such  
11 as a building foundation needs to be destroyed to  
12 achieve remediation objectives? Would something like  
13 that be considered eligible?

14 MR. KING: It could be. You know, of course, we  
15 have never tried to delineate in the eligible  
16 provisions every single item that could be eligible.  
17 We have -- we have left open with 725 Subsection B the  
18 opportunity for somebody to make a site specific  
19 demonstration. We have tried to cover what we see as  
20 the most typical or would have been the more  
21 controversial type issues.

22 HEARING OFFICER MCGILL: Okay. We are obviously  
23 taking a close look at these. I note that in  
24 740.715(a) the Agency says they will review  
25 applications for final review to determine, and it

1 uses a language, in accordance with Section 740.725  
2 and 740.730 whether the costs incurred are remediation  
3 costs. I think there is similar language in Section  
4 740.705(c). So it looked as though -- well, 725 and  
5 730 are important.

6 MR. KING: Right, right. Well, that was why --  
7 again, that is why we have that in 725, we have that  
8 Subsection B which allows someone to make a  
9 demonstration of eligibility for items that are not  
10 specifically included on the list under Subsection A.

11 HEARING OFFICER MCGILL: Thank you. At this point  
12 do any of the Board Members have any further  
13 questions?

14 BOARD MEMBER McFAWN: No questions.

15 BOARD MEMBER GIRARD: No questions.

16 CHAIRMAN MANNING: No questions.

17 BOARD MEMBER HENNESSEY: Thank you for your prompt  
18 response.

19 HEARING OFFICER MCGILL: Yes, we really appreciate  
20 it.

21 BOARD MEMBER HENNESSEY: Not that you had much  
22 choice about it.

23 MR. KING: You have to do it no matter what  
24 anyway.

25 HEARING OFFICER MCGILL: We thank you. Does

1 anyone else have any other questions for the Agency's  
2 witnesses about the proposed amendments or otherwise?

3 Seeing none, we will move to the sign up sheet to  
4 see who else will be testifying today. Let's go off  
5 the record for a moment.

6 (Discussion off the record.)

7 HEARING OFFICER MCGILL: All right. Back on the  
8 record.

9 Turning to the testimony of those who signed up to  
10 testify today, only one person has signed up. That is  
11 Kelsey Lundy with Regional Commerce and Growth  
12 Association or the RCGA.

13 Mr. Schmittgens, as Counsel for the RCGA, would  
14 you like to make any openings remarks?

15 MR. SCHMITTGENS: I have no other openings remarks  
16 other than to indicate that Ms. Lundy is going to read  
17 verbatim with I think probably a couple of other  
18 thoughts from her testimony. I think everyone -- all  
19 the Board Members have it. We have, similar to the  
20 Agency, a panel, some other members and people that  
21 have worked with the RCGA as we were developing the  
22 statute which is the subject of this rulemaking  
23 procedure. They will join her to help her ask  
24 questions. I will have each of them introduce  
25 themselves whenever you are ready to do that.

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1 HEARING OFFICER MCGILL: Okay. Maybe they could  
2 join us up here at the head of the table there.

3 MR. SCHMITTGENS: Okay.

4 HEARING OFFICER MCGILL: Before we proceed with  
5 the testimony of the St. Louis RCGA, why don't we  
6 swear in all the witnesses, please.

7 (Whereupon Ms. Kelsey Lundy, Mr. Mike  
8 Alesandrini and Mr. Eric Voyles were sworn by the  
9 Notary Public.)

10 HEARING OFFICER MCGILL: Before we proceed with  
11 Ms. Lundy's testimony, I would appreciate it if each  
12 of the witnesses would state their name and position  
13 and who they are representing here today and perhaps  
14 the affiliation with the RCGA.

15 MR. ALESANDRINI: I am Mike Alesandrini. I am the  
16 environmental manager at the RCGA staff.

17 MR. VOYLES: I am Eric Voyles. I am the Vice  
18 President of Economic Development for the River Bend  
19 Growth Association. We are both a chamber of commerce  
20 and an economic development agency operating in the  
21 Alton area. One of the big projects that we are  
22 working on is the redevelopment of the Owens-Illinois  
23 site. I serve on the environmental committee that  
24 Mike has. My organization is also a member of the St.  
25 Louis Regional Commerce and Growth Association.

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1 HEARING OFFICER MCGILL: Thank you. Ms. Lundy, if  
2 you would like to begin your testimony.

3 MR. SCHMITTGENS: Do you want me to authenticate  
4 this as an exhibit?

5 HEARING OFFICER MCGILL: Sure. That is fine.

6 K E L S E Y L U N D Y,  
7 having been previously duly sworn by the Notary  
8 Public, saith as follows:

9 DIRECT EXAMINATION

10 BY MR. SCHMITTGENS:

11 Q Ms. Lundy, I will show you what has been  
12 marked as Exhibit 6 and ask you to review that and  
13 identify that for me?

14 A It is the 11 page copy of my testimony.

15 MR. SCHMITTGENS: Okay. I would like to introduce  
16 this into the record. I have additional copies if any  
17 of the Board Members need one.

18 HEARING OFFICER MCGILL: I have been handed a copy  
19 of a document entitled, Testimony of Kelsey Lundy on  
20 Behalf of the St. Louis Regional Commerce and Growth  
21 Association. It is an 11 page document. Is there any  
22 objection to entering this document as a hearing  
23 exhibit?

24 Seeing none, I will mark this document as Exhibit  
25 Number 6 and enter it as a hearing exhibit.

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1 (Whereupon said document was duly marked for  
2 purposes of identification and entered into  
3 evidence as Hearing Exhibit 6 as of this date.)

4 HEARING OFFICER MCGILL: Ms. Lundy, if you would  
5 like to proceed with your testimony.

6 MS. LUNDY: Thank you. Good morning. My name is  
7 Kelsey Lundy, and I am the Director of Community  
8 Affairs with the St. Louis Regional Commerce and  
9 Growth Association, also known as RCGA. The RCGA  
10 represents business and industries in the St. Louis  
11 metropolitan area, including five counties in  
12 southwestern Illinois. The RCGA was proud to work  
13 with the Office of the Governor, the Illinois  
14 Environmental Protection Agency, the Illinois  
15 Department of Commerce and Community Affairs and the  
16 Illinois Department of Revenue to have the Brownfields  
17 Remediation Tax Credits legislation passed. We  
18 appreciate the leadership of Senators Frank Watson and  
19 James Clayborne and Representatives Tom Holbrook and  
20 Ron Stephens in moving this legislation to passage.  
21 We would like to thank the Governor for signing this  
22 landmark legislation.

23 The RCGA has reviewed the proposed regulations and  
24 has consulted with a number of its members regarding  
25 their views of the impact of the regulations on

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1 projects that they would undertake. I also attended  
2 the hearing on February 24, in Chicago, Illinois and  
3 had the chance to hear the testimony of the Illinois  
4 Environmental Protection Agency and talk with them  
5 regarding our concerns with the proposed rules. I  
6 believe that we are close to an agreement with the  
7 Agency on most of the rules. I have been asked to  
8 make the following comments in order to clarify the  
9 RCGA's position regarding the proposed rules.

