

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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4 IN THE MATTER OF:

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6 HEARING PURSUANT TO SPECIFIC

7 RULES, PROPOSED NEW SUBPART K,

8 INVOLUNTARY TERMINATION R99-9

9 PROCEDURES FOR ENVIRONMENTAL (Rulemaking-Procedural)

10 MANAGEMENT SYSTEM AGREEMENTS,

11 35 ILL. ADM. CODE 106, SUBPART K

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15 Proceedings held on October 6, 1998, at 1:40 p.m.,

16 at the Illinois Pollution Control Board, 600 South

17 Second Street, Suite 402, Springfield, Illinois,

18 before the Honorable Richard R. McGill, Jr., Hearing

19 Officer.

20

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1 A P P E A R A N C E S

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Claire A. Manning, Chairman

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Kathleen M. Hennessey, Board Member

4

Marili McFawn, Board Member

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Charles King, Attorney Assistant

6

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On behalf of the Illinois EPA.

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1 P R O C E E D I N G S

2 (October 6, 1998; 1:40 p.m.)

3 HEARING OFFICER MCGILL: Good afternoon. My name
4 is Richard McGill, and I have been appointed by the
5 Illinois Pollution Control Board to serve as Hearing
6 Officer in this rulemaking proceeding entitled, In the
7 Matter of: Hearings Pursuant to Specific Rules,
8 Proposed New Subpart K, Involuntary Termination
9 Procedures for Environmental Management System
10 Agreements, 35 Illinois Administrative Code 106,
11 Subpart K. The Docket Number for this rulemaking is
12 R99-9. Today is the second hearing.

13 Also present today on behalf of the Board is
14 Kathleen Hennessey, the lead Board Member assigned to
15 this rulemaking.

16 BOARD MEMBER HENNESSEY: Good afternoon.

17 HEARING OFFICER MCGILL: Chairman Claire Manning
18 and Board Member Marili McFawn, both of whom are also
19 assigned to this rulemaking.

20 Chuck King, Attorney Assistant to Marili McFawn is
21 also present.

22 By way of background, on August 17, 1998, the
23 Illinois Environmental Protection Agency, or Agency,
24 filed a proposal to amend 35 Illinois Administrative
25 Code 106. The Agency proposes to establish procedures

1 for involuntary termination of Environmental
2 Management System Agreements, or EMSAs, entered into
3 pursuant to Section 52.3 of the Environmental
4 Protection Act. Proposed rules would be added to the
5 existing procedural rules of the Board.

6 Section 52.3 of the Act provides for a voluntary
7 pilot program to allow persons to propose, and the
8 Agency to accept pursuant to an EMSA, a pilot project
9 to implement innovative environmental measures, even
10 if one or more of the terms of the EMSA is
11 inconsistent with an otherwise applicable statute or
12 regulation of the State.

13 Section 52.3-2(c) of the Act requires the Board to
14 complete this rulemaking no later than 180 days after
15 receipt of the Agency's proposal. Given this
16 deadline, the Board, on August 20, 1998, adopted the
17 Agency's proposal for first notice without commenting
18 on the merits of the proposal. First notice appeared
19 in the Illinois Register on September 4, 1998.

20 Please note that sign up sheets for this
21 proceeding's service and notice lists are located at
22 the side of the room. Those on the notice list will
23 receive only Board opinions and orders, hearing
24 officer orders. Those on the service list will
25 receive these documents plus certain other filings.

1 Also at the side of the room are copies of the current
2 notice and service lists. These lists are updated
3 periodically. I have also placed at the side of the
4 room copies of my two hearing officer orders in this
5 matter dated August 28, 1998, and September 4, 1998,
6 respectively.

7 Besides witnesses for the Agency, if you wish to
8 testify today, you must sign in on the appropriate
9 sign up sheet at the side of the room. Time
10 permitting, after the Agency's testimony we will
11 proceed with the testimony of persons who signed up in
12 the order their names appear on the sign up sheet.

13 A few comments regarding hearing format today,
14 this hearing will be governed by the Board's
15 procedural rules for regulatory proceedings. All
16 information that is relevant and not repetitious or
17 privileged will be admitted. All witnesses will be
18 sworn and subject to cross questioning.

19 If you do not wish to give testimony, you may file
20 written public comments. It should be noted, however,
21 that generally the Board gives greater weight to the
22 testimony because the witness is under oath and
23 subject to questioning.

24 As for the order of today's proceeding, we will
25 begin with the Agency's testimony. Time permitting

1 after that we will proceed with the testimony of any
2 persons who sign up in the order their names appear on
3 the sign up sheet. Anyone may ask a question of any
4 witness. I ask that during question periods if you
5 have a question please raise your hand and wait for me
6 to acknowledge you. When I acknowledge you, please
7 state your name and any organization that you are
8 representing here today.

9 Please speak one at a time. If you are speaking
10 over each other, the court reporter will not be able
11 to get your statements down for the record. Please
12 note that any questions asked by a Board Member or
13 staff are intended to help build a complete record for
14 the Board's decision, and not to express any
15 preconceived notion or bias.

16 Are there any questions about the procedure that
17 we will follow today?

18 Seeing none, I note that there are no additional
19 hearings scheduled in this matter. At the end of
20 today's hearing I will set a deadline for filing
21 public comments. The Board is presently accepting
22 public comments.

23 Would any of the Board Members present like to
24 make any remarks at this time?

25 BOARD MEMBER McFAWN: No thank you.

1 CHAIRMAN MANNING: No.

2 BOARD MEMBER HENNESSEY: No.

3 HEARING OFFICER MCGILL: Seeing none, we will now
4 turn to the testimony of the Agency. Again, the
5 purpose of this portion of the hearing is to receive
6 testimony from the Agency.

7 At this point Laurel Kroack, would it make sense
8 to go ahead and swear in both you and Roger Kanerva?
9 I imagine you will be providing some testimony today?

10 MS. KROACK: Certainly.

11 HEARING OFFICER MCGILL: Okay. If the court
12 reporter will swear in both the witnesses.

13 (Whereupon Ms. Kroack and Mr. Kanerva were
14 sworn by the Notary Public.)

