

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

2 March 15, 2004

3

4 IN THE MATTER OF:)
5)
6 PROPOSED AMENDMENTS TO:) R04-22
7 REGULATION OF PETROLEUM LEAKING) (UST Rulemaking)
8 UNDERGROUND STORAGE TANKS)
9 (35 ILL. ADM. CODE 732))

10)
11 IN THE MATTER OF:)
12)
13 PROPOSED AMENDMENTS TO:) R04-23
14 REGULATION OF PETROLEUM LEAKING) (UST Rulemaking)
15 UNDERGROUND STORAGE TANKS) Consolidated
16 (35 ILL. ADM. CODE 734))

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18 Transcript of proceedings held in
19 the hearing of the above-entitled matter, taken
20 stenographically by Stacy L. Lulias, CSR, before
21 Marie E. Tipsord, Hearing Officer, at James R.
22 Thompson Center, 100 West Randolph Street, Room
23 2-025, Chicago, Illinois, on the 15th day of March,
24 A.D., 2004, scheduled to commence at 10:00 a.m.,
 commencing at 10:01 a.m.

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

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ILLINOIS POLLUTION CONTROL BOARD,

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James R. Thompson Center

100 West Randolph Street

4

Suite 11-500

Chicago, Illinois 60601

5

(312) 814-3956

BY: MS. MARIE E. TIPSORD, Hearing Officer

6

MR. ANAND RAO, Board Member

MS. ALISA LIU, P.E., Board Member

7

-AND-

8

ILLINOIS POLLUTION CONTROL BOARD,

9

1021 North Grand Avenue East

P.O. Box 19274

10

Springfield, Illinois 62794

(217) 524-8500

11

BY: MR. G. TANNER GIRARD, Ph.D., Board Member

12

-AND-

13

ILLINOIS POLLUTION CONTROL BOARD,

2125 South First Street

14

Champaign, Illinois 61820

(217) 278-3109

15

BY: MR. THOMAS E. JOHNSON, Board Member

16

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

17

1021 North Grand Avenue East

P.O. Box 19276

18

Springfield, Illinois 62794

(217) 782-5544

19

BY: MR. M. KYLE ROMINGER, Assistant Counsel

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-AND-

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MR. HERNANDO A. ALBARRACIN, Unit Manager

Bureau of Land;

22

MR. BRIAN P. BAUER,

23

Environmental Protection Specialist

Leaking Underground Storage Tank Section,

24

Bureau of Land;

1 A P P E A R A N C E S: (Continued)

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MR. HARRY A. CHAPPEL, P.E., Unit Manager
Leaking Underground Storage Tank Section,
Bureau of Land;

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MR. DOUGLAS W. CLAY, P.E., Manager
Leaking Underground Storage Tank Section,
Bureau of Land;

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MR. GARY P. KING, Manager
Division of Remediation Management,
Bureau of Land;

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MR. DOUGLAS E. OAKLEY, Manager
LUST Claims Unit,
Bureau of Land

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1 HEARING OFFICER TIPSORD: Good
2 morning, everyone. My name is Marie Tipsord and I
3 have been appointed by the Board to serve as Hearing
4 Officer in these combined proceedings entitled,
5 In the Matter of Proposed Amendments to Regulations
6 of Petroleum Leaking Underground Storage Tanks,
7 35 Ill. Adm. Code 732 and 734. The docket numbers
8 are R04-22 and 23.

9 To my immediate left Dr. Tanner
10 Girard, the Board Member assigned to this matter.
11 To his left is Board Member Thomas Johnson. From
12 our technical staff, on my immediate right, is Anand
13 Rao and to his right is Alisa Liu. At this time, I
14 think that's all the Board staff present.

15 This is the first hearing to be
16 held in these proceedings. The purpose of today's
17 hearing is twofold. First, we will allow anyone who
18 wishes to make an opening statement. We will let
19 the Agency begin and then if anyone else wants to,
20 we will let them. Then we will hear the prefiled
21 testimony of the Illinois Environmental Protection
22 Agency and allow anyone who wishes to ask questions
23 of the Agency. The prefiled testimony will be taken
24 of and marked as an exhibit and the attachments to

1 the testimony all go to, I believe, Harry Chappel's
2 testimony, so they will be part of his testimony and
3 exhibit number.

4 The Agency witnesses will
5 summarize their testimony, and, also, Mr. Gary King
6 will give testimony. After they have all testified,
7 we will open the floor to questions.

8 When we open the floor to
9 questions, we will go subpart by subpart. We will
10 take 732 and 734 together. This will help keep the
11 record concise and will also help us from having to
12 turn back and forth many times through the
13 documents.

14 Anyone may ask a question.
15 However, I do ask that you raise your hand, wait for
16 me to acknowledge you. After I have acknowledged
17 you, please state your name and who you represent
18 before you begin your questions. Please speak one
19 at a time. If you are speaking over each other, the
20 court reporter will not be able to get your
21 questions on the record.

22 Also note that any question asked
23 by Board Member or staff are intended to help build
24 a complete record for the Board's decision and not

1 Dr. Girard if he'd like to say good morning.

2 BOARD MEMBER GIRARD: Yes, I would.

3 Good morning. On behalf of the
4 Board, I welcome everyone to this rulemaking hearing
5 to consider additions and amendments to the leaking
6 underground storage tank rule.

7 The proposal we are considering
8 has language and response to Public Acts 92-554 and
9 92-735. In addition, there are amendments to
10 streamline to process for obtaining payments from
11 the UST fund.

12 We appreciate the time and effort
13 that the Illinois EPA and members of the regulated
14 community have already expended to narrow the
15 outstanding issues to the six categories listed in
16 the proposal. We hope that your testimony and
17 questions today will help resolve those remaining
18 issues, and we look forward to that testimony and
19 questioning. Thank you.

20 HEARING OFFICER TIPSORD: Thank you,
21 Dr. Girard.

22 BOARD MEMBER JOHNSON: Nothing from me
23 other than I'm looking forward to an informative
24 hearing. Thanks for coming.

1 HEARING OFFICER TIPSORD: Thank you,
2 Member Johnson.

3 Before we begin with the
4 testimony, the Agency filed errata sheets as a part
5 of the prefiled testimony for parts 732 and 734. If
6 there's no objection, we'll admit the errata for
7 Part 732 as Exhibit 1 and Part 734 as Exhibit 2.

8 Seeing none, those will be entered
9 into the record.

10 (Whereupon, Exhibit Nos.
11 2 and 3 were admitted into
12 the record by Hearing Officer
13 Tipsord.)

14 HEARING OFFICER TIPSORD: At this time
15 then I would ask Mr. Rominger if he would like to
16 make an opening statement?

17 MR. ROMINGER: Yes. I'd like to
18 introduce everybody we have as witnesses today for
19 the Agency.

20 We have Gary King, Manager of
21 Division of Remediation Management; Doug Clay, to
22 his left, Manager of the LUST Section; to my right
23 is Hernando Albarracin. He's a Unit Manager in the
24 LUST Section. We have Doug Oakley directly behind

1 had to conduct site evaluations and then classified
2 their sites either as no further action, low
3 priority or high priority.

4 No further action sites were
5 simply that no further action was conducted. Low
6 priority sites were required to monitor ground water
7 for three years. And then high priority sites had
8 to do with remediation in accordance with TACO.

9 That site classification process
10 was changed by the Public Act and now all sites
11 merely defined the extent of contamination and
12 remediate in accordance with TACO. So that's what
13 we based the 734 regulations on.

14 732 we left intact because those
15 requirements still apply to releases reported prior
16 to the effective date of the Public Act.

17 We've also made some amendments to
18 update the 732 rules so they're consistent with the
19 734 rules.

20 The new Part 734 is intended to
21 apply to sites reported on or after the effective
22 date of the Public Act. In developing those rules,
23 we started with Part 732 and revised mainly the site
24 investigation portion of the rules and the

1 corrective action portion, and those are found in
2 Subpart C of 734.

3 The remainder of 734 should be
4 essentially the same as 732. We have done, again,
5 some updates to the rules, but any updates we have
6 in 734 should be reflected also in 732.

7 In 734, there has been some
8 reorganization. What we tried to do was pull out
9 some provisions that apply to -- at many different
10 points during the remediation process, and we've
11 organized those into Subpart D and just tried to
12 collect those in one area for easier reference.

13 With the Professional Geologist
14 Certification Legislation of Public Act 92-735,
15 that's basically covered in 732-108 and 734-130.
16 And under 732, we've changed the rules to allow
17 geologists to certify all of the reports that are
18 submitted to the Agency except for high priority
19 corrective action completion reports. And, in 734,
20 geologists can certify anything but the corrective
21 action completion reports. And that's consistent
22 with the legislation.

23 In addition to that, there are
24 other revisions to reimbursement process, and that

1 will be clarified further in testimony, so I'll
2 defer to witnesses on that.

3 Everybody had prefiled testimony
4 except for Mr. King. We brought copies with that,
5 which are not here yet, but they are on their way.
6 And, with that, I'll turn it over to the witnesses.

7 HEARING OFFICER TIPSORD: Before we do
8 that, is there anyone else here who would like to
9 make an opening statement?

10 Seeing none, I also would like to
11 note that Mr. Fix, Chairman Novak's assistant, has
12 joined us from the Board.

13 Then let's swear in the witnesses.

14 (Witnesses sworn.)

15 HEARING OFFICER TIPSORD: Mr.
16 Rominger, if you'd like to present your witnesses?

17 MR. ROMINGER: Okay. Gary, do you
18 want to go first?

19 MR. KING: Yes.

20 My name is Gary King. I am the
21 manager of the Division of Remediation Management
22 within the Bureau of Land at the Illinois
23 Environmental Protection Agency. In this position,
24 I am the senior manager responsible for almost all

1 of the Illinois EPA cleanup programs, including
2 the LUST program. I've had senior manager
3 responsibility for the LUST program ever since the
4 LUST section was established in 1990. I've been
5 directly involved in every statutory change to the
6 LUST program since 1990. I've appeared as a witness
7 at every LUST rulemaking since 1990.

8 During the last 14 years, the
9 Agency has proposed, and the Board has adopted,
10 numerous changes to the LUST regulations. Some of
11 these changes were the direct result of statutory
12 changes. Other changes were the result of Agency
13 experience in administering this complex program.
14 These changes were intended to streamline the
15 program and increase its cost effectiveness. In
16 this proceeding, we have both types of changes:
17 those necessary to meet statutory mandates and those
18 necessary to make the program more cost effective.