10 My comments will center on three primary issues.  
11 They are: The preliminary budget review, eligible  
12 costs and what the Agency has termed "double dipping"  
13 a term which we believe is inappropriate in the  
14 context of our objections and to the language of the  
15 regulations. After addressing these three issues, I  
16 will briefly address two matters which were raised by  
17 the Board at the hearing. I will deal with each issue  
18 in the same order as they are listed above.

19 The statute at 415 ILCS 5/58.14(c) provides: If a  
20 preliminary review of a budget plan has been obtained  
21 under subsection (d) the Remediation Applicant may  
22 submit, with the application and supporting  
23 documentation under subsection (b) a copy of the  
24 Agency's final determination accompanied by a  
25 certification that the actual remediation costs

1 incurred for the development and implementation of the  
2 Remedial Action Plan are equal to or less than the  
3 costs approved in the Agency's final determination on  
4 the budget plan. The certification shall be signed by  
5 the Remediation Applicant and notarized. Based on  
6 that submission, the Agency shall not be required to  
7 conduct further review of the costs incurred for  
8 development and implementation of the Remedial Action  
9 Plan and may approve costs as submitted.

10 This provision allows for a simplification of the  
11 application process in the event an applicant has  
12 received a preliminary review of the budget for the  
13 site. The RCGA believes that it is extremely  
14 important that the developer of a Brownfields site  
15 know from the outset what credits it will be entitled  
16 to at the completion of the remediation. We also  
17 understand that flexibility is required to allow both  
18 the Agency and the developer to cost overruns and  
19 underruns at the completion of the remediation.  
20 Unless a developer can have some certainty, a  
21 developer will be reluctant to pursue the development.

22 At the February 24, 1998 hearing, some questions  
23 were raised regarding the extent that the Agency's  
24 preliminary budget review was binding upon the Agency  
25 with respect to the awarding of credits, particularly



1 since a right of appeal of the Agency's determination  
2 is granted to the Remedial Applicant by the statute.

3       The RCGA believes that this problem can be  
4 alleviated by implementing a three pronged approach,  
5 as we understand this pronged approach to be in  
6 Tuesday's hearing, in analyzing the approval of a  
7 Remedial Action Plan. The first prong relates to the  
8 remedial activities approved in the Remedial Action  
9 Plan. For example, if the removal of contaminated  
10 soil is approved, then that activity's associated  
11 costs are deemed eligible costs and are binding on the  
12 Agency subject to the review of the third prong.

13       The second prong addresses actual costs which are  
14 contained in the RAP's preliminary budget. If the  
15 Agency has approved the sampling protocol which the  
16 Remedial Applicant has done for its preliminary review  
17 of the viability of the site, then those actual costs  
18 will be binding upon the Agency for the purposes of  
19 determining the amount of the credits.

20       The final prong deals with approved activities for  
21 which the costs are only estimated. In this event,  
22 the Agency's determination that the activity is proper  
23 for the remediation of the site will only be subject  
24 to review for the purposes of determining the actual  
25 cost incurred for that activity and whether that cost

1 is above, or below the estimate contained in the  
2 preliminary budget.

3       The RCGA believes that this approach will provide  
4 an applicant, once its Remedial Action Plan has been  
5 approved, the necessary level of certainty that it  
6 will receive tax credits and that there will be no  
7 further question regarding the eligibility of the  
8 activities undertaken at the site. If the Agency  
9 believes that there is sufficient reason for  
10 undertaking a certain activity, then that should end  
11 the discussion regarding the eligibility and necessity  
12 for those costs. We believe that the approval of the  
13 Remedial Action Plan should be evidence that the costs  
14 are eligible for all purposes under the Act.

15 Therefore, the RCGA would suggest that the Board  
16 consider new language in Section 740.725 as follows:

17       (c)(1) If the Agency has approved a Remedial  
18 Action Plan in accordance with Section 740.450, then  
19 the costs associated with the activities of the  
20 approved Remedial Action Plan should be considered  
21 eligible remediation costs. Only the costs associated  
22 with activities contained in an approved Remedial  
23 Action Plan will be eligible costs for the purposes of  
24 receiving a remediation tax credit.

25       (2) If the Agency has approved a preliminary

1 budget in accordance with Section 740.705, then upon  
2 the submission of a certification that the actual  
3 remediation costs incurred for the development and  
4 implementation of the Remedial Action Plan are equal  
5 to or less than the costs approved by the Agency's  
6 final determination on the budget plan, then the  
7 Agency shall, absent fraud or further review pursuant  
8 to Section 740.710(c) approve the eligibility of  
9 costs.

10       The RCGA believes that the above language will  
11 address the concerns of developers that the Remedial  
12 Action Plan will not be modified so as to exclude  
13 costs which were associated with activities approved  
14 by the Agency. The proposed language will give the  
15 Agency the flexibility to address changes in the  
16 estimated costs which often arise in the  
17 implementation of the Remedial Action Plan.

18       Turning to the second issue regarding the  
19 classification of some costs as ineligible for  
20 determining the proper tax credit due, as was stated  
21 above, the RCGA believes that if a Remedial Action  
22 Plan is approved, then the costs associated with the  
23 approved activities should necessarily become eligible  
24 costs. If the changes proposed by the RCGA regarding  
25 the preliminary budget review are accepted, then the

1 majority of its concerns regarding the costs which the  
2 Agency considers ineligible as outlined in Section  
3 740.730 will mostly be addressed. The RCGA believes,  
4 however, that many of these costs should be considered  
5 eligible costs and the language, in some instances,  
6 should be modified. We will, therefore, address each  
7 costs for which we have concerns.

8       Section 740.730 (e) makes costs that might  
9 otherwise be reimbursable ineligible if the Remedial  
10 Applicant receives reimbursement from an insurance  
11 policy, federal or state grants, or the Leaking  
12 Underground Storage Tank Fund ineligible. The RCGA's  
13 objection to this exclusion will be addressed later in  
14 my testimony. Therefore, the specifics of our  
15 concerns will be more fully discussed below.

16       Section 740.730(f) prohibits costs which are  
17 associated with "material improvements which serve  
18 incidentally as engineered barriers and are not  
19 primarily designed or intended to eliminate or  
20 mitigate exposures to, or migration of regulated  
21 substances."

22       It is important that the Agency clarify under what  
23 circumstances a cost would be denied. The application  
24 of this restriction on a Brownfields project is  
25 important. There are a number of industrial

1 structures which can be incorporated into engineered  
2 barriers. Parking lots can be relocated to provide  
3 caps. Loading docks can be constructed to incorporate  
4 berms to prevent the migration of contaminants. These  
5 are but two examples of structures which can have  
6 multiple uses. It does not make economic sense to  
7 require the construction of two structures when one  
8 can provide the benefit of two. Creative design  
9 changes should be encouraged to make these projects as  
10 economically viable as possible by incorporating a  
11 number of uses into one structure.