15 HEARING OFFICER MCGILL: Why don't you begin.

16 MS. KROACK: Good afternoon. I am Laurel Kroack,
17 Assistant Counsel for the Illinois Environmental
18 Protection Agency in the Bureau of Air, Regulatory
19 Unit.

20 With me today is Roger Kanerva, Manager of
21 Environmental Policy, and Policy Advisor to the
22 Director of the Agency, Mary Gatey. As you know, Mr.
23 Kanerva submitted testimony, written testimony, and
24 read that testimony into the record at the first
25 hearing on September 29th, 1998, in Chicago.

1 We are proposing today that because that testimony
2 is already part of the record, and we have made the
3 copy of the testimony available on the table for
4 anyone who wishes to review a copy, that we would just
5 propose to move forward with questions from the public
6 or the Board.

7 HEARING OFFICER MCGILL: Okay.

8 MS. KROACK: If that is acceptable.

9 HEARING OFFICER MCGILL: Did the document you just
10 referred to --

11 MS. KROACK: It would be Exhibit Number 1. It is
12 available on the table.

13 HEARING OFFICER MCGILL: Okay. That was -- you
14 are referring to the testimony of Roger Kanerva that
15 was entered as Exhibit Number 1 at the previous
16 hearing?

17 MS. KROACK: Correct.

18 HEARING OFFICER MCGILL: Okay.

19 MR. KANERVA: The same thing, the same date.

20 HEARING OFFICER MCGILL: Does the Agency have
21 additional --

22 MS. KROACK: There is some additional matters, but
23 that would be the substantive testimony. We have some
24 things we would like to enter into the records today
25 as exhibits.

1 HEARING OFFICER MCGILL: Okay.

2 MS. KROACK: The first one we would like to enter
3 is the Board asked us for a copy of the comments from
4 the Chemical Industry Council of Illinois, and we
5 agreed to provide a clean copy of those comments. I
6 would like to enter that into the record as well.

7 HEARING OFFICER MCGILL: Okay. I have been handed
8 a four-page document. The letterhead is Chemical
9 Industry Council of Illinois. It is a letter dated
10 June 30, 1998, directed to Roger Kanerva from Jennifer
11 Marsh of the Chemical Industry Council of Illinois.
12 It attaches a Ross & Hardies memorandum dated June 23,
13 1998, regarding: Comments on Part 106 Hearings
14 Pursuant to Specific Rules - Subpart K, Involuntary
15 Termination Proceedings for EMSA's, Environmental
16 Management System Agreements.

17 Is there any objection to entering the described
18 document as a hearing exhibit?

19 Seeing none, I will mark this document as Exhibit
20 Number 2, and enter it as a hearing exhibit.

21 (Whereupon said document was duly marked for
22 purposes of identification as Hearing Exhibit
23 Number 2, and admitted into evidence as of this
24 date.)

25 BOARD MEMBER HENNESSEY: Do you have any other

1 copies of that document available at the table?

2 MS. KROACK: No. I am sorry.

3 MS. CYNTHIA ERVIN: I can go make some.

4 BOARD MEMBER HENNESSEY: Okay. Thank you.

5 MS. KROACK: The next item we would like to enter

6 into the record as an exhibit is the errata sheet or

7 proposed revisions to the rule based on questions at

8 the hearing on September 29th. I have one as an

9 exhibit and then one for each of you to look at.

10 HEARING OFFICER MCGILL: Thank you. I have been

11 handed a document referred to as the Agency errata

12 sheet, entitled: Proposed Revisions to 35 Illinois

13 Administrative Code 106. In the Matter of: Hearings

14 Pursuant to Specific Rules, Proposed New Subpart K,

15 Involuntary Termination Procedures for EMSAs, for 35

16 Illinois Administrative Code 106, Subpart K, R99-9.

17 It is a four-page document.

18 Is there any objection to entering the described

19 document as a hearing exhibit?

20 Seeing none, I will mark this as Exhibit Number 3,

21 and enter it as a hearing exhibit.

22 (Whereupon said document was duly marked for

23 purposes of identification as Hearing Exhibit

24 Number 3, and admitted into evidence as of this

25 date.)

1 MS. KROACK: The last item we would like to enter
2 as an exhibit is, Response of Illinois EPA to specific
3 questions raised at the September 29th, 1998, hearing
4 by Board Members. Again, we have extra copies for you
5 to look at and to be in the record.

6 Unfortunately, this document may not cover all of
7 the questions answered because we did not get a copy
8 of the hearing transcript until yesterday. I have not
9 had a chance to go through it very carefully. I went
10 through it rather abruptly and covered as much of it
11 as I could. And, additionally, there may be a couple
12 of areas that we want to supplement in our written
13 comments. I would be happy to elaborate on any of the
14 points that we have raised in our response to this
15 particular document if you would like.

16 HEARING OFFICER MCGILL: Okay. Thank you. I have
17 been handed a four-page document entitled: Response
18 of Illinois EPA to Questions of the Pollution Control
19 Board raised at hearing on 09-29-98.

20 Is there any objection to entering the described
21 document as a hearing exhibit?

22 Seeing none, I will mark this document as Exhibit
23 4, and enter it as a hearing exhibit.

24 (Whereupon said document was duly marked for
25 purposes of identification as Hearing Exhibit

1 Number 4, and admitted into evidence as of this
2 date.)

3 HEARING OFFICER MCGILL: Would the Agency like to
4 provide any additional testimony at this point, or is
5 there any other part of your presentation today?

6 MS. KROACK: I have one additional statement I
7 would like to make. We were asked at hearing, on
8 September 29th, whether summary termination, which is
9 the term that we all agreed to use, for termination by
10 the Agency pursuant to Section 52.3-4(b) of the Act,
11 whether that would be subject to either the APA or the
12 administrative review law.

13 On further investigation, we have determined, at
14 least initially, and we are continuing to look at it,
15 that this would not fall under the APA, because it
16 would not be, quote, a contested case, for which a
17 hearing is required by the Act.

18 Secondly, we looked at the administrative review
19 law, and have determined that the legislation is not
20 specifically subject to the administrative review law
21 so, therefore, it wouldn't be. So the avenue of
22 appeal, as Ms. McFawn pointed out, would be through a
23 writ of cert of the Circuit Court from any decision by
24 the Agency on a summary termination, assuming that we
25 went ahead and used that particular section to

1 terminate an EMSA agreement.