19 Some of the changes we are
20 proposing in this proceeding are likely to be more
21 controversial than others, particularly, Subpart H,
22 Maximum Payment Amounts, and the corresponding
23 appendixes. The Agency's administration of the
24 reimbursement process of the LUST program has always

1 been the most controversial part of the program.
2 Illinois is not the only state to have faced
3 controversy in this regard. In some states, the
4 LUST payment process has been a disaster. In some
5 states, the administrative processes have "locked
6 up" such that no payment requests could be
7 processed. In other states, the system became a
8 "giveaway" with no control on what was being paid
9 out. Finally, in some states, the state legislature
10 did not provide nearly enough funding for an
11 adequate program.

12 Fortunately, in Illinois, we have
13 avoided these catastrophes. The legislature has
14 approved appropriate levels of funding to address
15 the program needs, we process payment requests
16 efficiently and in accordance with Board rules.
17 Given the integrity of our review process, no one
18 has ever accused us of running a "giveaway" program.

19 Despite our successful track
20 record, over the last few years, we have noted that
21 more and more administrative time is being spent,
22 not on the oversight of LUST cleanup activities, but
23 on the oversight of budget approvals. We have also
24 encountered more frequent instances of what we

1 believe are abuses of the system. About a year ago
2 we began the process of developing new system, the
3 one that is now proposed to be set forth in
4 Subpart H.

5 In developing this system, we
6 have been constantly aware that it is our
7 responsibility as administrators of the LUST Fund to
8 pay "reasonable costs." Others from the Agency will
9 provide details on how we reached the numbers we are
10 proposing and the factual support for those numbers.
11 I'm sure the Board will appreciate the difficulty
12 for the Agency of deciding on a reasonable cost
13 figure for reimbursement purposes. I expect that
14 some will argue that our data could support a higher
15 figure and will request that the Board raise the
16 number.

17 Although I do not expect anyone to
18 present testimony arguing that the numbers should be
19 lower, I think that as the Board reviews our data it
20 will see instances where the data would have
21 reasonably supported the Agency supporting a lower
22 number.

23 I think the Board is justified in
24 questioning both whether an Agency number is too

1 high or too low. We are confident that the maximum
2 payment amounts we have proposed in Subpart H and
3 appendices fall within the range of reasonable
4 costs. But, in the end, it will be the Board's
5 authority and responsibility in this proceeding to
6 determine whether the numbers we have proposed are
7 reasonable.

8 MR. ROMINGER: Doug?

9 MR. CLAY: My name is Doug Clay. I'm
10 the manager of the Leaking Underground Storage Tank
11 Section. Today I will be testifying in support of
12 the proposed Part 732 amendments and in the new
13 Part 734, 35 Ill. Adm. Code.

14 The proposed regulations are
15 intended to streamline the leaking underground
16 storage tank remediation process to clarify the
17 remediation requirements and most notably reform the
18 budget reimbursement process. The new budget
19 reimbursement process would eliminate the majority
20 of budgets and reimbursement packages submitted
21 based on a time and materials basis and replaced
22 with submittals based on unit rates and lump sums
23 for specific tasks established in these regulations.
24 We believe that this will streamline the approval of

1 budgets and the processing of reimbursement claims.

2 Currently, there is a tremendous
3 amount of time spent reviewing budgets and
4 reimbursement packages. Furthermore, the majority
5 of plans and report denials, amendments to plans and
6 reports submitted by consultants and appealed before
7 the Illinois Pollution Control Board are related to
8 budget and reimbursement issues as opposed to
9 technical issues.

10 The Agency believes the proposed
11 amendments will allow more efficient use of Board
12 resources, Agency resources, improve consistency,
13 lower remediation costs, expedite cleanups and allow
14 taken owners and operators to be reimbursed in a
15 more timely manner.

16 The proposed costs in Subpart H
17 were developed with input from the consulting
18 industry, other trade organizations, nearly 15 years
19 of Agency experience administering the leaking
20 underground storage tank reimbursement program and
21 are generally consistent with the rates we currently
22 approve for reimbursement.

23 Over the past 15 years, the Agency
24 has approved over half a billion dollars in

1 reimbursement. This involves reviewing 12,800
2 budgets, 18,300 applications for payment.

3 In addition, it should be noted
4 that our current rates and the approach to
5 developing our current rates have been upheld in
6 Board decisions. In addition to the reimbursement
7 changes, the Agency has proposed in Part 734 a new
8 three-staged approach to site investigation.
9 Consultants originally suggested this new approach
10 to site investigation. The idea was to allow more
11 site investigation work in stage one to be conducted
12 after early action activities and prior to submittal
13 of the first site investigation planned budget in
14 stage two to the Agency. This would give
15 consultants more information to be used in
16 developing their stage two plan. This requires a
17 fairly restrictive approach to stage one since there
18 is no prior Agency approval of the plan for budget
19 in stage one. Stage two would be the proposed plan
20 fully defining the extent of contamination on-site
21 and stage three would be the plan to fully define
22 the extent of contamination off-site, if necessary.
23 That concludes my summary.

24 MR. ALBARRACIN: My name is Hernando

1 Albarracin. I'm a unit manager in the LUST section.
2 My testimony comprises Subparts A, B, and C, except
3 732.306, the first site classification.

4 HEARING OFFICER TIPSORD: Could you
5 speak up, please?

6 MR. ALBARRACIN: Sure.

7 In Subpart A, new terms were
8 defined. The incorporation by reference section was
9 updated, and the new section was added to specify
10 that plans, budgets, and reports must be certified
11 by a licensed professional engineer or licensed
12 professional geologist.

13 In Subpart B, the location and
14 number of early action soil samples that must
15 be collected for laboratory analysis when an
16 underground storage tank system is or is not removed
17 is specified, the amount of free product that must
18 be present in order to trigger the free product
19 removal requirements is greater than one-eighth of
20 an inch in depth measured in a groundwater
21 monitoring well. Free product, when it is present
22 as sheen on groundwater in the tank excavation or in
23 surface water must also be removed and a free
24 product removal plan and budget is seeking

1 reimbursement from the UST Fund for free product
2 removal activities conducted more than 45 days after
3 confirmation of the presence of the free product
4 must be submitted.

5 In Subpart C, minor changes were
6 made in several sections. One important change
7 though is the addition of the water supply well
8 survey requirement.

9 My testimony comprises Subparts A,
10 B, and C, except 734.450, deferred site
11 investigation or corrective action of Part 734.

12 In Subpart A, that section was
13 added to clarify that the owner or operator may
14 propose tier two or tier three remediation
15 objectives in accordance with 35 Ill. Adm. Code 742.

16 In Subpart B, the location and
17 number of early soil samples that must be collected
18 for laboratory analysis when an underground storage
19 tank system is or is not removed is specified, the
20 amount of free product then must be present in order
21 to trigger a free product removal requirement is
22 greater than one-eighth of an inch in depth measured
23 in groundwater in a groundwater monitoring well.
24 Again, free product, when it is present as seen on

1 groundwater in the tank excavation or in surface
2 water must also be removed in a free product removal
3 plan and budget, if applicable, must be submitted.

4 In Subpart C, to delineate the
5 extent of contamination in soil and groundwater, a
6 site investigation must proceed in three stages.
7 The owner-operator will have the ability to request
8 payment for site investigation activity at the
9 completion of each stage rather than at the
10 completion of the entire site investigation.

11 In Subpart B, site map
12 requirements in the water supply well survey
13 requirements are specified. Here is the summary of
14 my testimony for Parts 732 and 734.

15 My name is Doug Oakley. I've been
16 the official manager of the LUST claims unit for
17 the past five years; however, I've worked in the
18 reimbursement/payment side of the program in various
19 capacities since January of 1990. My testimony is
20 related to five major sections of the proposed rules
21 732.601, 732.602, 732.605, 732.606 and to a lesser
22 degree, 732.610.

23 Section 732.601 is amended to
24 clarify what information must be submitted in an

1 application for payment, require information to
2 confirm that subcontractors have been paid when
3 subcontractor handling charges are requested,
4 confirm that accredited laboratories perform lab
5 work paid for by the LUST Fund, clarify that the
6 Agency intends to review all amended plans, budgets
7 and claims prior to payment, ensure that deferred
8 corrective action is performed and approved by the
9 Agency prior to payment from the fund and encourage
10 prompt submittal of claims.

11 Section 732.602 is amended to
12 reflect the fact that the Agency conducts a full
13 review of all applications for payment.

14 Section 732.605 is amended to
15 clear up confusion regarding the concrete
16 replacement.

17 Section 732.606 is amended to
18 clarify language regarding the payment of legal
19 fees, clarify the Agency's intention to require
20 proof of payment for subcontractor costs when
21 subcontractor handling charges are requested,
22 encourage prompt submittals of claims, prohibit
23 companies from adding handling charges to the fees
24 of their own entities, and prohibit multiple layers

1 of subcontractor handling charge assessments.

2 Section 732.610 is amended to
3 further clarify and define the steps and procedures
4 necessary to access the fund for indemnification
5 purposes. All of the proposed recommendations have
6 results from conversations with consultants,
7 contractors, owner-operators, and Agency personnel
8 concerning various problems with payments issues.

9 It is the Agency's intention and
10 belief that these changes will help to clarify and
11 streamline parts of the payment process.

12 MR. BAUER: My name is Brian Bauer. I
13 am a project manager in the underground storage tank
14 section in the Bureau of Land of the Illinois
15 Environmental Protection Agency.

16 Today I will testify in support of
17 the proposal to adopt 35 Ill. Adm. Code 732 and 734.
18 My testimony will focus on the maximum payment
19 amounts proposed in Subpart H, as well as Appendix E
20 of Part 732 and 734.

21 Section 732.810 and 734.810, UST
22 removal and abandonment costs establishes maximum
23 allowable costs for the excavation, removal, and
24 disposal or abandonment from an UST system based on

1 monitoring well properly in accordance with the
2 Illinois Department of Public Health Regulations, a
3 maximum cost of \$10.00 per linear foot as well would
4 be acceptable.

5 Section 732.840(a) and 734.840(a)
6 replacement of concrete, asphalt or paving;
7 destruction or dismantling and reassembly of above
8 grade structures allows for a maximum cost of \$2.18
9 per square foot for the replacement of up to 4
10 inches or more of asphalt or concrete.

11 Throughout Sections 732.845 and
12 734.845, professional consulting services, the
13 Agency refers to a half day rate of \$500. The half
14 day rate is five hours of work at an average rate of
15 \$80.00 per hour and includes such things as mileage,
16 photo ionization detector and miscellaneous
17 supplies.