12 At the hearing in Chicago, the Agency seemed to  
13 indicate that it agreed with the above example.  
14 Therefore, some modification of subparagraph (f) would  
15 be appropriate. The RCGA would propose that this  
16 Section be modified to read as follows:

17 (f) Costs associated with material improvements  
18 which serve incidentally as engineered barriers and  
19 are not primarily designed or intended to eliminate or  
20 mitigate exposures to, or migration of regulated  
21 substances except that if the improvement is part of  
22 an approved Remedial Action Plan, then the costs  
23 associated with the improvement shall be considered an  
24 eligible cost.

25 The RCGA agrees with the questions posed by the  
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1 Board regarding the inconsistency with the Underground  
2 Storage Tank cost regulations as they apply to Section  
3 740.730(h). It seems unfair that a Remedial  
4 Applicant, who is undertaking a remediation effort for  
5 which it is not required to do, should find that  
6 wrongful acts of third persons over whom it has no  
7 control will make the Remedial Applicant liable for  
8 costs associated with such wrongful acts. Therefore,  
9 the RCGA would propose that the language of 732.606(c)  
10 be incorporated here as well. Section 740.730(h)  
11 should then read:

12 Costs incurred as a result of vandalism, theft, or  
13 fraudulent activity by the Remedial Applicant or the  
14 Agent of the Remedial Applicant;

15 Section 740.730(k) excludes costs which appears to  
16 be inconsistent with Section 740.725(15). At the  
17 hearing in Chicago, the Agency indicated that it  
18 intended to address incidents involving negligence by  
19 the Remedial Applicant or its contractors. That being  
20 so, it would be appropriate to have some clarification  
21 of the reasons such costs are considered ineligible.  
22 Therefore, the RCGA would suggest that the language be  
23 modified to read:

24 Costs associated with the replacement of  
25 above-grade structures destroyed or damaged during

1 remediation activities due to negligence by the  
2 Remedial Applicant or the agent of the Remedial  
3 Applicant;

4 Section 740.730(1) makes costs for obtaining  
5 generator identification numbers ineligible. At the  
6 hearing in Chicago the Agency indicated, as they had  
7 shown in the proposed rules, that these costs are  
8 ineligible because of abuses in the Leaking  
9 Underground Storage Tank program which led to inflated  
10 costs. Because the RCGA believes that this is a  
11 necessary cost associated with the remediation  
12 project, particularly with respect to the disposal of  
13 contaminants of concern it would propose the following  
14 modification:

15 Costs associated with obtaining a special waste  
16 generator identification number in excess of \$250.00  
17 or the actual time spent in obtaining the permit as  
18 certified by the Remedial Applicant or the agent of  
19 the Remedial Applicant.

20 Section 740.730(m) disallows attorneys' fees  
21 except in very limited circumstances. These  
22 circumstances do not include duties which are normally  
23 within the duties of counsel such as the preparation  
24 of contracts and so on. Such costs are, however,  
25 eligible costs as set forth in Section 740.725(a)(1).

1 In addition, contrary to the assertions of the Agency  
2 in Chicago, discussions with the Agency regarding  
3 target clean up levels often involve matters of  
4 statutory or regulatory interpretation. Such  
5 activities are matters which involve the practice of  
6 law, for which attorneys are the proper individuals  
7 for undertaking such negotiations. Any position by  
8 the Agency to the contrary or which allows individuals  
9 other than attorneys to prepare contracts and other  
10 legal documents encourages the unauthorized practice  
11 of law. This cannot be the intended consequence of  
12 the Agency's prohibition on attorneys fees.  
13 Therefore, at a minimum the language of subparagraph  
14 (m) must be modified as follows:

15 Attorneys fees, except for those attorney services  
16 provided in appeals to the Illinois Pollution Control  
17 Board pursuant to this Part 740 where the Board rules  
18 in favor of the Remedial Applicant as petitioner and  
19 the Board has not authorized payment of the  
20 petitioner's legal fees, or incurred for the  
21 preparation of an application for an Environmental  
22 Remediation Tax Credit, or arising out of the Remedial  
23 Applicant's participation in the Site Remediation  
24 Program to the extent such services arise out of the  
25 preparation of legal documents or involve the practice



1 of law.

2 Section 740.730(n) is unnecessarily limited in its  
3 application. For example, similar language is found  
4 in Section 732.606(h) which provides, "purchase costs  
5 for non-expendable materials, supplies, equipment or  
6 tools, except that a reasonable rate may be charged  
7 for the usage of such materials, supplies, equipment  
8 or tools." Under the IEPA's proposed rules that  
9 change is made.

10 Section 740.730(s) makes costs for "unnecessary"  
11 tests ineligible. The RCGA believes that if a test is  
12 approved in a Remedial Action Plan, then that test is  
13 by definition necessary. Therefore, if the RCGA's  
14 approach that costs associated with approved remedial  
15 activities is adopted, this Section should be modified  
16 as follows:

17 (s) Costs not associated with the approved  
18 Remedial Action Plan, including improperly conducted  
19 activities, such as data collection, testing,  
20 measurement, reporting, analyses, modeling, risk  
21 assessment, or sample collection, transportation,  
22 measurement, analyses, or testing:

23 Sections 740.730(w)(x)(y) and (bb) are costs that  
24 should be considered eligible if the costs are  
25 contained in an approved Remedial Action Plan. If so,

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1 then the costs should be eligible.

2 With respect to the third issue, at the hearing in  
3 Chicago, the Agency characterized the RCGA's Public  
4 Comments regarding objections to Section 740.710(a)(4)  
5 as "double dipping." Such a characterization  
6 misstates the objections to that Section. The Section  
7 requires an applicant to certify that "none of the  
8 costs included in this application have been or will  
9 be reimbursed from any state government grant, the  
10 Underground Storage Tank Fund, or any policy of  
11 insurance."

12 According to the Agency, the statutory support for  
13 this limitation is found at 35 ILCS 5/201(1) of the  
14 state income tax act which allows a tax credit against  
15 Illinois income taxes for "certain amounts paid for  
16 unreimbursed eligible remediation costs as specified  
17 in this subsection." RCGA's understanding of the  
18 Agency's interpretation of this Section is that  
19 because a Remedial Applicant is reimbursed for costs  
20 by any state government grant, the Underground Storage  
21 Tank Fund, or any policy of insurance the costs then  
22 cannot be "unreimbursed" costs. However, this  
23 position misconstrues the provisions of the Section.  
24 Subparagraph (1) goes on to state that:

25 For purposes of this Section, "unreimbursed

1 eligible remediation costs" means costs approved by  
2 the Illinois Environmental Protection Agency under  
3 Section 58.14 of the Environmental Protection Act that  
4 were paid in performing environmental remediation at a  
5 site for which a No Further Remediation Letter was  
6 issued by the Agency and recorded under Section 58.10  
7 of the Environmental Protection Act, and does not mean  
8 approved eligible remediation costs that are at any  
9 time deducted under the provisions of the Internal  
10 Revenue Code. Then it goes on to say, in no event  
11 shall unreimbursed eligible remediation costs included  
12 any costs taken into account in calculation an  
13 environmental remediation credit granted against a tax  
14 imposed under the provisions of the Internal Revenue  
15 Code.