2 We are continuing to look at the issue, because
3 there was a recent case in front of the Appellate
4 Court on a provisional variance. Let me find a copy
5 of that. Basically they held that in the case of
6 provisional variance there was a direct appeal to the
7 Appellate Court, even though that is clearly -- also
8 isn't clearly provided for by the Environmental
9 Protection Act. So we are continuing to investigate
10 whether or not that decision has any applicability to
11 this type of summary termination.

12 CHAIRMAN MANNING: What decision are you talking
13 about, Ms. Kroack?

14 MS. KROACK: That decision is the Fourth District
15 Appellate Court in the matter of W.R. Meadows, Inc.
16 versus the Illinois Environmental Protection Agency.
17 They docket it as Number 4960736, and they rendered
18 the decision on February 3rd of this year.

19 CHAIRMAN MANNING: Is that a denial of the
20 provisional variance, an Agency denial of a
21 provisional variance, therefore, it wasn't -- if the
22 Agency granted the provisional variance, it would go
23 to the Board, and it would be --

24 MS. KROACK: Correct.

25 CHAIRMAN MANNING: -- subject to the

1 Administrative Procedures Act, obviously, going to the
2 Appellate Court because it went through the Board's
3 process?

4 MS. KROACK: Correct. Because denials of
5 provisional variances are not specifically covered
6 under -- don't specifically -- under the Act don't go
7 to the Board for review. There was -- we argued in
8 that case that there was no avenue of appeal to the
9 Appellate Court.

10 The Appellate Court said that would be an absurd
11 result and various dict in there that is very general
12 and very broad and possibly has some applicability in
13 this case. We are continuing to investigate whether
14 that is a possible avenue of appeal. At this point we
15 are just not sure, because of the broad dict in the
16 case.

17 HEARING OFFICER MCGILL: Will the Agency be
18 addressing that point in their public comment?

19 MS. KROACK: We will probably include a statement
20 once we have thoroughly evaluated the case.

21 CHAIRMAN MANNING: Could you explain the Agency's
22 position on why this would not be a contested case
23 under the Administrative Procedures Act?

24 MS. KROACK: In the Administrative Procedures Act,
25 they define the contested case as -- it means an

1 adjudicatory proceeding not including rulemaking,
2 quasi-legislative, informational, or similar
3 proceedings, in which the individual legal rights,
4 duties, and privileges of a party are required by law
5 to be determined by an Agency only after opportunity
6 for a hearing.

7 And when we looked at this particular section, it
8 makes no statement about providing a hearing under
9 that particular section. So, again, we will
10 supplement our current position with written comments,
11 but we -- the initial blush, based on all of the cases
12 that I have been able to look at addressing what is a
13 contested case, it looks as if this may fall outside
14 of that definition.

15 BOARD MEMBER HENNESSEY: But you do agree that --
16 it is the Agency's position that that would be
17 reviewable through a writ of certiorari?

18 MS. KROACK: It is clearly reviewable through a
19 writ of certiorari of the Circuit Court.

20 CHAIRMAN MANNING: And even if it wasn't subject
21 to the Administrative Procedures Act as a contested
22 case, the appeal would still be with the Circuit Court
23 and not the Appellate Court --

24 MS. KROACK: Yes, it would.

25 CHAIRMAN MANNING: -- because it would not be a

1 Board determination, it would be an Agency

2 determination?

3 MS. KROACK: Yes.

4 CHAIRMAN MANNING: The Agency's determinations

5 would be determined by the Circuit Court --

6 MS. KROACK: Correct.

7 CHAIRMAN MANNING: -- review?

8 MS. KROACK: Correct. We have procedures for

9 contested case hearings, and the question is whether

10 we would have to use our contested case hearing

11 procedures to summarily terminate the EMSA under this

12 section.

13 CHAIRMAN MANNING: Thank you.

14 MS. KROACK: Again, I want to make it clear that

15 this is not a final statement, but at first blush that

16 is what it looks like.

17 CHAIRMAN MANNING: Okay.

18 BOARD MEMBER HENNESSEY: Just so I have this in my

19 notes, where are the Agency's contested case hearing

20 procedures?

21 MS. KROACK: I think it is 35 Illinois

22 Administrative Code, Part 166. It may be 168.

23 BOARD MEMBER HENNESSEY: Ms. Kroack, would you be

24 able to, you or Mr. Kanerva, just briefly outline what

25 changes you have made or that you propose to the

1 rules?

2 MS. KROACK: Certainly. The Board noted that in
3 various places in these proposed rules the term
4 complaint or petition was used, when it appears as if
5 the correct term should be statement of deficiency.
6 We went through the rules and looked for those terms
7 and found that in several sections that those terms
8 had been used when it should have been the term
9 statement of deficiency. That would be Sections
10 106.948(d), 106.952(f), 106.956(b), 106.966(h) and
11 (i), 106.970(b), and 106.974(a)(1).

12 The Board also asked a question whether the
13 maximum 30 day extension that appeared in Section
14 106.952 would apply to all requests in toto or to each
15 request that met the criteria for an extension. We
16 considered this question and we believe that the
17 maximum 30 day extension should apply to each request
18 that meets the criteria for an extension.

19 But we know that the Board need not grant the
20 entire 30 days for each request meeting the criteria,
21 but only such time as necessary to alleviate the
22 conditions requiring an extension. Because of that
23 consideration that would necessitate changes to
24 Section 106.952(a) and (c).

25 We made a change in Section 106.952(f) to allow

1 for 30 day notice of a hearing on involuntary
2 termination of an EMSA. The Board noted that 30 days
3 may be required under the Clean Air Act when they are
4 submitted as revisions to the Illinois' State
5 Implementation Plan, or SIP.

6 We believe that an involuntary termination of an
7 EMSA would be treated like a revocation of a variance,
8 site specific rule or adjusted standard, and it is
9 uncertain whether the minimum hearing notice is
10 required under the Clean Air Act for these type of
11 actions. But because it is uncertain, we agree that a
12 30 day notice of hearing would be prudent.