18 The half day rate would be
19 applicable for UST removal oversight, line repair
20 oversight, oversight of an excavation at a rate of
21 one half day for each 250 cubic yards of soil
22 removed and disposed, oversight of a soil boring at
23 a rate of one half day for every four soil borings,
24 or one half day for each soil boring that is

1 converted to a monitoring well.

2 Appendix E, personnel titles and
3 rates of 732 and 734 list personnel titles and rates
4 for use whenever a time breakdown is required to be
5 submitted to the Agency. A consultant proposes the
6 time and material budget, must use the title, and
7 their personnel must be able to meet the
8 requirements listed in Appendix E. The reimbursed
9 personnel rate is based on the task performed, not
10 necessarily the title, of the person performing the
11 task.

12 MR. ROMINGER: Harry?

13 MR. CHAPPEL: Morning. My name is
14 Harry Chappel. I'm a unit manager in the leaking
15 underground storage tank section within the Bureau
16 of Land. My testimony will primarily focus on
17 Subpart H of 734 and 732 dealing with the
18 reimbursement amounts for activities conducted under
19 the tank program. My testimony supports the Agency
20 proposal for the following costs:

21 First, soil removal and disposal
22 under 734.825. \$57.00 a cubic yard for the cost to
23 excavate, transport and dispose of contaminated
24 soil; \$20 a cubic yard for the cost to backfill and

1 excavation; \$6.50 a cubic yard to remove
2 uncontaminated soil and replace it on-site.

3 This section also proposes a
4 formula to account for the volume difference of
5 in-place soil to that of excavated soil for purposes
6 of calculating the estimated soil volume. Likewise,
7 a conversion factor for tons to cubic yards has been
8 proposed.

9 Second, sample handling and
10 analysis, 734.835. Appendix D of the proposal sets
11 forth the proposed maximum for various laboratory
12 tests.

13 Third, professional consulting
14 services, 734.845 includes early action tank
15 removal, \$960, free product reports of \$1,600, 20
16 and 45 day reports, \$4,800; site investigation,
17 \$9,600; corrective action plans, \$5,120; and
18 corrective action completion reports, \$5,120.

19 The limits proposed in this
20 section were developed using a personal rate of \$80
21 an hour and a maximum number of hours for each task.
22 The proposed limits are intended to include office
23 work conducted by the consultants in completing each
24 of these tasks. Field activities require the

1 consultant to complete these activities were
2 previously discussed by Mr. Bauer.

3 Number 4, time and material. This
4 section establishes a procedure for developing
5 reimbursable costs for activities not included in
6 the above Subpart H. As an example, time and
7 material cost estimates were required for corrective
8 action plans proposing alternative technologies.

9 Number 5, unusual or extraordinary
10 expenses. This section allows for an owner and
11 operator or the consultant to justify why the
12 amounts testified in Subpart H should be increased
13 for their specific project.

14 And number 6, we added an
15 inflation factor that will be used to increase the
16 allowable reimbursable amount in Subpart H annually
17 based on inflation.

18 As far as 732, most of the changes
19 are similar to 734 with the following two
20 exceptions:

21 Number 1, site classification
22 activities for method 1 or method 2 of 732.370;
23 consultant costs for various plans, budgets, field
24 oversight work and completion reports will be

1 limited to \$9,870.

2 Two, no priority corrective action
3 costs will be limited to \$10,880, plus a maximum of
4 seven half days or \$3,500 for field monitoring and
5 oversight. Thank you.

6 MR. ROMINGER: And that's a summary of
7 everybody's testimony.

8 HEARING OFFICER TIPSORD: Shall we go
9 ahead and admit their prefiled testimony then as
10 exhibits?

11 MR. ROMINGER: Yes, I move that the
12 prefiled testimony be entered as read.

13 HEARING OFFICER TIPSORD: For
14 housekeeping purposes, we will start, since Mr. Clay
15 went first, let's start with Mr. Clay.

16 Mr. Clay's testimony for Part 732
17 will be admitted as Exhibit 3. I'll go through all
18 of these and then I'll ask if there's any
19 objections.

20 For 734, Mr. Clay's testimony will
21 be admitted as Exhibit Number 4; Mr. Albarracin's
22 732 testimony will be admitted as Exhibit Number 5;
23 his 734 testimony will be admitted as Exhibit Number
24 6; then I believe it was Mr. Oakley's 732 testimony

1 as Number 7; his 734 testimony as Number 8; and
2 Mr. Bauer I believe was next, his 732 testimony is
3 Exhibit 9; his 734 testimony as Exhibit 10; and,
4 finally, Mr. Chappel's Exhibit Number 11 for 732 and
5 Exhibit Number 12 for 734. Is there any objection?

6 Seeing none, we will admit those
7 as exhibits. But, again, to Mr. Chappel's
8 testimony, Exhibit Number 11 and Number 12, there
9 are attachments.

10 MR. ROMINGER: We also have Mr. King's
11 testimony here.

12 HEARING OFFICER TIPSORD: Did he read
13 it in?

14 MR. ROMINGER: He read it in.

15 HEARING OFFICER TIPSORD: Then I don't
16 think we need to -- we'll just have copies available
17 if anyone wants.

18 MR. ROMINGER: You want us to go ahead
19 and give copies out on the Board or --

20 HEARING OFFICER TIPSORD: That would
21 be great. There were no attachments to Mr. King's
22 testimony, right?

23 MR. ROMINGER: No, no.

24 HEARING OFFICER TIPSORD: And,

1 actually, I need copies of all the prefiled
2 testimony. I need one copy of each one because my
3 copies, obviously, I use to prepare for the hearing,
4 so I need clean copies of each one to mark as the
5 exhibits.

6 (Whereupon, Exhibit Nos. 3-12 were
7 admitted into the record by
8 Hearing Officer Tipsord.)

9 (Whereupon, a discussion was had
10 off the record.)

11 MR. ROMINGER: We also have some
12 additional documents over there that members of the
13 public may be interested in. We have copies of the
14 forms --

15 MR. CLAY: Yes, it's the modified
16 budget forms that include the rates that we're
17 proposing.

18 HEARING OFFICER TIPSORD: We probably
19 need to enter those as exhibits then as well.

20 MR. CLAY: And the second thing is
21 there's an example that goes through early action
22 Stage 1, Stage 2, Stage 3 corrective action. It's
23 sort of a -- you know, we outline a scenario and
24 then go through each of those with the appropriate

1 forms filled out, to just give you an example, from
2 start to finish and what we would expect as far as
3 which forms to be filled out, what the total cost
4 would be. So I think it would be helpful to pick up
5 one just to see how we see it working.

6 HEARING OFFICER TIPSORD: Then for
7 purposes of the record, I will admit the draft
8 budget and billing forms for the underground storage
9 tank fund March 9, 2004, as Exhibit 13, if there's
10 no objection.

11 Seeing none, we'll admit that.

12 (Whereupon, Exhibit No. 13
13 was admitted into the record
14 by Hearing Officer Tipsord.)

15 HEARING OFFICER TIPSORD: And then the
16 leaking underground storage tank reimbursement
17 example, 35 Ill. Adm. Code 734 will be admitted as
18 Exhibit 14, if there's no objection.

19 Seeing none, we'll admit that as
20 Exhibit 14.

21 (Whereupon, Exhibit No. 14
22 was admitted into the record
23 by Hearing Officer Tipsord.)

24 HEARING OFFICER TIPSORD: I think if

1 we're ready, we will start with Subpart A of both
2 Part 732 and 734. Are there any questions?

3 We'll start behind you first.

4 MR. RIESER: Dave Rieser,
5 McGuireWoods, on behalf of the Illinois Petroleum
6 Council. We can sort of go to Subpart A in sort of
7 general questions as well.

8 The purpose of the legislation was
9 to -- the first piece of legislation we discussed
10 was to do away with the site classification system.
11 One of the purposes was to do away with the site
12 classification system and encourage the use of TACO
13 in tank cleanups; is that correct?

14 MR. KING: I think that's a fair
15 statement, yes.

16 MR. RIESER: How do you see the
17 transition between -- for sites that are already
18 in the 732 program, how do you see them being
19 transitioned to 734, continue to be handled under
20 734?

21 MR. KING: You mean with respect to
22 732 or just in general?

23 MR. RIESER: In general.

24 The sites that are in 732 that

1 have not yet received NFR letters, do they stay in
2 732, or how are those handled?

3 MR. CLAY: Yes, they would stay in 732
4 or you can opt into 734. They're similar provisions
5 as -- when 732 is passed allowing 731 sites to opt
6 into 732.

7 The other thing is if you're
8 classifying under 312 and you haven't classified --
9 in 732, if you're classifying under 312 and you
10 haven't done the classification, it automatically
11 kicks you into the classification under the Stage 1,
12 Stage 2, and Stage 3 or site investigation in 734.
13 So if you haven't done that work, then you would
14 proceed under 734.

15 MR. RIESER: So that only -- and I was
16 going to ask about that when we got there --

17 MR. CLAY: Go ahead.

18 MR. RIESER: -- going Subpart by
19 Subpart, but -- so if you -- what is the cutoff for
20 having not done that as far as submitted an
21 objectives report or what will the Agency be looking
22 at in making that decision about those people using
23 pathway exclusions, how will -- what will those
24 sites that haven't received NFR letters, what will

1 have to go into 734?

2 MR. CLAY: It's just if you haven't
3 done any site investigation or site classification
4 work.

5 MR. RIESER: Okay.

6 MR. CLAY: Otherwise -- I mean, we'll
7 have to look at it. I mean, if someone wants to opt
8 into 734 and they've done some site investigation
9 work, we have to look at where that fits in, whether
10 it's Stage 2 or Stage 3, and we'd make that call,
11 you know, on a site specific basis.

12 MR. RIESER: Just as a suggestion,
13 it would be probably useful to have something
14 formalized in terms of those categories of sites and
15 how they would be transitioned into -- how they
16 would be handled through the two regulations.

17 MR. CLAY: And we did look at that,
18 it's just that there's so many variables I'm not
19 sure that we could make that real, you know, clear,
20 how that would transition, that's why we proposed to
21 do that on a site specific basis.

22 For example, if someone is almost
23 completely defining the extent on-site, you know,
24 but there's one area they haven't defined, then

1 maybe that doesn't warrant a full Stage 2 of site
2 investigation. Maybe they'd do a couple more
3 borings and then go to Stage 3 in the new rules.

4 MR. RIESER: Which brings up a far
5 more general question, which is, is it really
6 necessary to have two different rules for both of
7 these programs? Is it really necessary to have a
8 732 and 734, or could the current 732 rule simply be
9 amended to account for both situations?