16 It is apparent that the plain reading of the  
17 statute excludes only costs for which a federal tax  
18 deduction or credit is to be taken. Therefore, there  
19 is nothing in the Act that would require the  
20 certification in Section 740.710(a), nor is there any  
21 statutory authority, which would allow the Agency to  
22 prevent the granting of tax credits if an applicant  
23 were able to recoup some of its costs from other  
24 sources.

25 To put this another way, the requirement of the

1 proposed regulation seriously inhibits an applicant's  
2 ability to finance a deal by requiring the applicant  
3 to offset other sources of financing against the tax  
4 credits. In the case of a Brownfields redevelopment  
5 project, the applicant is undertaking a remediation  
6 effort, which it would not ordinarily be required to  
7 take. In fact, the Act prohibits the awarding of a  
8 tax credit to an individual who cannot demonstrate  
9 "that the release of the regulated substances of  
10 concern for which the No Further Remediation Letter  
11 was issued were not caused or contributed to in any  
12 material respect by the Remediation Applicant."

13 Brownfields projects are inherently riskier, may  
14 give rise to future liability and are difficult to  
15 finance. These credits are but one tool to create a  
16 cleaner environment in the State of Illinois. In and  
17 of themselves, they are insufficient to finance the  
18 entire project. Therefore, they should not be  
19 required to be offset by other sources of funding,  
20 particularly when there is no statutory authority to  
21 do so.

22 While the RCGA believes that the Agency is without  
23 authority to place the limitation discussed here,  
24 should the Board agree with the Agency's  
25 interpretation of the statute, then it should consider

1 a modification of the impact of the proposed  
2 regulations on this topic. At the hearing in Chicago,  
3 the Agency indicated that it did not intend the impact  
4 of the limitation to preclude the Remedial Applicant  
5 from accepting reimbursement for costs which exceed  
6 the value of the tax credit. For example, the Agency  
7 stated that if a site contained two underground  
8 storage tanks; one eligible for reimbursement from the  
9 fund, the other not eligible, then credits could be  
10 obtained for the remediation associated with the tank  
11 not subject to reimbursement from the fund.

12 Taking this position to its logical conclusion  
13 then, if there are a number of contaminants which are  
14 to be addressed, then the fact that the tank fund may  
15 reimburse the applicant for costs associated with a  
16 petroleum release should not affect the ability of the  
17 Remedial Applicant to receive tax credits for costs  
18 associated with those other contaminants. Similarly,  
19 if the cost of remediating the property exceeds the  
20 value of the tax credits, then the Remedial Applicant  
21 should be able to receive reimbursement from other  
22 sources. For example, if the total cost of  
23 remediating the site is three million dollars, of  
24 which only \$600,000.00 is eligible for tax credits and  
25 the Remedial Applicant receives a grant of

1 \$400,000.00, insurance proceeds in the amount of one  
2 million, and tank fund money in the amount of  
3 \$100,000.00, then there is still \$900,000.00 of  
4 unreimbursed costs.

5 The RCGA believes, for the reasons set forth above  
6 that the applicant should still be able to receive the  
7 full value of the tax credit. In other words, the tax  
8 credits should not be offset against other  
9 reimbursements from the three sources listed above.  
10 It may be appropriate then to revise the provision to  
11 affirmatively state that reimbursements from any state  
12 or federal government grant, the Underground Storage  
13 Tank Fund, or any policy of insurance shall not  
14 preclude the award of tax credits.

15 Finally, at the hearing in Chicago two matters  
16 were raised by the Board on which the RCGA would like  
17 to comment. There was an indication that the Board  
18 has concerns whether Section 740.725(a)(15) dealt with  
19 remediation costs. The RCGA believes that the costs  
20 addressed in the Section must remain. This provision  
21 gives the Agency and the Remedial Applicant the  
22 flexibility to address particular issues which may  
23 affect the overall viability of a Brownfields  
24 project. Because these sites are being remediated by  
25 an entity with no responsibility to do so, it is

1 necessary that the flexibility remain so that such  
2 projects will be encouraged.

3       The RCGA shares the Board's concern regarding the  
4 language of Section 740.730(d). It would like to work  
5 with the Agency to ensure that activities which must  
6 be performed subsequent to the issuance of a No  
7 Further Action Letter are eligible for the tax credits  
8 if the activity is part of the Remedial Action Plan.

9       Again, the RCGA appreciates the opportunity to be  
10 a part of this very important undertaking. We look  
11 forward to working with all parties in the future to  
12 implement the tax credit program and to ensure its  
13 benefits to the People of Illinois and to remediate  
14 sites which would not otherwise be addressed.

15       I would like to add that the RCGA believes that it  
16 is inappropriate to compare the LUST Program to this  
17 program. It is important to point out that those in  
18 the LUST Program and many in the Site Remediation  
19 Program contaminated the property and that those who  
20 would be eligible for this tax credit did not  
21 contaminate the site. It seems that the Illinois  
22 Environmental Protection Agency, through the revisions  
23 proposed today, may be setting a higher standard for  
24 those who voluntarily clean up a site that they did  
25 not contaminate than for those under the LUST Program

1 who did contaminate the site.

2 I would be happy to answer any questions.

3 HEARING OFFICER MCGILL: Thank you very much.

4 Let's go off the record.

5 (Whereupon a short recess was taken.)

6 HEARING OFFICER MCGILL: All right. Back on the  
7 record.

8 Does the RCGA have any additional testimony they  
9 would like to present at this point?

10 MR. SCHMITTGENS: I don't think so. Ready to  
11 forge ahead.

12 HEARING OFFICER MCGILL: Okay. At this point we  
13 will proceed with questions for the RCGA's witnesses.

14 Does the Agency have any questions?

15 MR. WIGHT: We would like to thank the RCGA for  
16 their participation in the development of the proposal  
17 and for reviewing drafts last fall before the proposal  
18 was submitted. We would also like to thank the RCGA  
19 for their participation in these hearings. Obviously,  
20 we still have some differences of opinion, but it has  
21 been helpful that they have identified issues and  
22 brought a different perspective, and we think we can  
23 all benefit from that and use the discussion to  
24 clarify the rule and make it the best rule we can.

25 With that in mind, we think we understand the



1 RCGA's testimony so we don't have any questions with  
2 regard to clarification. However, we would reserve  
3 the right to respond to any of those points in written  
4 comments or whatever procedures the Board decides  
5 should follow these hearings. We may have more to say  
6 in reply at a later date, but as far as questions to  
7 clarify points of the testimony we have none.

8 HEARING OFFICER MCGILL: Thank you. Before the  
9 Board proceeds with its questions, does anyone else  
10 have any questions? Seeing none, the Board has a few  
11 questions.

12 Referring to page four of the testimony of Kelsey  
13 Lundy, up at the top of page four, proposed Subsection  
14 (c)(1) to Section 740.725, from reading that, that  
15 subsection is not limited to situations where  
16 preliminary budgets are approved. In this subsection  
17 is the RCGA suggesting that any costs, no matter how  
18 high, shall be eligible as long as it is incurred in  
19 performing an activity contained in an approved RAP?

20 (Mr. Schmittgens and Ms. Lundy confer briefly.)