13 We also believe that personal notice, as opposed
14 to notice by publication, of the filing of a statement
15 of deficiency against a sponsor should only be given
16 to stakeholders and any person who either submitted
17 written comments on the sponsor's EMSA or participated
18 in the public hearing on the sponsor's EMSA by signing
19 the attendance sheet or making a verbal comment at
20 hearing. So we made changes to that section as well
21 to address that point.

22 The Board also asked in Section 106.954 whether
23 the term owner or operator appropriately appeared in
24 each of the subsections. We reviewed that section and
25 determined that section 106.954(f) should not include

1 owner or operator, but that (d) and (e) should.
2 Our position is that a situation could arise that
3 the sponsor to an EMSA is the corporate parent or
4 intermediary, but not the actual owner or operator of
5 the pilot project. The notice of violation of
6 regulations or laws that are outside of the EMSA would
7 not necessarily go to the sponsor then. They may go
8 to the owner or operator. But because it effects the
9 pilot project, which is the subject of the agreement,
10 we needed to include those notices to owners or
11 operators.

12 In Section 106.956(a) and (d), the Board noted the
13 rules allowed to find that a sponsor has had deficient
14 performances under the EMSA and give them an
15 additional 90 days to come into compliance. But this
16 would be an interim order and not a final order.
17 Subsection (a) and (d) are revised to delete the term
18 final, and include the language conditional or
19 interim.

20 In Section 106.962(a), at the Board's suggestion
21 we have clarified what is meant by participated in the
22 public hearing on a sponsor's EMSA to include those
23 persons who sign an attendance sheet or made a verbal
24 comment at hearing. We also include in there the
25 change that we suggested at the first hearing on

1 September 29th to clarify that any person who
2 submitted written comments on the EMSA may also
3 intervene in involuntary termination procedure if they
4 otherwise meet or satisfy the criteria in Section
5 106.962(a).

6 In Section 106.968(a) we reviewed again the rules
7 to determine whether references to owner or operator
8 in addition to sponsor were appropriate. We
9 discovered that this section did not -- it should not
10 have included -- it did not but should have included a
11 reference to the owner or operator.

12 It is our position that the owner or operator may
13 not necessarily be the sponsor, but will derive the
14 most direct benefit from the EMSA, and therefore,
15 stands in the shoes of the sponsor for purposes of
16 defending an EMSA against involuntary termination.
17 Therefore, the costs of any appearance by the owner or
18 operator at an involuntary termination proceeding
19 should not be borne by the Illinois EPA. So we have
20 suggested that revision.

21 I believe that covers all of the changes. The
22 remaining portion of this Exhibit 3, I believe, is the
23 discussion of summary termination, as we have coined
24 it, under Section 52.3-4, and how we view that under
25 the APA and the administrative review law.

1 BOARD MEMBER HENNESSEY: I would like to suggest
2 that we take a break after a couple of questions to
3 allow us to review some of the materials that we have
4 and while we have you here to ask questions.

5 MS. KROACK: Okay.

6 BOARD MEMBER HENNESSEY: But before we do that, I
7 have just one or two questions and the other Board
8 Members may, of course, as well.

9 We talked at the last hearing about the effect of
10 a determination that a sponsor had violated some law
11 other than that addressed by the EMSA, and how that
12 would be a basis on which the EMSA could be
13 involuntarily terminated. You stated at that time
14 that -- I think, Ms. Kroack, you stated that the --
15 that determination would not be binding on the sponsor
16 or owner or operator.

17 Have I recounted your testimony faithfully?

18 MS. KROACK: Yes, you have.

19 BOARD MEMBER HENNESSEY: Okay. I was wondering if
20 it would be appropriate to actually include that in
21 the rule itself so that there would be no question in
22 the future?

23 MS. KROACK: Certainly.

24 BOARD MEMBER HENNESSEY: You would have no problem
25 with that?

1 MS. KROACK: I would have no problem with that.

2 BOARD MEMBER HENNESSEY: Okay.

3 MS. KROACK: Would the Board like to suggest
4 language, or would you like the Agency to propose the
5 language?

6 BOARD MEMBER HENNESSEY: Well, we -- why don't you
7 suggest language. I think that would be the best way
8 to go about it.

9 MS. KROACK: Okay.

10 BOARD MEMBER HENNESSEY: The other question that
11 occurred to me is that when we have an interim order
12 where the Board would issue an interim order giving
13 somebody up to 90 days to come into compliance with
14 the EMSA and other conditions that the Board might
15 set, would the Agency have any objection to allowing
16 that period to be extended for good cause?

17 And let me just explain. The reason for my
18 concern is that there might be some issues that just
19 by their nature cannot be addressed in 90 days. If
20 someone is making good progress and trying to come
21 into compliance, can we give them more time?

22 MR. KANERVA: Just a couple of thoughts about
23 that. I mean, the 90 day window was really something
24 that could be fixed fairly readily. For instance, it
25 isn't that they had had a complete failure in some

1 major piece of equipment that, you know, you have to
2 order it and it takes nine months or something like
3 that. Because if that's the case, we probably have a
4 serious enough breakdown in the project that maybe we
5 should just be terminating and getting back on the old
6 system.

7 Having said that, 90 days is, you know, sort of a
8 judgment call. Probably 120 is not a problem. But I
9 would tend to be very nervous about something that
10 could become a very extended length of time. Because
11 it tends to just point out that you probably have a
12 project that was in enough trouble that you shouldn't
13 be proceeding. So I don't know. Maybe there is some
14 middle ground there we could consider, you know, like
15 an extension of 60 days or something.

16 BOARD MEMBER HENNESSEY: You would want there to
17 be a fairly high standard to be made to give that kind
18 of extension?

19 MR. KANERVA: Yes, you would want a -- I mean,
20 your progress point and that they clearly have
21 documented that they are achieving what we want, et
22 cetera. I mean, something other than just saying, you
23 know, give us another 60 days.

24 One other question about that. What were you
25 thinking about procedurally? I mean, in other words,

1 would 90 days be sort of the standard? No more than
2 90? You know, if they came in and said they needed
3 some additional after that or are you saying if they
4 came in and said, gee, we need 120 days here, and you
5 just start off with 120 days?

6 BOARD MEMBER HENNESSEY: Well, I can't speak for
7 the Board.

8 MR. KANERVA: Right.

9 BOARD MEMBER HENNESSEY: I guess personally, as I
10 read the rules as you proposed it, 90 days was the
11 outside limit. And it would depend on the
12 circumstances, that if something could be corrected in
13 30 days we are certainly not going to give somebody 90
14 days to do it.