10 MR. CLAY: Well, I think for clarity
11 purposes we set it up with 732 and 734 because I
12 think if someone had a release that fell under 732,
13 you know, it's my understanding they would have the
14 right to proceed under the rules and regulations
15 that were in effect at that time and instead of
16 trying to combine them both into one set of
17 regulations, we thought it would be more confusing.
18 So it really keys off when the incident was as to
19 what set of regulations you proceed with or you can
20 opt into the subsequent regulation.

21 MR. RIESER: But it's true, isn't it,
22 that the only things that would apply to 732 -- only
23 sites that would come into 732 are sites that have
24 releases prior to the effective date of legislation,

1 which is June something of 2002, July something
2 2002, right?

3 MR. CLAY: That's correct.

4 MR. RIESER: And the real difference
5 between the two regulations or proposals is the
6 ability to use the site classification section,
7 which is in Subpart C, or are there other
8 differences?

9 MR. CLAY: It's the -- you don't have
10 the high priority and low priority. The cap on the
11 amount per incident or per occurrence you can be
12 reimbursed for the fund as a million and a half
13 instead of a million. I mean, there's other small
14 changes, I would say, but the main thing is the site
15 classification versus the site investigation.

16 MR. RIESER: Turning to one specific
17 language, in the definitions there's a definition
18 for financial interest, what's the purpose of the
19 definition?

20 MR. CLAY: The purpose is it relates
21 to the ineligible costs and -- someone who is a --
22 who owns the consulting firm and maybe owns the
23 subcontracting firm, we've had experience where they
24 have requested handling charges even though they own

1 both companies. They request handling charges for
2 the subcontractor. And what we put in there as an
3 ineligible item is if you own both companies,
4 they're really not a subcontractor to you so you're
5 not entitled to any charges.

6 MR. RIESER: In the second line of
7 that definition it talks about different
8 relationships such as director, advisor, officer,
9 employee or other active participants. Is this a
10 way of describing the ownership interest or what's
11 the purpose of those terms?

12 MR. CLAY: It's actually in addition
13 to the ownership. It's one -- somebody who's
14 an active participant in the company in addition to
15 the ownership.

16 MR. RIESER: And by adviser are you
17 also including consultants or attorneys as people
18 who would have a financial interest in the companies
19 they're representing?

20 MR. ROMINGER: Could you repeat the
21 question?

22 MR. RIESER: Would you read it back,
23 Ms. Reporter?

24

1 (Whereupon, the record
2 was read as requested.)

3 MR. ROMINGER: So if the attorney or
4 the consultant themselves had a financial interest
5 you're saying?

6 MR. RIESER: Well, the question is, if
7 you're identifying an adviser to a company as a
8 person who has a financial interest in that company,
9 my question is, well, what type of adviser do you
10 have in mind and are you going beyond the typical
11 definition of having a financial interest either,
12 i.e., having an equity of ownership interest and
13 going towards a professional relationship, you know,
14 their lawyer or their consultant who wouldn't
15 normally be considered as having a financial
16 interest?

17 MR. ROMINGER: Yeah, I don't think we
18 consider a professional relationship if you have
19 a -- if you're hiring somebody as a consultant or an
20 attorney --

21 HEARING OFFICER TIPSORD: Excuse me,
22 Mr. Rominger?

23 MR. ROMINGER: Yes.

24 HEARING OFFICER TIPSORD: We need to

1 have you sworn in.

2 MR. ROMINGER: Should we have Doug
3 answer that or --

4 HEARING OFFICER TIPSORD: Let's just
5 go ahead and have you sworn in since you already
6 started to answer it.

7 MR. ROMINGER: Okay. Fine.

8 (Witness sworn.)

9 HEARING OFFICER TIPSORD: Sorry to
10 interrupt.

11 MR. ROMINGER: Yeah, I don't think
12 that would be seen as a different relationship than
13 a financial interest.

14 MR. RIESER: Thank you.

15 MR. CLAY: And, Dave, we'll look at
16 that further too.

17 MR. RIESER: That would be my
18 suggestion. Thanks very much.

19 MS. HESSE: My name is Carolyn Hesse.
20 I'm representing the CW3M and I'm with the law firm
21 of Barnes & Thornburg. I have a couple of general
22 questions.

23 If the testimony Mr. Clay
24 referenced some rates were upheld in Board

1 decisions, could you provide citations for those
2 Board decisions? I don't expect you to necessarily
3 cite them.

4 MR. CLAY: Sure. Yes, we can provide
5 those citations.

6 MS. HESSE: Also, in the background
7 information, you mentioned meeting the number of
8 different associations and entities; could you
9 elaborate on with whom you met?

10 MR. CLAY: I think it's in the
11 testimony, but we met with the Consulting Engineers
12 Council of Illinois.

13 MS. HESSE: And, specifically, who did
14 you meet with there?

15 MR. CLAY: We met with -- Dave Kennedy
16 was there. He is the executive director. There
17 were -- probably missed some of them. But Joe
18 Truesdale was there from CSD Environmental, Cindy
19 Davers from CSD Environmental, Dan Goodwin from
20 Secor, Mike Rapps from Rapps Engineering. It was a
21 group that CECI had put together. And, you know,
22 they didn't comment on the rates, it was more, you
23 know, talking about what kind of activities went
24 into the preparation of different plans and

1 reports.

2 MS. HESSE: Now some detailed
3 questions.

4 Were the rates generally developed
5 in-house at the IEPA then?

6 MR. CLAY: Yes. They were developed
7 in-house, but they were developed on, as I said in
8 testimony, 15 years of experience and, you know,
9 what we had seen submitted by consultants throughout
10 the state.

11 MS. HESSE: I'll defer further
12 questions on that later.

13 HEARING OFFICER TIPSORD: If I may,
14 also, I'd just like to supplement and point out,
15 Mr. Clay, actually, on Pages 2 and 3 of the
16 statement of reasons, you list the organizations
17 that you met with.

18 MR. CLAY: Thank you.

19 HEARING OFFICER TIPSORD: Additional
20 questions?

21 MR. TRUESDALE: My name is Joe
22 Truesdale. I'm a professional engineer with CSD
23 Environmental Services.

24 And going back to Dave Rieser's

1 question about financial interest and tying that to
2 the definition of handling charges. As described in
3 732, the definition for handling charges specifies
4 administrative, insurance, and interest costs of a
5 reasonable profit or procurement, oversight and
6 payment of subcontractors and field purchases in a
7 free market economy where one company owns a
8 completely independent contracting company or other
9 entity, they still incur these same types of costs
10 for maintaining and running that alternate company
11 even though there may be financial interest between
12 one or more of the owners from the parent company
13 itself, there's still not a differentiation in the
14 items included as described in handling charges when
15 that situation actually occurs, and I just wanted to
16 point that out and make that known for
17 consideration.

18 HEARING OFFICER TIPSORD: Mr.
19 Truesdale, could I ask you to be sworn in, please?

20 (Witness sworn.)

21 HEARING OFFICER TIPSORD: Could we go
22 off the record for just a second?

23 (Whereupon, a discussion was had
24 off the record.)

1 HEARING OFFICER TIPSORD: Are there
2 any other questions?

3 MR. COOK: My name is Jay Cook. I'm
4 with United Science Industries. I have a question
5 with regard to the list of activities that were
6 provided by the Consulting Engineering Council.

7 Can you elaborate on that list of
8 activities; was it a list, like a work breakdown
9 structure type of list, a list of work activities?

10 MR. CLAY: It was a list of activities
11 that, for example, go into the 45-day report, 24-day
12 report, site investigation plan, site investigation
13 completion report, and, you know, the Agency looked
14 at that. It also looked at, again, the experience
15 we had had and -- it's a list, but we didn't put
16 that list per se or propose that in regulations just
17 because it wasn't meant to be an all inclusive list.
18 I mean, I think it was everything they could come --
19 the consulting engineers group could come up with,
20 but if there's something else that maybe was
21 omitted, we didn't want that billed separately.
22 It's everything that goes into these different
23 activities was meant to be included in the rates
24 that we were proposing.

1 MR. COOK: And so the rates that you
2 proposed are inclusive of all activities or intended
3 to be inclusive of all activities that would go into
4 the development of a line item associated with a
5 certain rate of your proposed regulation?

6 MR. CLAY: Correct. Correct.

7 MR. COOK: Did the Agency, prior to
8 receiving this list from the Consulting Engineers
9 Council, have an internal list of activities that it
10 had generated based upon its 15 years of experience
11 of administering the program?

12 MR. CLAY: No, we did not have a
13 specific list of activities.

14 MR. COOK: Did the Agency have a work
15 breakdown structure on its historical reimbursement
16 forms that would allow you internally to evaluate
17 cost as they related to this list of activities that
18 were provided to you by the Consulting Engineers
19 Council?

20 MR. CLAY: Would you explain that
21 further?

22 MR. COOK: The list of activities
23 provided by the Consulting Engineers Council, I
24 assume it was a discreet list of specific working

1 activities to be all inclusive of those activities,
2 in the proposed rates, there would need to be an
3 apples to apples comparison between those activities
4 and historical cost included in the Agency's
5 database that had accumulated over the last 15
6 years; I guess my question is, you've mentioned that
7 the Agency did not or does not have an internal
8 database of those activities, so how was it that the
9 rates that are proposed in these regulations were
10 determined as they correlate to this list of
11 activities that was provided by the Consulting
12 Engineers Council?

13 MR. CLAY: Well, I mean, the list of
14 activities from the Consulting Engineers Council was
15 much more detailed. And as far as, you know,
16 preparation of maps, I mean, much more detailed than
17 what we normally see from consultants in their
18 budgets or reimbursement packages.

19 For example, some consultants will
20 just simply say, preparation of a cap and have a
21 number of hours and like a dollar figure. So
22 preparation of cap, I assume that that meant all
23 activities associated with the preparation of the
24 cap, consultant work included in that.

1 MR. COOK: That was your assumption?

2 MR. CLAY: Yes. I mean, because
3 that's all they bill for, and I assume they're
4 billing for their cost.

5 MR. COOK: So that there's an
6 assumption in these proposed rates that the work
7 breakdown structure provided by the Consulting
8 Engineers Council is somewhere included in certain
9 line items under historical reimbursement for it,
10 but I want to emphasize that this is an assumption;
11 is that correct; or you want to emphasize it's an
12 assumption?

13 MR. CLAY: Well, I think it's accurate
14 that 15 years I don't think consultants have not
15 been billing for costs that they've incurred in
16 preparation of those claims and reports, so I think
17 that's a pretty good assumption.