21 MS. LUNDY: I think that our point in including  
22 that is that activity itself would be eligible and  
23 that the third prong, referring to the estimated cost,  
24 that if the estimated cost -- if the actual costs were  
25 to go over the estimated costs then that would kick in

1 the Agency's ability to come in and determine  
2 reasonableness.

3 HEARING OFFICER MCGILL: Thank you. Referring to  
4 the last sentence there in the same subsection (c)(1)  
5 that the RCGA is proposing, that actually reads like a  
6 limitation. Is the second sentence of (c)(1) actually  
7 a limitation that would preclude, for example, site  
8 investigation costs incurred prior to the development  
9 of a Remedial Action Plan?

10 MS. LUNDY: No, it would not because my  
11 understanding is that those activities are generally  
12 included in the Remediation Action Plan when put  
13 together so we do not believe that it would preclude  
14 those costs.

15 HEARING OFFICER MCGILL: Thank you. Does the RCGA  
16 believe it is permissible to allow attorney fees to be  
17 eligible at all without specific statutory authority?

18 MS. LUNDY: Yes.

19 HEARING OFFICER MCGILL: Do you have any basis for  
20 that or do you want to flush that out at all?

21 (Mr. Schmittgens and Ms. Lundy confer briefly.)

22 MS. LUNDY: We believe that there is authority to  
23 include legal fees in professional fees because  
24 eligible cost was purposely not defined in the  
25 statute, so that the Illinois Environmental Protection

1 Agency as well as other groups could, as we have been  
2 doing up to this point talking about what that  
3 definition of eligible cost would be, we believe it is  
4 within that perimeter that legal fees could be  
5 included.

6 HEARING OFFICER MCGILL: Thank you.

7 BOARD MEMBER HENNESSEY: As a follow-up to that  
8 question, the language that you have proposed for  
9 subparagraph (m) of 730 on page seven of your  
10 testimony, you refer to basically this would make  
11 eligible costs those attorneys fees arising out of an  
12 RA's participation in the Site Remediation Program to  
13 the extent such services arise out of the preparation  
14 of legal documents or involve the practice of law.

15 Is this language going to require the agency to  
16 determine what involves the practice of law?

17 (Mr. Schmittgens and Ms. Lundy confer briefly.)

18 MS. LUNDY: I think that probably the definition  
19 needs to be worked on more. But I think that what our  
20 point is is that there are situations in -- you know,  
21 during the remediation of a Brownfield site in which  
22 such as negotiations with the Agency on tier levels,  
23 et cetera, would necessitate the use of an attorney  
24 and so maybe the specifics maybe need to be spelled  
25 out a little bit more.

1 BOARD MEMBER HENNESSEY: Yes, I think it would be  
2 helpful. When you are looking at those specifics I am  
3 also wondering if when you talk about negotiations  
4 with the Agency do you actually mean time spent  
5 with -- between an RA's attorney and the Agency or  
6 would you also include time spent preparing for those  
7 negotiations.

8 (Mr. Schmittgens and Ms. Lundy confer briefly.)

9 MS. LUNDY: Yes, I would say that would be  
10 correct, that it would include both.

11 BOARD MEMBER HENNESSEY: Okay.

12 HEARING OFFICER MCGILL: Does the RCGA interpret  
13 the word, quote, unreimbursed, end quote, in Section  
14 201(1) of the Illinois Income Tax Act to mean only two  
15 things, namely remediation costs that are, one, not  
16 deducted under the Internal Revenue Code or, two, not  
17 used to calculate a remediation tax credit against a  
18 tax imposed under the Internal Revenue Code?

19 MS. LUNDY: That is correct.

20 HEARING OFFICER MCGILL: Referring to the example  
21 provided on page ten of your testimony, is the  
22 \$600,000.00 figure referring to an Internal Revenue  
23 Code tax credit?

24 MS. LUNDY: No. What the \$600,000.00 cost is  
25 attributable to is that the amount -- there are caps

1 that apply and first you have to meet a threshold for  
2 \$100,000.00 in order for your site to become eligible  
3 for the tax credit. Then the ceiling is \$700,000.00.  
4 The point behind the caps was that the Office of the  
5 Governor wanted to and the Illinois Environmental  
6 Protection Agency believed that sites under  
7 \$100,000.00 were already being addressed and we wanted  
8 to target those larger sites. So that's where the  
9 \$600,000.00 comes from.

10 HEARING OFFICER MCGILL: In your testimony you  
11 note that structures like parking lots may serve as  
12 engineered barriers, and that it does not make  
13 economic sense to require the construction of two  
14 structures when one can provide the benefit of two.  
15 Independent of any tax credit, doesn't the Remediation  
16 Applicant already have an economic incentive not to  
17 build two structures if only one will do, namely  
18 avoiding the expense of building the second structure?

19 (Mr. Schmittgens and Ms. Lundy confer briefly.)

20 MS. LUNDY: The answer to your question is yes. I  
21 think that what our reasoning behind emphasizing that  
22 point was that we were worried that the language from  
23 the Agency may have leaned too heavily on disallowing  
24 cost if it was more of an economic benefit than an  
25 engineered barrier. We wanted to point out that it

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1 could be interpreted either way. We believe that if  
2 both can do -- if building a parking lot and also  
3 doing the cap would do two things and one it should  
4 automatically be an eligible cost. So we wanted to  
5 clarify that, that if it can do both that it would be  
6 and it wouldn't side more on whether it was an  
7 economic benefit or whether it was an engineered  
8 barrier.

9 HEARING OFFICER MCGILL: The last two questions  
10 relate to language that the Agency has presented  
11 today, and if you are prepared to respond to these  
12 questions that would be great. Does the RCGA agree  
13 with the newly proposed Section 740.725(a)(15) as  
14 presented by the Agency earlier today?

15 (Mr. Schmittgens and Ms. Lundy confer briefly.)

16 HEARING OFFICER MCGILL: It is on page five of  
17 Exhibit 2.

18 MS. LUNDY: We would like some time to further  
19 look at that.

20 HEARING OFFICER MCGILL: Sure.

21 MR. SCHMITTGENS: Mr. McGill, we understand that  
22 the Agency was under really tight deadlines to get  
23 with you. Just as it is the Board's first look at  
24 this, it is ours. We anticipate that we will have  
25 many comments on those proposals.

1 HEARING OFFICER MCGILL: I understand. Thank  
2 you. The last question, I wondered if you had a  
3 chance to look at -- if you had any reaction to the  
4 Agency's proposed approach in Section 740.715(c) on  
5 pages three and four of Exhibit 2 regarding line  
6 items?

7 MS. LUNDY: I would say that at our first glance  
8 we agree with what the Agency has proposed, although  
9 we do have some concerns on page four, that last part  
10 of the last sentence. It says as if no budget plan  
11 had been approved. That does raise some concerns with  
12 us. We would like to see that possibly there could be  
13 some sort of letter that would accompany the  
14 certification as far as justification as far as why  
15 they went over the budgeted cost, but that that  
16 initial budget review would not be completely  
17 disregarded.