15 MR. KANERVA: Right.

16 BOARD MEMBER HENNESSEY: In this thinking about
17 extensions, I was envisioning a situation in which you
18 would certainly have some interim check points to make
19 sure that somebody was proceeding with the work that
20 they were supposed to be doing. And if they were
21 making satisfactory progress, that there might be some
22 circumstances in which the Board may want to give them
23 more time.

24 MR. KANERVA: Okay. So clearly thinking of it as
25 an add on after you do the initial period of time,

1 rather than giving people like five months to start
2 with?
3 BOARD MEMBER HENNESSEY: I guess I hadn't thought
4 about that.

5 MR. KANERVA: Oh, okay. All right. We would have
6 to think about that.

7 BOARD MEMBER HENNESSEY: Yes.

8 MR. KANERVA: Okay. Again, because that would
9 tend to imply whatever it is -- if they started off
10 with like a six month -- if you gave them a six month
11 window in a order, what it implies is that they had a
12 fairly serious problem if it would take that long. I
13 mean, they had to go out and get the engineering or
14 order some equipment, as opposed to -- well, let me
15 say something else here just to sort of clarify that
16 perspective.

17 By having a fairly tight window on the end of the
18 process, that doesn't restrict them at all from trying
19 to get it straightened out right from the beginning.
20 In other words, our concept was from the moment we
21 send them that notice of deficiency if they really
22 care about getting their act together, they should
23 already be working on it. And they may be well on
24 their way, although we, you know, keep the pressure on
25 them by proceeding with the process that, in effect,

1 they ought to be able to convince you that they are
2 well down the road toward rectifying this whole
3 thing. They realize that something went wrong, give
4 us the extra time, and we will finish it up and be
5 done. So, I mean, there is that aspect, too.

6 I would hate for this to become a provision where,
7 in effect, they don't get religion until after they
8 have had their opportunity to talk with you all, and
9 then they say, gee, give us six months to fix this.

10 BOARD MEMBER HENNESSEY: Well, there may be a
11 legitimate dispute between the Agency and the sponsor
12 about exactly what is required to comply with the
13 EMSA. So it may not -- and that the Board will need
14 to resolve.

15 MR. KANERVA: That is possible, too.

16 BOARD MEMBER HENNESSEY: So that the sponsor in
17 good faith may not take action immediately upon
18 receiving a statement of deficiency. But I take it,
19 from your comment, that you are more comfortable with
20 the situation in which the Board would look at
21 ordinarily 90 days as the outside time frame and then
22 consider granting extensions; is that correct?

23 MR. KANERVA: Correct.

24 BOARD MEMBER HENNESSEY: Okay. Thank you.

25 HEARING OFFICER MCGILL: Why don't we go off the

1 record for a moment.

2 (Discussion off the record.)

3 HEARING OFFICER MCGILL: All right. Back on the
4 record.

5 At this point, do any of the Board Members present
6 have any further questions?

7 CHAIRMAN MANNING: Yes, I have a couple.

8 Apparently, I -- I was not able to make the last
9 hearing in this matter, so I apologize if I tread on
10 territory that has already been covered. But to some
11 extent even though it has been covered, I am not sure
12 that I understand it, and I have to have a clear
13 understanding of what we are talking about here.

14 This deals a little bit with the summary
15 termination issue and sort of the segue, if you will,
16 between the two sections, the two different sections
17 of the Act which the Agency is reading independently.
18 First of all, it is my understanding, just so that I
19 am correct, the summary termination provision, you
20 have not adopted rules, but feel that you have the
21 authority to do so?

22 MR. KANERVA: Yes.

23 CHAIRMAN MANNING: In all of your discussions that
24 you have had in preparing this rule so far with the
25 industries that are interested in the rule, and I

1 assume you have had several. You have the comment
2 here that James Harrington prepared for CICI. Are
3 they aware, as well, of your position on the summary
4 termination versus the other termination? Have you
5 had discussions regarding that and regarding your
6 intention to propose separate rules for summary
7 termination? Could you explain a little bit to me of
8 those discussions?

9 MR. KANERVA: Sure. They have happened in two
10 contexts, really. The first -- I responded to a
11 question from Kathleen Crowley at the first hearing
12 about do we have some projects that are starting to
13 show up on the map now and that are looking like they
14 are going to go somewhere, and part of the reason why
15 we are on a fast track here. And I said, yes, we have
16 about five or six companies that look like they are
17 pretty serious.

18 Well, the first one of those was 3M, and in
19 working with them on an actual very rough first
20 version of the document we actually had the
21 termination provisions described in there, and then
22 sat down across the table from the company and their
23 legal counsel and what have you, and talked about this
24 dual tract or two different pathways that termination
25 would happen. And that was talked about fairly

1 specifically with the company, so they were well aware
2 of it.

3 That is the discussion that has gotten the
4 furthest so far. The other companies have come in
5 later and we are really talking more about the
6 substance of the innovative measures, and what have
7 you, in the project. We have not gotten to all of the
8 procedural things that we would be talking about
9 within a few weeks probably even.

10 The second place this has all gotten discussed is
11 in the various sessions we have had over the Agency
12 rules and ultimately these rules and the filing of
13 those. So it has been both in the context of -- with
14 the companies that are interested. I mean, you know,
15 we only talk to whoever shows up and expresses some
16 interest. So both with the rulemakings and individual
17 agreements that we are starting to work on we have
18 gone through this procedure.

19 MS. KROACK: I also want to add that I believe,
20 and I will check this during comment, but I believe I
21 served a copy of our statement of reasons that lays
22 out this position -- I have served a copy of this both
23 on CICI and Mr. Harrington, as well as a number of
24 other individuals, 3M, Citizens for a Better
25 Environment. I can't remember the others.