18 MR. COOK: However, there's no list
19 and consultants were not asked to charge according
20 to a specific work breakdown structure historically?

21 MR. CLAY: That's correct.

22 MR. COOK: The other question I have
23 relates to financial interest, and the question
24 relates to the public companies.

1 Why are public companies excluded
2 from that provision and privately held companies are
3 not?

4 MR. CLAY: We looked at this
5 definition from other rules and regulations, and the
6 other thing is we wanted to get away from someone
7 holding stock in a company, you know, maybe a very
8 small percentage being excluded as entitlement to
9 handling charges. We'll look at that definition a
10 little bit further.

11 MR. COOK: Thank you.

12 HEARING OFFICER TIPSORD: Thank you.

13 Anything else?

14 MR. SINK: Harry Sink with United
15 Science Industries.

16 Several of you made statements
17 concerning the streamlining of the approval
18 processes, efficiencies to be maintained in the
19 approval of reimbursement packages.

20 Many of the regulations, the
21 proposed changes, have to do with the early action
22 and the free product removal, but there was very
23 little said in there concerning the corrective
24 action part itself from a technical side of how to

1 streamline that particular process, and yet there
2 are proposed caps put on consulting services times
3 for the preparation of those, and much of that
4 time -- how do you correlate those two things?

5 Because I see a big problem in the
6 streamlining of the corrective action part as well
7 of the owner/operator knowing, you know, trying to
8 provide the report to the Agency and a rejection and
9 this cycle that goes on, rejection, new report,
10 rejection, and trying to get that report to a point
11 where the owner/operator, the consultant, and the
12 Agency are working together, and that's just a big
13 concern of mine and I don't really see that
14 addressed in these attempts to streamline.

15 Did you look at that particular
16 issue with the corrective action and how, from a
17 technical side, that we can streamline that process?

18 MR. CLAY: Well, one, I think the site
19 investigation portion will better define in a lot of
20 cases the extent of contamination so that when
21 you're developing your corrective action plan, you
22 know, you'll have more information; two, it's break
23 the corrective action into two parts. You've got
24 the conventional dig and haul and then you've got

1 alternative technology. And the conventional dig
2 and haul, you know, I think the streamlining comes
3 in the, you know, what you're going to get paid up
4 front, you know, per cubic yard or, you know, for
5 oversight for the corrective action plan, you know
6 that up front and as we, you know, said in our
7 testimony, it seems like the majority of the denials
8 for a corrective action plan for a dig and a haul
9 is, you know, budget related, you know, so that's
10 where the streamlining comes in. Hopefully, you
11 know, in one shot you'll -- you know, in a dig and a
12 haul, it'll be approved because you know exactly
13 what you'll get paid, you'll be in the rules, and,
14 you know, it's pretty basic as far as the dig and
15 haul.

16 Now, the alternative technology is
17 a different story. In alternative technology, the
18 corrective action plan, fieldwork, all of that is
19 time and materials, and I think you're right, there
20 is a lot of going back and forth as far as giving
21 something that the Agency is comfortable approving,
22 and part of that is I think we need to provide
23 guidance consultants as far as what we're looking
24 for. We're working on that. But I think

1 consultants also need to do a better job of
2 explaining to us the design that is supposed to be
3 done by consultants rather than -- I mean, we've
4 been told in the past, well, that's the
5 manufacturer's edge. Well, that's not doing design
6 work. So we expect the consultants to do a better
7 job in your submittals to us, as well. We need
8 to write that guidance, but then I think the
9 consultants need to do a better job of telling us
10 how they design this alternative technology.

11 MR. SINK: Did you take a look at -- I
12 know we looked at a lot of -- looking at the number
13 of appeals that go before the Pollution Control
14 Board and that a large number of them, the testimony
15 has been, are due to the reimbursement side of
16 things. Did you look at anything about the number
17 of corrective action plans that, I don't know, some
18 basis, I think maybe a yearly basis, that were
19 rejected and had to be re-submitted a number of
20 times and maybe even compared to the size of the
21 remediation plan, you know, that, I think, TACO type
22 caps compared to the convention dig and haul
23 compared to the alternative technology, you know --
24 and I ask that question basically --

1 MR. ROMINGER: For what purpose? What
2 was the purpose for looking at those?

3 MR. SINK: The purpose for looking at
4 those, I guess, is to clarify that there may be a
5 need to do a better job, all of us, to streamline
6 that process. I'm just saying I think maybe we left
7 out -- if you analyze the data, we have certain
8 things that we're trying to do to improve, but my
9 fear is that we've left out a real important area
10 that we made from the technical side that all of us
11 maybe need to work on doing that. And I don't know
12 if there was any evaluation done, I thought an
13 evaluation of those things might help to point that
14 out.

15 MR. CLAY: Well, I'm not sure -- we
16 didn't really do an evaluation as far as the numbers
17 that way, but, I mean, I think I said in the
18 testimony that not only is it the majority of the
19 things that are appealed to the Board, but the
20 majority of denials we make, so I think what you're
21 getting to is that the majority of the denials are
22 based on budget-related issues as opposed to
23 technical.

24 Now, alternative technology I

1 would say may be the exception. I mean, there's
2 a -- a lot of those denials are technical based as
3 well as budget related.

4 HEARING OFFICER TIPSORD: Mr.
5 Truesdale, I saw your hand first.

6 MR. TRUESDALE: Going back to what
7 Doug just said about the cap denials being primarily
8 related to budget or reimbursement issues rather
9 than technical issues is that despite the
10 requirement and inclusion of professional engineer
11 certification with those submittals certifying that
12 those costs are in fact reasonable and necessary
13 parts of corrective action still subjected to review
14 and potential Board appeal and Agency denial.

15 MR. CLAY: I'm sorry. What was the
16 question again?

17 MR. TRUESDALE: You said that the
18 number of -- the vast majority of the reports that
19 are appealed or denied are appealed or denied based
20 on budget purposes rather than technical purposes,
21 and I asked if that is irrespective of the fact that
22 those submittals include professional engineer
23 certifications certifying that in fact those costs
24 are reasonable and necessary parts of corrective

1 action?

2 MR. CLAY: Yes.

3 HEARING OFFICER TIPSORD: Anything
4 further?

5 MR. MAGAN: My name is Tom Magan. I'm
6 a senior project manager and licensed Illinois
7 geologist with Marlin Environmental. I have one
8 simple question.

9 How and what authority does the
10 Illinois EPA have to begin implementation of
11 proposed rules that have not been, in fact, signed
12 into law. For instance, the site investigation work
13 plan and budgets, you refuse them, you cut their
14 budgets based on what? I just don't understand how
15 you can have the authority to do this when we are
16 here today going over these proposed rules and what
17 the pricing should be. I find that to be somewhat
18 ludicrous and an abuse of the Agency's power that
19 you so readily throw on us consultants for having
20 abused the system which you have omitted from your
21 document here that all these sites have been closed
22 all by your own power. You have done this all in
23 isolation? I think not.

24 Consultants need and want to have

1 a voice here. I think we deserve an answer. Thank
2 you.

3 HEARING OFFICER TIPSORD: I'm going to
4 have to ask that you be sworn in as well. I think
5 you were offering testimony there.

6 (Witness sworn.)

7 MR. CLAY: Regarding the
8 implementation, you know, I think there's a
9 distinction between implementing the rules and using
10 the information that you gathered in preparation for
11 those rules until their adopted and -- so we have
12 not implemented the rules. And that doesn't mean
13 that if the Agency -- which it is the Agency's
14 responsibility to determine what is reasonable. If
15 we determine that \$57 for excavation and disposal is
16 appropriate and \$20 for backfill transportation is
17 appropriate, for us to go out and be approving more
18 or less now when we have rules before the Board
19 saying this is a reasonable amount I think would be
20 very irresponsible of the Agency. So, I mean, to
21 ignore what we've determined to be reasonable in the
22 interim I think would be very irresponsible. So
23 yes, we are using those numbers that we've learned.

24 Now, are we implementing the

1 rules, are we requiring Stage 1, Stage 2, and Stage
2 3? No. Are, you know, we requiring these other
3 things that are part of the rules? No. But I
4 would say the numbers that we're approving for
5 reimbursement and budgets and reimbursement packages
6 are consistent with the proposed rules.

7 HEARING OFFICER TIPSORD: If I may, I
8 would just like to clarify, Mr. Clay.

9 You're talking about decisions
10 currently being made in contested cases with
11 underground storage tank reimbursement proceedings;
12 is that correct?

13 MR. CLAY: We're talking about
14 decisions being made on a daily basis, not
15 necessarily contested, but on a daily basis
16 regarding budgets and reimbursements.

17 HEARING OFFICER TIPSORD: And those
18 are subject to appeal to the Board where the
19 Agency's position can be challenged before the
20 Board; is that correct?

21 MR. CLAY: That is correct.

22 HEARING OFFICER TIPSORD: I would just
23 like to say that because this is a rulemaking
24 proceeding and because there are many of those cases

1 correct.

2 MR. COOK: So the rates that have
3 historically been reimbursed in the past 15 years
4 would not be considered to be "giveaway" rates and
5 would be considered to be reasonable?

6 MR. KING: Let me make sure I -- the
7 context of the statements I was making, I was not
8 commenting on any single specific item that was
9 reimbursed or not reimbursed. I was looking at the
10 program as a whole and looking at what the Illinois
11 EPA reimbursement program, how that's been
12 understood and perceived within the state and within
13 other states as far as people that I'm in contact
14 with. I'm not trying to comment on any specific
15 case, but just the program as a whole.

16 MR. COOK: More specifically then,
17 the rates and historical charges that have been
18 reimbursed by the program since its inception up
19 to the current point in time, are those rates
20 considered to be reasonable by the Agency?

21 MR. KING: Again, I don't know, it --
22 to me, you're trying to -- it looks like you're
23 trying to ask about a specific set of numbers or a
24 specific thing.

1 MR. COOK: No. The body of knowledge
2 that you've accumulated is it in fact reasonable
3 that the reimbursements that have been made, the
4 over half a billion dollars worth of reimbursements
5 that have been made, were those rates associated
6 with those reimbursements reasonable or not?