18 HEARING OFFICER MCGILL: You mean not completely  
19 disregarded for a line item that was exceeded?

20 MS. LUNDY: (Nodded head up and down.)

21 HEARING OFFICER MCGILL: Thank you. Do any of the  
22 Board Members have any questions?

23 Does anyone else have any questions for the RCGA's  
24 witnesses?

25 MR. SCHMITTGENS: I think Mr. Voyles would like to

1 make a couple of comments just to illuminate further  
2 Ms. Lundy's testimony with respect to it is important  
3 to understand the differences between the LUST Program  
4 and this Brownfield tax credit program Mr. Voyles is  
5 intimately involved in those issues. He confronts  
6 them all the time. I think it would be useful to the  
7 Board just to let him make a couple of comments in  
8 that regard.

9 HEARING OFFICER MCGILL: Sure. Thank you.

10 E R I C V O Y L E S,  
11 having been first duly sworn by the Notary Public,  
12 saith as follows:

13 MR. VOYLES: The primary difference, as I see it,  
14 when you start to consider the individuals that are  
15 making these type of investments for remediation, when  
16 you look at a LUST type issue primarily you are  
17 looking at someone who has been involved with a  
18 problem, an environmental problem, in which they are  
19 cleaning up a problem that they themselves have  
20 somehow been associated with.

21 When you are looking at a Brownfield issue, there  
22 is many different aspects that come into play. When  
23 you look at a developer who is coming in to do a  
24 Brownfield project, you know, that's even simplifying  
25 the statement. When you look at the Brownfield

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1 developer, they are trying to make a decision on where  
2 they are going to put their money. Are they going to  
3 put it into a Greenfield or are they going to put it  
4 into a Brownfield.

5       So at the first pass you have to come up with a  
6 way to even level the playing field so that the issue  
7 of do I redevelop a Brownfield even becomes  
8 economically plausible. When you go about doing the  
9 Brownfield redevelopment, there is a multitude of  
10 issues that come into play that can at any point along  
11 the way throw the entire project out the window. You  
12 know, going back to the project that I am most  
13 familiar with, which is the Owens-Illinois project, we  
14 have found that over the last six years that we have  
15 been working at trying to get them to the point where  
16 they will commit to the buy the property, that we have  
17 had to re-examine the financial commitments in the  
18 projects at multiple levels.

19       The biggest component of that is when you try and  
20 leverage what you can get in the form of conventional  
21 financing or what you can get as far as public  
22 participation, as those variables become less crystal,  
23 in other words, as they become more hazy, moving  
24 targets, so to speak, it gets very, very difficult to  
25 assign an actual dollar amount of what the project is

1 going to cost.

2 As that starts moving around, because most of the  
3 time in these projects they are looking at multiple  
4 locations, because they are operating their business,  
5 they are trying to determine am I going to do a  
6 project in North Carolina as opposed to a project in  
7 Illinois, the more that the cost on this cannot be  
8 hammered down and be more specific on the front end,  
9 you actually get to a point where the project becomes  
10 less likely to be doable.

11 So it is very important to see that these people  
12 are coming in to actually do these projects because  
13 they see that there is an economic potential here. As  
14 compared to what I have normally seen with the LUST  
15 Programs, they are cleaning up a property that they  
16 already own, and it has some repercussions to do with  
17 the fact that the contamination has been somehow or  
18 another associated with their own activities.

19 HEARING OFFICER MCGILL: Thank you. Does the RCGA  
20 have any additional testimony today? Okay. We have  
21 an additional question.

22 BOARD MEMBER HENNESSEY: This is to Ms. Lundy. On  
23 730(h) you would propose to revise this description of  
24 the ineligible costs and the Agency would exclude  
25 costs incurred as a result of the negligence of the

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1 Remedial Applicant or its agent in addition to such  
2 costs resulting from vandalism, theft, or fraudulent  
3 activity.

4 Do you object to the -- do you agree with the  
5 Agency's proposal that the RA's cost that it may have  
6 negligently occurred should be ineligible?

7 MS. LUNDY: If I understand that you said, that if  
8 a cost that is incurred was because of negligible --  
9 negligence, there we go, that it would not be  
10 eligible?

11 BOARD MEMBER HENNESSEY: Right.

12 MS. LUNDY: We would agree.

13 CHAIRMAN MANNING: The Agency's example, I think,  
14 was a spill or some sort of contamination caused by  
15 the RA in the remediation project, and you would agree  
16 that that should not be an eligible expense? That it  
17 should be an ineligible expense?

18 MS. LUNDY: Correct.

19 CHAIRMAN MANNING: Thank you.

20 HEARING OFFICER MCGILL: Does the RCGA have any  
21 additional testimony?

22 MR. SCHMITTGENS: I think we are set.

23 HEARING OFFICER MCGILL: Okay. Thanks. Does  
24 anyone else have any questions for the RCGA today?

25 Any questions for these witnesses?

1 BOARD MEMBER HENNESSEY: I guess one question. We  
2 have been wondering about how do insurance policies  
3 work? If you do get a tax credit, and maybe there is  
4 no one simple answer to this question, but if you are  
5 able to get a tax credit under this program, would the  
6 insurance policy prevent you from getting insurance  
7 for that amount of the benefit?

8 MR. SCHMITTGENS: You better swear me in, because  
9 I think I can answer that question.

10 BOARD MEMBER HENNESSEY: Okay.

11 HEARING OFFICER MCGILL: Would you swear in Mr.  
12 Schmittgens.

13 (Whereupon the witness was sworn by the Notary  
14 Public.)

15 E U G E N E P. S C H M I T T G E N S, JR.,  
16 having been first duly sworn by the Notary Public,  
17 saith as follows:

18 MR. SCHMITTGENS: I have been involved in a number  
19 of projects regarding the transfer of contaminated  
20 properties from one seller to another. The insurance  
21 products, as they have developed over even the last  
22 six months, we find that they are becoming extremely  
23 affordable because the insurance companies are getting  
24 better at their underwriting skills. They know what  
25 these things will ultimately cost.

1           When a developer -- and there are a number of  
2 companies that specialize in Brownfield  
3 redevelopment. When they approach this project many  
4 of them, quite frankly, take a look at financing this  
5 from a number of different sources. For example,  
6 although many insurance -- property damage policies  
7 today contain exclusions for contamination or  
8 environmental releases and that type of thing, many of  
9 the policies prior to about 1972 or 1973 did not  
10 contain such exclusions.

11           So what companies are doing -- and I think a good  
12 example is the Owens-Corning project -- is they are  
13 looking at the prior owners who are carrying this  
14 liability on their books, i.e., the requirement that  
15 they remediate, or you are looking at a bankrupt  
16 property owner who is -- you know the property is not  
17 worth anything. But their insurance policies are part  
18 of an asset which can be reached.

19           The insurance policies, you can go back to the  
20 1960, 1970 policies and receive reimbursement from the  
21 prior owner. What you may also get there is, for  
22 example -- there are a lot of Brownfield sites being  
23 held in the inventory of Fortune 500 companies,  
24 because they don't want to mess with site remediation  
25 programs or anything else like that. There is stuff

1 there and as long as the release hasn't left their  
2 site then some will take the position that they don't  
3 have to do anything.