1 What are some of the other companies, Roger?

2 MR. KANERVA: The statement of reasons.

3 BOARD MEMBER McFAWN: You have a service list on
4 the second page of your initial filing.

5 MS. KROACK: Correct. I sent it to Mark Biel, but
6 I didn't send it to Mr. Harrington. I apologize. I
7 sent it to Jeff Fort, who represents 3M and Tom Zosel
8 of 3M, and Bill Compton of Caterpillar, and Dan
9 Goodwin, who came to one of the hearings. Ron Burke
10 with the American Lung Association. Joanna Hoelscher
11 with Citizens for a Better Environment. Steve Longhta
12 with Illinois Manufacturer's Association. Sid Marder
13 with IERG.

14 CHAIRMAN MANNING: You are talking about your
15 statement of reasons, right.

16 MS. KROACK: Correct. The whole package.

17 HEARING OFFICER McGILL: You are referring to the
18 proposal the Agency filed on August 17, 1998?

19 MS. KROACK: Correct.

20 HEARING OFFICER McGILL: Thank you. Mark Biel is
21 with CICI?

22 MS. KROACK: Correct.

23 HEARING OFFICER McGILL: Thank you.

24 BOARD MEMBER McFAWN: If you -- you mentioned that
25 you talked about this with 3M and other sponsors or

1 potential sponsors. If you don't adopt rules about
2 this, quote, summary termination, would the -- what
3 kind of notice would they have, sponsors, potential
4 sponsors, or companies that are thinking of becoming
5 potential sponsors, what kind of notice would they
6 have? Would it only be the statute, then, that this
7 could, in fact, happen, an EMRS situation?

8 MR. KANERVA: Well, again, we have not quite
9 gotten all the way through all of the aspects of that
10 in the agreement yet because 3M kind of went into a
11 holding pattern for a while. But we simply said we
12 would like to work it out in a couple -- in the first
13 kind of batch of agreements that come up that we work
14 our way through as a way to help develop the thought
15 process of how to handle that. There is several other
16 things as well that you almost have to do it to figure
17 it out. And so far they have been comfortable -- I
18 mean, they don't have to enter into one of these
19 agreements.

20 BOARD MEMBER McFAWN: I know. It is voluntary.

21 MR. KANERVA: Yes, it is voluntary. So, I mean,
22 we will try to work out an agreement that has the
23 procedures in it, whether it be notice to the company,
24 et cetera, time to get their permits back in place and
25 presumably -- I mean, we will have to come up with

1 something they are comfortable with or they are not
2 going to sign the agreement. So once we have done
3 that a couple of times and I think worked our way
4 through it, then we will give some thought to maybe
5 going ahead and having some kind of standard set of
6 procedures or maybe enhancing our rules of this aspect
7 of it. That talks about authority as well for -- it
8 says including mediated dispute resolution.

9 CHAIRMAN MANNING: Alternative dispute resolution.

10 MR. KANERVA: Yes, alternative dispute resolution.

11 CHAIRMAN MANNING: Actually, it says that and it
12 says performance assurance. It does not say
13 termination.

14 MR. KANERVA: Right.

15 CHAIRMAN MANNING: The whole idea of summary
16 termination, if I am correct, came through the
17 statement of proposal, the proposed statement of
18 reasons, wasn't it? I mean, where did the whole
19 terminology summary termination come from? Not from
20 the --

21 MR. KANERVA: It came at the first hearing when
22 Kathleen Hennessey read my testimony where I said
23 summarily terminate or something and we all started
24 calling it summary termination. But it is not a term
25 in the Act.

1 CHAIRMAN MANNING: Okay. What would be the
2 difference between the use of -- I mean, how would the
3 Agency decide whether it is a summary termination of
4 an EMRS or whether it is a termination that goes
5 through the Board procedure?

6 MR. KANERVA: Right. We tried to work -- we
7 worked at that some in the first hearing as well.
8 And, of course, the statute -- the test in the statute
9 is that something -- the performance is so grossly
10 deficient that, in effect, the very purpose for why
11 they were getting into the agreement is not going to
12 be met. You know, whether it be some major
13 improvement in emissions or discharges or something
14 else they are doing in a very innovative way, and we
15 have documentation to show that they are flat not
16 going to be able to do it and, in fact, maybe grossly
17 so. That being the case, the feeling was -- the
18 concept in putting this together originally was if we
19 know that, for the credibility of this program we
20 ought to just move and we ought to act. We ought to
21 stop a project, put them back under the old system,
22 and be done with it rather than have something drag on
23 and drag on and have a bunch of battling with the
24 Agency and this company over something when they have
25 not really achieved what they should have. Now,

1 having said that, that is sort of the worse case
2 scenario. If we have a melt down, and the whole
3 reason for doing the project falls out from under us,
4 just stop. If you have something in between,
5 something is a little off track, things don't look
6 quite as rosy as we would like, these five things we
7 have enumerated, or perhaps a combination of a couple,
8 then it seems to make sense to us that that is kind of
9 the in between ground where the Board really could
10 serve a real purpose here by sort of hearing both
11 sides of the story, and the Agency would need to make
12 its case that this is a project that probably needs to
13 stop. But we are not facing a situation where dire
14 consequences or some real problematic things would
15 continue to go on while we go through these
16 procedures. I mean --

17 BOARD MEMBER McFAWN: Didn't the Agency meet with
18 some companies that would be potential sponsors so
19 that you could introduce your program?

20 MR. KANERVA: Do what?

21 BOARD MEMBER McFAWN: So that you could introduce
22 the Agency's program on this?

23 MR. KANERVA: Yes, we had a workshop session. I
24 think that you came and joined us, as a matter of
25 fact.

1 BOARD MEMBER McFAWN: I did.

2 MR. KANERVA: It was back in early February of
3 this year where we invited about twenty-some companies
4 to talk about some of the approaches that we wanted to
5 take to encourage them to participate.

6 BOARD MEMBER McFAWN: Yes, I was there.

7 MR. KANERVA: Right.

8 BOARD MEMBER McFAWN: I was kind of there on the
9 spur of the moment, so I am not sure that I caught
10 everything that was discussed. Was this concept of
11 this second type of termination, was that discussed
12 with the companies at all?

13 MR. KANERVA: We didn't get into that much detail
14 on that day.

15 BOARD MEMBER McFAWN: Okay.

16 MR. KANERVA: Because we were also covering both
17 the voluntary EMSA evaluation project that the ten
18 states are doing and Peter Weiss presented some
19 information about. We were covering that and this
20 Illinois specific innovation program.