7 MR. KING: I think it would be --
8 anytime you take an action that we've reimbursed
9 somebody, you know, there's always a decision to
10 make as to whether something is reasonable or
11 unreasonable. I'm not going to go back and say that
12 things that we've done in the past were wrong, but
13 now if I'm looking at the data set and I'm looking
14 at the range of things that we've reimbursed, we
15 felt that we could narrow the dimensions on that so
16 that those costs that we may have reimbursed in the
17 past that were outliers that now as we look at them
18 and say, well, maybe that was not the best decision
19 to have made there. So we've looked to narrow what
20 was the scope of what was reimbursed. Our job is to
21 reimburse an owner's reasonable costs. Our job is
22 not to reimburse every consultant's costs on these
23 projects. So we're going back and we're trying to
24 figure out what makes the most sense as far as

1 putting something in a Board rule. As I said in my
2 opening statement, you know, it's going to be the
3 Board's responsibility to determine whether what
4 we've proposed is reasonable or not, and they
5 certainly have that choice to do so based on the
6 evidence as presented.

7 MR. COOK: The reason I ask is that
8 the testimony about over have a billion dollars
9 worth of payments from the fund, and I think that
10 most of us in this room are taxpayers, so I have to
11 ask a question with regard to that side and the
12 other side where many of us are also consultants,
13 the real question is with this body of knowledge,
14 historical body of knowledge as to the levels of
15 reimbursement, and there's over -- there's a wealth
16 of information, as we can see, all in a time and
17 materials basis, is it reasonable for us to assume
18 that what the Agency has historically reimbursed
19 were reasonable costs?

20 MR. KING: I'm not going to -- I
21 really feel that you're trying to put me in a
22 position of saying specific items were reasonable or
23 not, and I'm not going to -- all I was trying to do
24 is say in terms of our program that the program is

1 not going to give away -- we've done a -- the costs
2 that we've been generally reimbursing, to look at
3 the whole speed of things as a --

4 MR. COOK: Let me restate my question
5 in a slightly different manner.

6 If those historical costs are not
7 reasonable, then why so?

8 MR. KING: If those historical
9 costs --

10 MR. COOK: If historical costs were
11 found to not be reasonable, then why would that be
12 the case? Why would they have been reimbursed?

13 MR. KING: Well, you know, part of the
14 reason I -- maybe I'm dancing around it because if
15 you're trying to get me to say that a cost, for
16 instance, that USI has billed us is reasonable now,
17 if you want me to say that, then that obligates us
18 to go back probably and seek reimbursement from an
19 owner that we reimbursed. And I don't want to be in
20 a position here of saying that we did something that
21 was now unreasonable and now we're going to have to
22 go back against somebody, I mean, if that's what you
23 expect me to say, I'm not going to say that.

24 MR. COOK: Without -- I don't mind

1 testifying, but the -- I don't understand how all of
2 this information historically could be applied,
3 reimbursed, and then things change in approximately
4 April of 2002? I don't see how that can take
5 effect.

6 The other question that I have is
7 does the Agency have any --

8 HEARING OFFICER TIPSORD: Just a
9 second. I think -- are you guys -- he's got another
10 question.

11 MR. KING: Go ahead. Just let him ask
12 his --

13 HEARING OFFICER TIPSORD: Okay. Go
14 ahead.

15 MR. COOK: I have a question as to
16 streamlining the process. Can the Agency provide
17 any statistics as to the number of site
18 classification and work plans and budgets or site
19 investigation plans that are approved on first
20 review by the Agency historically?

21 MR. CLAY: Do we have a number? No.

22 MR. COOK: Do you have a number of
23 site classification or investigation work plans and
24 budgets that are approved on second review?

1 MR. CLAY: I don't have a number for
2 any of those, no.

3 MR. COOK: How about as it relates to
4 corrective action plans in the associated budgets?

5 MR. CLAY: I don't have a number for
6 any of those either.

7 MR. COOK: Do you have any statistics
8 that would show that the larger -- or do you have
9 any statistics that would indicate that the larger
10 site in terms of levels of contamination and size of
11 the fluid contamination that it may require or
12 submittals or report submittals than the average?

13 MR. CLAY: I don't have -- we don't
14 have that.

15 MR. COOK: You don't have any
16 information?

17 MR. CLAY: No, we don't track anything
18 based on the size of the site or the size of the
19 contamination. I'm not sure -- you know, size of
20 the site really has no bearing. You have to use the
21 size of the contamination -- even size isn't
22 necessarily the governing factor. I mean, it could
23 be a very small area of contamination, but if you
24 got into a sewer, it could be a very big problem.

1 MR. COOK: So the scope of the work
2 related to that site, even though it may be a small
3 site, could be more excessive?

4 MR. CLAY: Could be.

5 HEARING OFFICER TIPSORD: Is there
6 someone else on this side of the room?

7 MR. HOLVER: My name is Bob Holver,
8 a senior project manager with United Science
9 Industries, and I'd like to be sworn in as well.

10 HEARING OFFICER TIPSORD: If you have
11 a question that you're going to ask and you are
12 going to give testimony as part of that, then we'll
13 do that. But I don't want to get into giving
14 testimony today per se, okay?

15 MR. HOLVER: Okay.

16 HEARING OFFICER TIPSORD: Okay. All
17 right. We'll go ahead and swear you in and then
18 allow you to ask your question.

19 MR. HOLVER: Okay.

20 (Witness sworn.)

21 MR. HOLVER: Let me add before I
22 begin, I look about this room, I've probably spent a
23 lot more time than a lot of people have, about 30
24 years, as a professional. Six years of public

1 service, three years with the USEPA, and what I see
2 coming about here is an abuse of the authority of a
3 governmental agency trying to commoditize
4 professional services. That's not the function of
5 the Illinois EPA.

6 My question is particularly to
7 Doug Clay. In particular, these proposed costs were
8 developed with input from the consulting industry
9 and other trade organizations and 15 years of Agency
10 experience are generally consistent with the rates
11 we currently approve for reimbursement, you're
12 talking about the proposed rates and the current
13 rates? Are they one in the same?

14 MR. CLAY: As I said, they should be
15 consistent. For example --

16 MR. HOLVER: The proposed rates and
17 the current rates, correct?

18 MR. CLAY: Correct.

19 MR. HOLVER: They're one in the same
20 as to what --

21 MR. CLAY: I said they should be
22 consistent.

23 MR. HOLVER: So you're implying what
24 is proposed to the regulated community -- see, I

1 know how the system works. You are using proposed
2 rates to the regulated community, have you done this
3 in the year 2003?

4 MR. CLAY: Done what?

5 MR. HOLVER: Were you using the
6 proposed rates before they were even published in
7 your decisions in 2003?

8 MR. CLAY: We are using the rates that
9 the Agency determined to be reasonable. They are
10 consistent with --

11 MR. HOLVER: All right. Where's your
12 statutory authority for using reasonableness, is it
13 a statutory or --

14 HEARING OFFICER TIPSORD: Excuse me.
15 Excuse me. I apologize for interrupting, but we are
16 venturing off into potential contested cases and
17 I --

18 MR. HOLVER: No, we're not. We're
19 trying to establish right here exactly what the
20 rulemaking process -- this is all -- we're talking
21 about the rulemaking process.

22 HEARING OFFICER TIPSORD: All right.
23 I'll give you a little bit more leeway, but we do
24 need to be very, very careful because the

1 consequence of --

2 MR. HOLVER: And I want to make the
3 Board very clear about the rulemaking process.

4 HEARING OFFICER TIPSORD: I understand
5 that, but the consequence of potentially going into
6 any specifics on any currently kicked, contested
7 cases is that you would disqualify the sitting Board
8 members, so we need to be very, very careful and
9 let's please keep this narrow.

10 MR. HOLVER: And each case should
11 stand on its own, correct?

12 HEARING OFFICER TIPSORD: I'm sorry.

13 MR. HOLVER: If there's an attorney
14 that would be able to help me here, I'd appreciate
15 it.

16 So your current rates are your
17 proposed rates, correct? And where -- oh, my last
18 question was about the reasonableness.

19 Where is the authority? Is it in
20 the incumbent act or is it in the statutory
21 authority about reasonableness, where is it?

22 MR. CLAY: Well, I think the act and
23 the statute are the same thing. But the -- it is
24 statutory and it is regulatory that the Agency is --

1 it's the Agency's responsibility to determine
2 reasonableness on costs submitted for reimbursement.

3 MR. HOLVER: Let me go to another
4 question, if I may.

5 You talked about the lump sums for
6 specific tasks?

7 MR. CLAY: Yes.

8 MR. HOLVER: And, in particular, I
9 believe the proposed rules calls for a lump sum for
10 corrective action plans when it comes to a dig and
11 haul.

12 You are a civil engineer, correct?

13 MR. CLAY: Correct.

14 MR. HOLVER: Much of a proposed scope
15 of work has to do with whether it's a small scope of
16 work or a large scope of work, correct?

17 In other words, if you're building
18 a bridge over a creek -- let me make an analogy. If
19 you're building a bridge over a creek versus over
20 the Mississippi River, as a professional engineer,
21 wouldn't it be reasonable that you would be paid on
22 a time and material basis rather than a lump sum?

23 MR. CLAY: I don't think your analogy
24 is applicable here.

1 MR. HOLVER: Let me make the analogy a
2 little bit more clear. If you have a situation with
3 one or two tanks, leaking tanks, with a small amount
4 of contaminations versus a site that has 15 tanks,
5 an off-site contamination, as you as an engineer,
6 would it not be reasonable, the fact that you're
7 putting a lot more time into trying to develop even
8 conventional technology, you would be putting a lot
9 more time into that larger scope of work and you
10 would be expected to be paid the same as the small
11 one?

12 MR. CLAY: There is some variability
13 built into our corrective action rates. Now, I
14 would say, yes, to define the extent, it would cost
15 more. I think maybe the tank removals would cost
16 more. But once you've got that determined, if
17 you're doing a dig and a haul, you know, I think
18 you're drawing -- you're drawing a bigger
19 excavation. I'm not sure that it would take that
20 much more. Once you've got the extent of
21 contamination defined, you've got the tanks out of
22 the ground and now you're just trying to determine,
23 you know, what area, it's a, you know, calculation
24 whether it's, you know, ten yards or a thousand

1 yards. I'm not sure that, you know -- you seem to
2 be making an analogy if it's ten yards it's just not
3 nearly as complicated as a thousand yards. I'm not
4 sure that's the situation. I think that --

5 MR. HOLVER: I'm trying to make a
6 point.

7 MR. CLAY: -- the effort of work --

8 MR. HOLVER: Fifty-five hundred some
9 dollars to produce a corrective action plan for a
10 very small site with a small dig is not equivalent
11 to a very large site.

12 MR. CLAY: I think it may or may not
13 be.

14 MR. HOLVER: I'm going to have you
15 consider making changes to that, that it's
16 unreasonable to think that somebody is going to be
17 paid the same amount, whether it be a small site or
18 a very large, complicated site with off-site issues.