4       So these properties are lying under utilized,  
5 un-utilized and abandoned. They are magnets for  
6 people who come in and damage them and vandalize them.  
7 They are magnets for crime and that type of things.  
8 But they are never going to come off the books because  
9 there is no real reason for them to do it because of  
10 the fear of liability.

11       So what often happens is that some of these larger  
12 companies can go to those owners and, say, look, we  
13 will take it. We will do -- we will fully indemnify  
14 you through these insurance products to turn this  
15 property and put it back to a useful purpose. What we  
16 want you to do -- they may either contribute. The  
17 owner may donate the property and contribute money.  
18 The owner may open up and make their insurance  
19 products available.

20       But the important thing to remember is that these  
21 are put together in pieces. What I think the RCGA is  
22 most concerned with, aside from the fact that we truly  
23 believe there is no statutory justification for  
24 removing these, it is important to realize that these  
25 are -- this is really an economic development. You

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1 can't approach it from the strict SRP or LUST fund.  
2 It won't work that way. You can't do it. You have to  
3 be creative.

4 I think the whole intent of the legislation was to  
5 be creative to allow this to be just one piece in the  
6 economic development package. You will often see  
7 these projects include TIF money, local tax credits,  
8 the feds are getting into it. The state is just one  
9 small piece. Quite frankly, at 25 percent only up to  
10 \$700,000.00, that is not going to make a difference in  
11 a lot of the projects that are being done.

12 So it is very, very important that this Board  
13 consider the fact that this is just one piece. I have  
14 rambled. I don't know if I answered your question.

15 BOARD MEMBER HENNESSEY: Well, it has been very  
16 interesting. My question was a little more narrow.

17 MR. SCHMITTGENS: Okay. Sorry.

18 BOARD MEMBER HENNESSEY: You provided a nice  
19 background for it. I am wondering if the Agency's  
20 concern about what they call double dipping is even  
21 justified if, for example, an insurance company knows  
22 that you are going to get a tax credit, so some of the  
23 money that you are spending for remediation you are  
24 effectively getting back through a tax credit, would  
25 an insurance company say there is no loss here, so to

1 the extent you have a tax credit you can't claim  
2 against the insurance policy.

3 MR. SCHMITTGENS: Short of litigation, there is  
4 always going to be give and take. If I were  
5 representing an insurance company and I knew that  
6 there was an eligible tax credit, I will say, look, I  
7 will give you money for cost of settlement, but you  
8 are going to get this \$150,000.00 that you can use  
9 over five years at \$40,000.00 a clip. Sure.  
10 Absolutely. It is a negotiating point, just like any  
11 other deal.

12 The same, I think, could be true with respect to  
13 grant programs. The same can be true with respect to  
14 even income tax. But the problem is that, you know,  
15 if you say -- our concern is the way that the language  
16 is read now the Environmental Protection Agency can  
17 say you are writing those off, you are using -- you  
18 know, there is more than \$150,000.00 that you are  
19 being reimbursed, and you are going to write them off  
20 dollar for dollar.

21 All we are saying is we maybe could live with,  
22 maybe, assuming that the Board accepts the Agency's  
23 interpretation of what the statute actually says, we  
24 maybe can live with you writing off -- you know, for  
25 example, if the project is three million dollars and



1 you get everything where you are going to eat into  
2 that \$150,000.00, say, down to \$100,000.00, we might  
3 be able to live with, and I have not talked to our  
4 membership, but we might be able to live with saying,  
5 okay, you are going to offset that a little bit. But  
6 we don't think the offset should be bottom up. It  
7 should be top down. That's the point. That's what we  
8 are trying to reach.

9 We are concerned that these projects -- you know,  
10 and perhaps based on some of the comments today  
11 perhaps it would be helpful when we have the next  
12 opportunity to comment to give more background as to  
13 how these deals are put together. I am not so sure  
14 that has been put on the table.

15 BOARD MEMBER HENNESSEY: Yes, I think that would  
16 be useful in your public comment.

17 CHAIRMAN MANNING: Your position, just so that I  
18 understand it, is that the statute allows for a tax  
19 credit even if 100 percent of the remediation costs  
20 were reimbursed through other mechanisms? That would  
21 be your -- your position is that the statute actually  
22 allows for the tax credit anyway?

23 MR. SCHMITTGENS: Except if you are using as an  
24 offset against only the federal income tax, or either  
25 a tax credit or a straight deduction off your income

1 tax. That's our reading of the statute. I believe  
2 that is the only -- that's our official position.

3 BOARD MEMBER HENNESSEY: What if the costs of the  
4 environmental remediation are capitalized so that they  
5 are added to the basis for the property?

6 MR. SCHMITTGENS: Now you are asking a tax  
7 question, and I don't even do my own income taxes.

8 BOARD MEMBER HENNESSEY: I guess there is some tax  
9 benefit because you get a higher basis but you may not  
10 realize that tax benefit for quite some time.

11 MR. SCHMITTGENS: I guess the simple answer is if  
12 you are going to write off those costs -- if you can  
13 answer it better than I can, I will let you.

14 MR. ALESANDRINI: In the hypothetical I guess it  
15 is possible that we could have that problem, but if  
16 there were that many easy ways to fund Brownfield  
17 projects we wouldn't be here right now anyway. I  
18 mean, that's -- frankly, I don't see any basis in that  
19 really in reality. Because if somebody can get that  
20 kind of financing they are not going to take the time  
21 and the effort it takes to go through the  
22 administrative concern to do this. They could make it  
23 go a lot quicker without dealing with the program. So  
24 I don't think that is ever going to come up.

25 HEARING OFFICER MCGILL: Does the RCGA have any

1 additional testimony?

2 MR. SCHMITTGENS: No, we don't.

3 HEARING OFFICER MCGILL: Thank you. Does anyone  
4 else have any questions for the RCGA witnesses today?

5 MR. WIGHT: We don't have questions but there  
6 might be a couple of points that we would like to  
7 respond to more in the form of, I guess, rebuttal for  
8 want of a better word. Is there an opportunity for  
9 that today, just a couple of brief points?

10 HEARING OFFICER MCGILL: You would like to provide  
11 testimony?

12 MR. WIGHT: Yes, additional testimony.

13 HEARING OFFICER MCGILL: That is fine. Does  
14 anyone else have any questions for the RCGA's  
15 witnesses today? Seeing none, the Agency would like  
16 to provide some testimony in response to the testimony  
17 of the RCGA.

18 MR. KING: We would like to touch on four points  
19 that were kind of raised by the RCGA's testimony and  
20 some of the responses on the questions. I will let  
21 Mr. Eastep handle the first point. This was related  
22 to the question as to the -- the question was related  
23 to whether the language being proposed in 725(c)(1)  
24 would be limiting. I believe the Hearing Officer  
25 asked that question as to the second sentence.

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1 I think the response -- limiting the terms of  
2 incorporating the cost from prior phases. And I  
3 believe the response from the RCGA was that it would  
4 not be limiting because those costs are rolled into  
5 the Remedial Action Plan anyway. Mr. Eastep was going  
6 to talk about that.