21 BOARD MEMBER McFAWN: Have you talked about this
22 second type of termination like with maybe some of the
23 key players you have there, like Bill Compton of
24 Caterpillar or Tom Zosel at 3M?

25 MR. KANERVA: We really left that to anyone

1 interested in the various rulemakings that we have
2 done or started talking to us about a specific
3 project. Caterpillar has not come forward and said
4 that they have a project that they are interested in
5 doing.

6 BOARD MEMBER McFAWN: Okay. So they have not, but
7 Bill Compton has been involved on it, or just on the
8 periphery.

9 MR. KANERVA: He has gotten copies of all of the
10 different actions that we have been taking. He
11 followed the Agency rulemaking very closely. He came
12 to the hearing and provided some comments on it. He
13 told me -- when did we run across each other -- it was
14 a few weeks before the last hearing. He had read over
15 the proposal that we filed on this proceeding and said
16 it looked pretty good to him.

17 BOARD MEMBER McFAWN: Okay.

18 MR. KANERVA: I am just passing that along, what
19 he said to me. I know he has not submitted any
20 written comments, but he did make that comment to me.

21 You know, Claire, this whole provision really -- I
22 mean, if you will recall, this performance assurance
23 business, and this whole kind of credibility aspect of
24 doing these innovations was something that we were
25 real sensitive about. I mean, I wrote this language

1 as a result of having -- I had conversations with the
2 Attorney General's office. And, believe me, they were
3 sort of open to the idea of let's try some managed
4 experiments. But they get paid to be lawyers and to
5 be concerned about what happens if things don't go
6 well here, Roger. Well, Roger wanted to be sure I had
7 an answer for a lot of their what ifs.

8 We also had some pretty serious discussions with
9 the public interest groups. I would say that they
10 were probably less open to this originally than the
11 Attorney General's office, but kind of came around
12 after we sort of talked to them about what some of
13 these companies had been suggesting to us that they
14 were willing to do, but there was just no real
15 incentive for them to go forward and do it, because we
16 couldn't acknowledge it in our regulatory procedures.
17 But they said we sure as heck don't want these
18 projects getting out there and kind of in their own
19 space and not being able to get them back under
20 control. So they wanted to see some pretty
21 straightforward procedures that we could manage these
22 projects with.

23 HEARING OFFICER MCGILL: You are referring to --

24 MR. KANERVA: This is what I came up with.

25 CHAIRMAN MANNING: Right.

1 HEARING OFFICER MCGILL: You are referring to
2 public interest groups wanted to insure that there was
3 summary termination?

4 CHAIRMAN MANNING: No, he didn't say that.

5 MR. KANERVA: Well, I mean, that term didn't exist
6 back then. They wanted to make sure that a project
7 that was in real trouble, it just had failed, it
8 should just be stopped, just stop it. Send them a
9 notice, stop it, and get them back on permits and
10 whatever else it is that they had disconnected from
11 and they would have to toe the line like any other
12 regulated entity. And, you know, I am very
13 comfortable with that. I mean, if a project fails
14 then we ought to stop, period. We don't need a lot of
15 long, extended debate about it, one way or another.

16 CHAIRMAN MANNING: So your point is you ought to
17 just stop because it is that bad, and there should be
18 no adjudicatory process pursuant to the adjudicatory
19 process of the rules established under Part C of what
20 we are dealing with in terms of the proposal?

21 MR. KANERVA: Right.

22 CHAIRMAN MANNING: Okay.

23 HEARING OFFICER MCGILL: Do any of the Board
24 Members or Board staff have any further questions at
25 this point?

1 BOARD MEMBER HENNESSEY: I have a more mundane
2 question. We talked at the first hearing about some
3 of the deadlines not really working with briefing
4 periods and time for the Board to come up with a
5 decision. And I see that you -- the errata sheet,
6 Exhibit Number 3, still provides that the Board is
7 supposed to come up with a decision within 30 days
8 after the hearing; is that correct?

9 MS. KROACK: Correct. Only because we hadn't
10 talked about it, what time frame the Board really
11 needed. And not knowing, I didn't really want to make
12 a suggestion without more to go on, on what you felt
13 you needed with respect to your schedules for Board
14 meetings and briefing schedules. So that's the only
15 reason I didn't make the change. We agree that if you
16 need more time, more time should be built into the
17 system. Throughout these dates in the proposal the
18 intent, again, of putting on as fast a track as
19 possible, but realizing that you may have concerns
20 where you need additional time. I just couldn't -- I
21 didn't know a good number.

22 BOARD MEMBER HENNESSEY: So you have no -- the
23 Agency has no objection to the Board making a
24 determination as to whether more time is needed for
25 some of these steps?

1 MS. KROACK: Correct.

2 BOARD MEMBER HENNESSEY: Consistent, of course,
3 with your concern that these proceedings go as quickly
4 as possible.

5 MS. KROACK: Quickly, yes. If I had had any idea
6 of exactly how much time you really needed with your
7 schedules I would have tried to suggest something, but
8 I simply didn't know that information.

9 BOARD MEMBER McFAWN: Fair enough.

10 MS. KROACK: Rather than suggest something you may
11 not still like, I just felt that I should leave that
12 in your hands to suggest what you thought you needed.

13 BOARD MEMBER HENNESSEY: Thank you.

14 HEARING OFFICER McGILL: Are there any further
15 questions for the Agency's witnesses at this point?

16 Seeing none, we will go off the record.

17 (Whereupon a short recess was taken.)

18 HEARING OFFICER McGILL: Back on the record.

19 (Chairman Manning was not present after the
20 recess.)

21 HEARING OFFICER McGILL: At this point we would
22 like to continue with questions for the Agency.

23 Do any of the Board Members or Board staff have
24 any further questions at this point?

25 BOARD MEMBER HENNESSEY: I have just a couple. I

1 see that when you provided the further explanation of
2 who is to receive notice of a hearing, you have now
3 extended that to any person who has submitted written
4 comments on the EMSA or participated in a public
5 hearing by either signing an attendance sheet or
6 making a verbal comment at the hearing. I thought I
7 understood you to say last time that you didn't want
8 to extend it to everyone who signed an attendance
9 sheet, because you might have to end up giving notice
10 to 600 people. Has your position changed on that?