19 HEARING OFFICER TIPSORD: Okay.

20 MR. HOLVER: I'd like to be able to
21 reserve the right to ask more questions.

22 HEARING OFFICER TIPSORD: Absolutely.
23 I do want to remind everyone we are just on
24 Subpart A though, and I do hope that -- we have a

1 couple of questions on Subpart A, so although I
2 appreciate the questions, let's stick to Subpart A.
3 Specific analogies and like that we can get to as we
4 get in further.

5 Actually, Mr. Truesdale has had
6 his hand up for a couple of minutes.

7 MR. TRUESDALE: Well, I can reserve.
8 It's actually just a general question that is
9 related to another item.

10 HEARING OFFICER TIPSORD: Mr. Rieser
11 first then.

12 MR. RIESER: I was not asking
13 questions on the lump sum issue, just in compliance
14 with the ruling.

15 The one thing you said in terms of
16 how you want to limit those questions, I think there
17 are legitimate questions to be asked in terms of the
18 Agency's process to deriving the values that are
19 presented in this proposal are legitimate questions
20 to be asked in terms of when they started doing this
21 and whether they started doing this, in other words,
22 charging lump sums. I'm not sure it's a great
23 question to ask about authority in this context. I
24 think a legal point to be made for the Board to

1 consider is the fact that all of those are
2 legitimate questions that are going to have to be
3 asked in the context of this proceeding to determine
4 the reasonability of the idea of having maximum
5 costs, the reasonability of costs identified,
6 whether it's a good idea or bad idea, and I think
7 limiting people from getting into that area -- and
8 they're not talking about specific cases, they're
9 talking about things that the Agency has done,
10 generally, the implementation of this program ought
11 to be allowed.

12 HEARING OFFICER TIPSORD: And I think
13 you're correct, and we will. I just do want to be
14 sure that everyone is aware that we know there are
15 contested cases that are currently before the Board
16 and I just don't want to take any chances, and
17 that's why I wanted to emphasize that we do need to
18 be very careful that they stay general questions and
19 also that, you know, they not get too specific.

20 But I agree with you, there are
21 legitimate questions to be asked about how this
22 information was developed and how they're using that
23 information, and as we get into the rule, we'll do
24 that. Thank you, Mr. Rieser.

1 BOARD MEMBER JOHNSON: I don't know if
2 this is Subpart A or -- it seems to me everything's
3 got a little Subpart H flavor to it, but I just want
4 to clarify one thing you said, Mr. Clay.

5 You said that the applicants are going
6 to know what they're paid up front. But, in fact,
7 these are still maximum payment amounts, aren't
8 they, and isn't there a process -- we all know human
9 nature, and I suspect that the maximum payment
10 amount is going to be more likely than not the
11 amount applied for, but if, in fact, the actual
12 costs are less than the scheduled maximum payment
13 amount, that's what you'll end up reimbursing,
14 correct?

15 MR. CLAY: Yes, that's correct. I
16 should have stated that those were the maximum
17 payment amount, that's correct. So then they get
18 that approved in a budget, but then when they come
19 in to be reimbursed and they have documentation from
20 invoices and receipts that only support, you know,
21 90 percent of that, for example, they would get paid
22 for that 90 percent, that's correct.

23 BOARD MEMBER JOHNSON: Thank you.

24 HEARING OFFICER TIPSORD: Question?

1 MR. KELLY: My name is Joseph Kelly
2 with United Science Industries. I'm a licensed
3 professional engineer in Illinois.

4 As you've stated, and we'll try to
5 have specific questions later on with the statutes,
6 but since Subpart A is kind of general in nature, I
7 just have two questions regarding some of the
8 prefiled testimony as kind of an overview or in
9 general.

10 It mentions that the Agency has
11 looked at 12,000 some odd budgets and 18 hundred and
12 some odd thousand applications for payment and 15
13 years of Agency experience, what specifically are we
14 talking about by what experience? Does this include
15 professional experience, is this experience as
16 consultants, contractors and drillers, or is this in
17 reviewing those budgets, what specifically are we
18 talking about?

19 MR. CLAY: I was primarily referring
20 to Agency experience in reviewing budgets and
21 reimbursement processes based on receipts and
22 invoices from consultants, drilling contractors,
23 excavators, that type of thing.

24 MR. KELLY: The other question I have,

1 since it's general nature, is that part of the
2 testimony with the Agency wanting to propose these
3 amendments to lower remediations costs, and since
4 there has been tossed around this idea of has it
5 been implemented or not, I won't go there, but isn't
6 that sort of a self-fulfilling prophecy because I
7 know even though these reimbursement appeals before
8 the Board have been budgetary in nature, I think
9 what my colleague here was trying to get at is that
10 most consultants and contractors are dealing with
11 the technical issues and in so trying to perform
12 remediation or site investigation or whatever the
13 case may be, they're having to continue to do that
14 work and then come back later and try to on behalf
15 of the owner/operator receive monies for that, but
16 they were complying in technical in nature, so I
17 think that's why most of the appeals for the Board
18 are not technical in nature because the consultant
19 and the contractors are doing their job in complying
20 in the technical in nature, but they're trying to
21 come back and trying to say, look, you know, this
22 took additional, this took additional things that
23 maybe not have been considered and so remediating
24 these costs at this point may be sort of a

1 self-fulfilling prophecy because we're going to get
2 into the questions about how these were all derived,
3 but I think that needs to be taken into
4 consideration.

5 HEARING OFFICER TIPSORD: I think I'm
6 going to ask you to be sworn in as well.

7 (Witness sworn.)

8 HEARING OFFICER TIPSORD: Any other
9 questions?

10 MR. CLAY: Can I make just a statement
11 about that, please?

12 HEARING OFFICER TIPSORD: Sure.

13 MR. CLAY: Mr. Kelly, that's true in
14 that I think that the cost savings are in the
15 resubmittals and re-resubmittals of the budget part
16 of it, so it's in the report and budget preparation.
17 And I'd also say that I think it will expedite the
18 remediation process on the average because many
19 consultants will not proceed with the technical
20 portion and the actual work until their budget has
21 been approved, you know, to their satisfaction. So
22 I think if -- you know, some consultants go ahead
23 and do the work, but I think the majority don't do
24 that. So if they're waiting for that budget to be

1 approved and waiting for that budget amendment to be
2 submitted and reviewed, it can delay projects.

3 MS. HESSE: I wanted to follow up on a
4 question that the gentleman over here raised
5 (indicating).

6 When he mentioned that when
7 request for reimbursement goes in it's certified by
8 a professional engineer as being reasonable, and I
9 believe Mr. Clay had testified earlier, and correct
10 me if I'm wrong, that you thought when caps were
11 being proposed and prepared that the consultants
12 were billing for their costs and putting in
13 estimates for their costs.

14 My question is that the Illinois
15 EPA personnel, the people who are reviewing those to
16 decide if IEPA believes they're reasonable, are
17 those people professional engineers with experience
18 in the field and with underground storage tanks?

19 MR. CLAY: Majority of those people
20 are not professional engineers.

21 MS. HESSE: And then my other question
22 at this time is generally -- I'm trying to save all
23 the specific questions for specific topics.

24 For a number of years, the

1 Illinois EPA has been operating the reimbursing
2 without having maximum rates set forth in
3 regulations, and my question is why is IEPA at this
4 point proposing maximum rates as opposed to
5 something else?

6 MR. CLAY: I think at this point it's
7 just, you know, we're seeing more and more rules,
8 more and more hours, more and more costs being
9 increased and everybody seems to be pushing the
10 envelope more and more as to what I would maybe
11 characterize as seeing more abuses or attempted
12 abuses, and so the Agency is looking to the Board to
13 adopt, you know, these numbers and regulations so
14 that it's clear from the Agency standpoint and the
15 Board standpoint what we feel are reasonable.

16 MS. HESSE: Have you made any effort
17 to try to separate out what you consider to be an
18 abuse or perhaps cite as more complicated
19 (phonetic), have you made any effort to sit down
20 with the regulated community and try to resolve
21 those issues before proposing these rules?

22 MR. CLAY: I'm not sure I understand.
23 How would you do that? I'm not sure what the
24 question -- I don't understand what you're

1 suggesting that we do.

2 MS. HESSE: My question or suggestion
3 is before proposing the regulations, if you think
4 what you were seeing were abuses, what efforts have
5 you made to sit down with the regulated communities,
6 with the various consultants who do the underground
7 storage tank work to discuss the issues?

8 MR. CLAY: We meet with consultants
9 all the time to discuss budget-related issues, but,
10 I mean, that doesn't give the Agency any more
11 authority or doesn't put these rates or unit costs
12 in regulations, so I'm not sure what additional
13 meetings would -- how that would benefit, having
14 additional meetings.

15 HEARING OFFICER TIPSORD: Mr.
16 Truesdale?

17 MR. TRUESDALE: I just want to say
18 that, as a professional engineer, I take offense at
19 the position that these abuses occur despite
20 certification. Just make the Board and the Agency
21 aware that the Department of Professional Regulation
22 has mechanisms to pursue enforcement against
23 professionals who falsely certify or performing
24 below the standard quality established within the

1 industry. And that's something that also should be
2 evaluated by the Agency.

3 I also want to state that I
4 think in both Gary's testimony and Doug Clay's
5 testimony, and the Board is very aware, apparently,
6 that the most notable revisions have to do with
7 pricing, and as Gary King mentioned, the Agency is
8 looking to pay not all costs associated but some
9 portion, and I just want to know, does the Agency
10 have an idea about what portion of those costs they
11 feel are reasonable if it's not 100 percent
12 reimbursement?

13 MR. CLAY: Well, I mean, I think that
14 the majority of consultants or, you know, a large
15 number of consultants should -- we base these
16 numbers on what we felt was fair based on the
17 records we -- you know, historical records and
18 reviews and approvals that we've made, and I think a
19 majority of the consultants would be in line with
20 these numbers.

21 MR. TRUESDALE: I just wanted to make
22 a statement.

23 In reading through the testimony,
24 I noticed a lot of reference to averages, and,

1 inherently, an average implies a 50 percentile. So
2 looking at a 50 percentile, that means that half of
3 the submittals before the Agency under these
4 regulations would be subject to Board appeal.

5 MR. CLAY: I don't think that all of
6 them are averages.

7 MR. TRUESDALE: I didn't say all. A
8 large majority of them are averages, rate wise and
9 so forth. There are different statistical
10 evaluations. Some didn't have any statistical
11 evaluations, correct?