7 MR. EASTEP: That's not necessarily the case.  
8 What we have seen over the last couple years, and I  
9 think we had 194 or 198 applications to the SRP last  
10 year and about 150 the year before that for the  
11 predecessor program. We see site investigations  
12 coming in independent of the Remedial Action Plan.

13 In some cases, depending on the size of the  
14 facility and the clean up, maybe the site like the  
15 Owens site, it is very large and very old and very  
16 complicated, they might come in with a couple  
17 different site investigation plans and then they might  
18 do their remedial objective plan, and then after they  
19 have done all of that then they come in with the  
20 remedial action plan. In other instances they come in  
21 with the whole thing.

22 In some very simple cases they come in with the  
23 site investigation plan, the remedial objective, the  
24 remedial action, and the closure certification report  
25 or the completion certification report. Sitting here

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1 I couldn't even project or estimate how many of each  
2 different kind have come in because it is just really  
3 very, very varied. You would see what I would term  
4 eligible costs coming in at different phases of the  
5 program.

6 BOARD MEMBER HENNESSEY: But you would agree that  
7 site investigation costs are eligible costs?

8 MR. EASTEP: Yes, as well as the establishment of  
9 remedial objectives.

10 MR. KING: The second part we wanted to talk about  
11 was in there testimony they had in several places used  
12 the phrase, contained in an approved RAP. That would  
13 be kind of the phrase that was contained in an  
14 approved RAP, it would then make it automatically  
15 eligible. I think that there is a misunderstanding as  
16 to what these Remedial Action Plans really look like  
17 when we get them. Sometimes they can have very  
18 comprehensive levels of information.

19 For instance, they will tell us a lot about what  
20 kind of development is going to occur at the site.  
21 You know, for the Owens-Illinois project, if and when  
22 we see a Remedial Action Plan on that, I am sure there  
23 is going to be a very lengthy discussion as to how the  
24 overall project is being designed and being developed,  
25 you know, what kind of buildings, what kind of

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1 potential tenants, what kind of potential -- what the  
2 landscaping is going to look like and all of that. We  
3 encourage that kind of description because it helps us  
4 to understand the nature the project.

5 Now, we don't want to go through and exclude all  
6 of that kind of information from the plan, because it  
7 is good information for us to have. On the other  
8 hand, we don't want to just -- we wouldn't want to  
9 just approve the plan and say just because we approve  
10 the plan that entire development is now eligible for  
11 the tax credit. You know, it would be -- like, one of  
12 the items we excluded was, you know, landscaping,  
13 vegetative cover, trees shrubs and aesthetic  
14 considerations. Well, that is something that would be  
15 good to describe in a plan so we know how the entire  
16 thing is going to look.

17 But just because it is described there doesn't  
18 mean it is necessary to -- for the environmental  
19 protection and the public health protection aspects of  
20 the project. We are -- we have stayed away from that  
21 kind of language because we see these documents as  
22 being a fairly comprehensive description of what is  
23 going on on the project.

24 The third item I wanted to mention, we talked a  
25 little bit about the LUST Program and the SRP Program.

1 There is no question that there is big differences  
2 here. We would agree with that. What we have done  
3 with the eligible versus ineligible items is to look  
4 at what was fundamentally being called eligible or  
5 ineligible.

6 In both of them you are looking at is this  
7 activity part of corrective action, is it part of  
8 remedial action. And that's the focus on either one  
9 of those as to the payment or the credit side of  
10 things. So we were just trying to use our experience  
11 in focusing on what is a corrective action, drawing  
12 from the LUST Program and building on that here.  
13 There is no question that there is big differences  
14 between programs in terms of the liability and those  
15 kind of issues. We are certainly not trying to put  
16 those in the same basket.

17 The final point I wanted to talk about, I just saw  
18 this recently. This is, I guess more for the Board's  
19 information purposes. But I believe there was a bill  
20 introduced and I believe it is SB1291. I don't have  
21 the -- I think there was also a corresponding House  
22 Bill introduced. That bill would modify 201(1), Sub  
23 (i), the section we have been talking about relative  
24 to this cross over with the Internal Revenue Code.  
25 That bill, if it became law, would eliminate the

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1 references to the Internal Revenue Code. So, in  
2 essence, if it became law then a person who is  
3 deducting remediation costs against the Internal  
4 Revenue Code could also use those same costs as a  
5 credit on the state level.

6 But there is another -- with the language that was  
7 being proposed to be deleted there, there still would  
8 be an issue of whether things were otherwise  
9 unreimbursed. It doesn't strike the entire concept.  
10 It just strikes out that sub provision. At least I  
11 guess somebody thought that was an independent  
12 concept. So I just kind of threw that out as a point  
13 of information relative to the ongoing legislative  
14 proposal.

15 That concludes our comments on rebuttal. Thank  
16 you.

17 HEARING OFFICER MCGILL: Thank you. Does anyone  
18 have any questions for the Agency regarding their  
19 additional testimony? Seeing none, we are going to go  
20 off the record for a moment.

21 (Discussion off the record.)

22 HEARING OFFICER MCGILL: Let's go back on the  
23 record, please.

24 Does anyone else wish to testify today? Seeing no  
25 response, I will move on to a few procedural matters



1 to address before we adjourn.

2 Actually, let's go off the record.

3 (Discussion off the record.)

4 HEARING OFFICER MCGILL: Why don't we go back on  
5 the record.

6 Due to the statutory deadline the Board is  
7 operating under, public comments must be received by  
8 the Clerk of the Board no later than 4:30 on March 19,  
9 1998, to insure that the comments will be considered  
10 by the Board in its deliberations as to how the  
11 proposed rule should read at the first notice  
12 publication. The mailbox rule does not apply to this  
13 filing.

14 Anyone may file public comments. These public  
15 comments must be filed with the Clerk of the Board and  
16 if you are on the service list your public comment  
17 must be simultaneously delivered to all persons on the  
18 service list. You should contact me or the clerk's  
19 office to make sure that you have an updated service  
20 list.

21 Please note that there will be additional time to  
22 file public comments. This time period will last at  
23 least 45 days commencing on the date the first notice  
24 appears in the Illinois Register. As I mentioned  
25 earlier today, there is one more hearing presently

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1 scheduled in this rulemaking. That hearing will take  
2 place on Tuesday, March 17, 1998, at 10:00 a.m. at the  
3 Illinois State Library, the Illinois Authors Room, 300  
4 South Second Street in Springfield, Illinois. The  
5 purpose of the hearing is to receive testimony  
6 concerning the Department of Commerce and Community  
7 Affairs explanation for not producing an economic  
8 impact study on the proposed rules.

9 Copies of the transcript of today's hearing should  
10 be available at the Board by March 4, 1998, and  
11 shortly after that the transcript should be available  
12 through the Board's home page on the World Wide Web  
13 which is located at [www.ipcb.state.il.us/](http://www.ipcb.state.il.us/).

14 Are there any other matters that need to be  
15 addressed at this time? Seeing none, I would like to  
16 thank everyone for their participation today. This  
17 hearing is adjourned.

18 (Hearing Exhibits 2 through 6 retained by Hearing  
19 Officer McGill.)

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