11 MS. KROACK: Yes. We decided that we couldn't
12 determine who might be giving a public comment at that
13 hearing on behalf of several people, and trying to
14 craft a provision to carve that out would be too
15 difficult and really wouldn't tell us who is truly
16 interested in the EMSA.

17 BOARD MEMBER HENNESSEY: Did you consider possibly
18 having notice by publication if the number of
19 stakeholders got to be over a certain size?

20 MS. KROACK: The stakeholder groups will always
21 get notice.

22 BOARD MEMBER HENNESSEY: Oh, I am sorry. If this
23 group --

24 MS. KROACK: For public hearing?

25 BOARD MEMBER HENNESSEY: Yes.

1 MS. KROACK: Okay. No, we hadn't.

2 BOARD MEMBER McFAWN: It is something that you
3 might want to think about. I don't know what it would
4 do to the time frame. I know that you are looking for
5 an expeditious time frame. If you are looking at 500
6 people and individual notice, it might be actually
7 cheaper to go with the newspaper. I don't know.

8 MS. KROACK: We will consider that and provide
9 additional responses in written comments.

10 BOARD MEMBER HENNESSEY: Okay.

11 MR. CHARLES KING: Just to clarify something,
12 those people would not all be considered parties; is
13 that right?

14 MS. KROACK: Correct.

15 MR. CHARLES KING: The parties would just be the
16 Agency and the Respondent?

17 MS. KROACK: The Agency and the sponsor.

18 MR. KANERVA: And the project sponsor. The
19 respondent for this action is what you meant.

20 MR. CHARLES KING: Unless somebody else
21 intervenes, then they are not a party for the purposes
22 of notice of motions?

23 MS. KROACK: Correct.

24 MR. CHARLES KING: Okay. Thank you.

25 BOARD MEMBER HENNESSEY: I had a question also on

1 Exhibit Number 2. On page two of that exhibit, Ross &
2 Hardies states, quote, it would be better if the
3 procedures provided that hearing before the Board
4 would be pursuant to the Board's procedural rules for
5 contested cases appropriately expedited and taking
6 into account the nature of the proceeding, end quote.

7 I would just like to get on the record your -- do
8 you see it? It is on the first page of the Ross &
9 Hardies memorandum, in the first paragraph, the third
10 sentence.

11 MS. KROACK: Yes. They made that statement, and
12 we felt it was essentially what the rules were, in
13 fact, doing. We used the Board's contested case
14 procedures in Part 103 as our model and expedited them
15 with some changes in discovery and ability to
16 intervene.

17 BOARD MEMBER HENNESSEY: So the draft that Ross &
18 Hardies was commenting on, was it also patterned on
19 the Board's procedural rules?

20 MS. KROACK: Yes, it was.

21 BOARD MEMBER HENNESSEY: So --

22 MR. KANERVA: Let me add to that. The version
23 that they saw had only the Agency being the one to
24 request the hearing. The other party did not have
25 that option. And we had some reasons why we started

1 off writing it that way. That flavored a lot of what
2 they were commenting about here. Because a number of
3 people were concerned about that, which we said to you
4 last time we went ahead and changed and just made it
5 an automatic hearing.

6 BOARD MEMBER HENNESSEY: Okay.

7 MS. KROACK: We were puzzled at the statement we
8 saw, because it is exactly how we patterned these
9 rules. While there were some differences between the
10 version we shared with them and the version we filed,
11 the most significant was who had the right to request
12 a hearing.

13 BOARD MEMBER HENNESSEY: Okay. I don't think I
14 have any other questions. Thank you.

15 HEARING OFFICER MCGILL: Okay. At this time are
16 there any further questions for the Agency's
17 witnesses?

18 Seeing that there are no further questions for
19 either Agency witness, I would like to make a few
20 closing remarks.

21 Let's go off the record for a moment.

22 (Discussion off the record.)

23 HEARING OFFICER MCGILL: All right. Back on the
24 record.

25 I see that no one has signed up to testify today

1 on the sign up sheet.

2 Just for the record, does anyone else wish to
3 testify today?

4 Seeing no response, I will move on to a few
5 procedural matters to address before we adjourn.

6 Let's go off the record for a moment.

7 (Discussion off the record.)

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

10 As I mentioned earlier, there are no additional
11 hearings scheduled in this matter. Public comments
12 must be received by the Clerk of the Board no later
13 than 4:30 on November 4th, 1998. The mailbox rule
14 does not apply to this filing.

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

22 Copies of the transcript of today's hearing should
23 be available at the Board by this Friday, October
24 the 9th, 1998. Then shortly after that, the
25 transcript should be available through the Board's

1 home page on the worldwide web, which is located at

2 www.ipcb.state.il.us.

3 Are there any other matters that need to be

4 addressed at this time?

5 Seeing none, I would like to thank everyone for

6 their participation today. This hearing is

7 adjourned. Thank you.

8 BOARD MEMBER HENNESSEY: Thank you.

9 BOARD MEMBER McFAWN: Thank you.

10 MS. KROACK: Thanks.

11 (Hearing Exhibits 1 through 4 retained by Hearing

12 Officer McGill.)

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1 STATE OF ILLINOIS)
) SS
2 COUNTY OF MONTGOMERY)

3 C E R T I F I C A T E

4

5 I, DARLENE M. NIEMEYER, a Notary Public in and for
6 the County of Montgomery, State of Illinois, DO HEREBY
7 CERTIFY that the foregoing 47 pages comprise a true,
8 complete and correct transcript of the proceedings
9 held on the 6th of October A.D., 1998, at 600 South
10 Second Street, Suite 402, Springfield, Illinois, in
11 the matter of: Hearings Pursuant to Specific Rules,
12 Proposed New Subpart K, Involuntary Termination
13 Procedures for Environmental Management System
14 Agreements, 35 Ill. Adm. Code 106, Subpart K, in
15 proceedings held before the Honorable Richard R.
16 McGill, Jr., Hearing Officer, and recorded in machine
17 shorthand by me.

18 IN WITNESS WHEREOF I have hereunto set my hand and
19 affixed my Notarial Seal this 7th day of October A.D.,
20 1998.

21

22

23 Notary Public and
24 Certified Shorthand Reporter and
Registered Professional Reporter

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