12 MR. KING: I don't know if I need to
13 amplify this or not, but, I mean, our responsibility
14 as an agency is to pay the reasonable costs inquired
15 by the owner and operator. That's what our
16 statutory responsibility is and that's what we try
17 to do.

18 The flip side of the coin is that
19 half the people come in within a certain range, the
20 question is, why can't they all come in within that
21 range? You know, I think if people have specific
22 suggestions they want to make as far as changes in
23 the rules, I think that's appropriate to do.

24 And then the other point that Joe

1 was making, when we find people that are
2 particularly -- that have an issue that we think
3 merits sending a complaint over to the Department of
4 Professional Regulation, we do that, and we have
5 done that, and we will continue to do that in the
6 future.

7 MR. TRUESDALE: I guess one more
8 related question goes hand-and-hand with something
9 that Doug mentioned earlier about payments of
10 amounts that are less than the lump sums and stated
11 that those then would be reimbursed at the actual
12 cost and not the averages calculated or the norms
13 calculated. However, numbers that fall above that
14 50th percentile will be automatically cut to that
15 number. That's where the potential for Board appeal
16 comes into play 48 percent of the cases where
17 averages are above.

18 MR. CLAY: No, you're assuming based
19 on past information that 50 percent of the cases
20 will be appealed under these new rules. You can't
21 assume that because these rules haven't been in
22 effect.

23 MR. TRUESDALE: There are a number
24 of --

1 HEARING OFFICER TIPSORD: Ladies and
2 gentlemen, we're speaking over one another. The
3 court reporter can't get everybody. Please raise
4 your hand.

5 MR. TRUESDALE: I'm just stating that
6 a number that's calculated based on an average is
7 inherently the 50th percentile mark. So 50 percent
8 of the cases will come in below that, 50 percent of
9 the cases will come in above that. The 50 percent
10 that come in below will be paid at that reduced
11 rate. The 50 percent that come above that, unless
12 the owner/operator is willing to take that reduction
13 and incur additional financial responsibility will
14 be subject to Board appeal.

15 MR. CLAY: But I think you need to
16 take into consideration what were based on averages
17 and what numbers were based above averages.
18 Remember -- for example, all of the rates that we
19 use for all consulting fees were over the averages.
20 So all the consulting fees are the averages, they're
21 above averages.

22 MR. TRUESDALE: Actually, all the
23 consulting fees that were calculated were based on
24 the \$80 per hour average rate, which is once again

1 50th percentile.

2 MR. CLAY: Right, but the \$130 for a
3 PE, the \$100 for a project manager and all those
4 rates are above averages. So the averages of the
5 above averages are still above averages, so, I
6 mean --

7 MR. TRUESDALE: I guess in that -- as
8 a related question too, abusing the averages, that
9 implies that the workload is distributed equally
10 from individual to individual and you have a \$40
11 rate for administrative support also including
12 project manager. And if 80 percent of the work load
13 is project management level and two percent is
14 administrative level, then that throws off the
15 average also.

16 MR. CLAY: I think that's, you know --
17 if there's a higher waiting that someone can support
18 in testimony, I think we --

19 MR. TRUESDALE: But there was some
20 consideration given to waiving the --

21 HEARING OFFICER TIPSORD: Okay.
22 Excuse me. I think we're getting way too into --
23 way too far down the road. We still have some
24 questions on Subpart A.

1 MR. TRUESDALE: I'm sorry.

2 HEARING OFFICER TIPSORD: Does anyone
3 else have some specific questions about Subpart A?

4 MR. RANGUSO: I think so.

5 (Laughter.)

6 MR. RANGUSO: Robert Ranguso, a
7 licensed professional geologist with Marlin
8 Environmental.

9 And my basic question would be, at
10 what point did the Agency stop using the 732
11 statutes in looking at work plans and budgets that
12 were submitted to the Agency?

13 MR. CLAY: We have not stopped using
14 them. And even if these rules are approved we won't
15 stop using them. We still need to use them for the
16 sites that apply to -- that the 732 rules were
17 applied to.

18 MR. RANGUSO: It seems to me that a
19 lot of what was in 732 involves the certification of
20 a licensed professional engineer at that time as to
21 the reasonableness and the requirements of what
22 typically would be required on environmental
23 projects and that they were going to look at the
24 Agency was going to pick ten percent of the plans to

1 do a full review?

2 MR. CLAY: I don't think the statute
3 says that.

4 MR. RANGUSO: What happened to that
5 basic premise of an idea, has that been given up by
6 the Agency at this point?

7 MR. CLAY: Well, I don't think that's
8 what the statute says. The statute says we have the
9 right to look at any of the plans and reports you
10 choose.

11 MR. RANGUSO: Currently, what is the
12 percentage of plans and budgets that are submitted
13 to the Agency that are selected for full review?

14 MR. CLAY: I don't have that off the
15 top of my head.

16 MR. RANGUSO: Wouldn't that be based
17 on a percentage type system within the Agency or is
18 it currently project manner discretion?

19 MR. CLAY: It's not a project
20 manager's discretion. I think we're looking at a
21 majority of those.

22 HEARING OFFICER TIPSORD: I actually
23 have a question along those same lines, if you don't
24 mind.

1 Part 734.100's applicability
2 section says that this part applies to, in essence,
3 releases reported after June 24th, 2002. I'm
4 putting on my whole Joint Committee on
5 Administrative Rules hat, and saying this looks like
6 a retroactive application of this provision of this,
7 and it goes to some of the questions on
8 implementation.

9 If I have a release that was
10 reported after June 24th, 2002, these rules are not
11 going to be in place, at best, September of this
12 year. That's over two years. Has my site been
13 sitting around doing nothing for two years or have
14 you proceeded under 732?

15 MR. CLAY: Well, we proceeded under
16 the wording in the public act. So, for example,
17 someone submits something that has a release today
18 is going to conduct site investigation under what's
19 said in the public act, which is, define the extent
20 of contamination. They would not be allowed to use
21 the classification system under 732 Method 1,
22 Method 2 for classifying their site.

23 HEARING OFFICER TIPSORD: So it's not
24 your intent to actually be implementing these rules?

1 You're not implementing these rules --

2 MR. CLAY: We are not implementing
3 these rules as we speak, no. And I might emphasize
4 though it doesn't -- but what we are implementing
5 and what we are doing on a daily basis should be
6 consistent with these rules because these rules, we
7 feel, reflect, for example, the rates, reasonable
8 rates.

9 HEARING OFFICER TIPSORD: Mr. Rao?

10 BOARD MEMBER RAO: I had a
11 clarification question on 732.108. It's supervision
12 by a licensed professional engineer or a licensed
13 professional geologist.

14 This section allows a licensed
15 professional geologist to conduct and prepare all
16 investigations, plans, budget plans, and reports
17 excluding corrective action completion reports.

18 Can you please clarify whether a
19 licensed professional geologist can prepare and
20 implement the corrective action plan but not sign
21 off on it?

22 MR. CLAY: The intent, and this was
23 based on the statutes, I believe, was that they can
24 sign and seal the plan, corrective action plan,

1 implement the plan, but there would have to be a
2 PE's signature and seal on the corrective action
3 completion report.

4 BOARD MEMBER RAO: The statute allows
5 them to prepare the plan and implement it?

6 MR. CLAY: That is our interpretation,
7 yes.

8 BOARD MEMBER RAO: Thanks.

9 HEARING OFFICER TIPSORD: Anything
10 further?

11 MR. COOK: I have a question with
12 regard to the rulemaking process test finding.

13 You've testified that the proposed
14 regulations have not been implemented, however, that
15 the Agency has sort of a duty to utilize the
16 information that was discovered during this process
17 of determining the rates; is that correct?

18 MR. CLAY: Correct.

19 MR. COOK: You've also testified that
20 these currently proposed rates have been upheld in
21 Board decisions?

22 MR. CLAY: Well, I don't know if I
23 would say the currently upheld rates, the rates that
24 we have been using, personnel rates, for example,

1 the -- I'm not sure. I think the excavation
2 rates -- I'm not sure about that, but the rate
3 proposed in this rule, I don't know if there's
4 anything we've had a Board decision on yet, to be
5 honest.

6 MR. COOK: You don't know that you've
7 had a Board decision --

8 MR. CLAY: Not on the rates as they
9 sit in these rules. Now, our process in
10 establishing the rate has been upheld in a Board
11 decision.

12 MR. COOK: The process of establishing
13 the rate, the -- not necessarily the forms of the
14 rates, but these are the rates that you're currently
15 approving in budgets for different types of work
16 activities?

17 MR. CLAY: Correct.

18 MR. COOK: And there are currently
19 basis pending before the Board with regard to these
20 rates?

21 MR. CLAY: Yes.

22 MR. COOK: Now, I have a question, and
23 this is more for the Board than anything. As the
24 Agency, you asked us to not comment with regard to

1 certain issues in order to protect the sanctity of
2 the Board as an impartial review process.

3 I want to ask the Board if, in its
4 opinion, the Agency has, by utilizing these rates
5 and now causing these rates which are embodied in
6 proposed regulations, to be the subject of Board
7 appeals concurrently with these hearings to the
8 extent that those appeals have to be ruled on
9 between now and the conclusion of these hearings, I
10 don't see how the Board can maintain independence
11 with regard to this hearing process as I understand
12 it, and I just have a question on how that can --

13 HEARING OFFICER TIPSORD: I can't
14 speak for the Board, but I can tell you as a body
15 overall, the Board always has adjudicatory processes
16 and rulemaking processes before us.

17 As long as we do not get into
18 specific details about any adjudicatory case I think
19 we'll be fine. I think you can ask your questions
20 about how these are implemented, I just felt that if
21 some of my initial rulings were concerns that the
22 questions might go too far, and so I wanted to be
23 sure that everyone understood that we have to remain
24 with general questions about the implementation,

1 about the process, and all of that.

2 The Board makes its decisions in
3 adjudicatory cases based on the record before the
4 Agency and the hearing record for the Board. And in
5 the case of underground storage tanks, it is the
6 record before the Agency which is the basis of the
7 decision.

8 I don't personally believe that
9 there will be a problem as long as no one in these
10 hearings talks about a specific case to anyone on
11 the Board or the staff. As long as we stay general
12 and ask only general questions, as Mr. Rieser
13 pointed out, that need to be asked, I don't think
14 there will be a problem.

15 I can assure you that if either of
16 the Board members who are currently here feel that
17 we're getting into an area that's a problem, they
18 will let me know and I will stop it. But I -- my
19 own personal belief, and this is my belief. I
20 cannot speak for the Board, I am an assistant to one
21 of the Board members, is that the Board members will
22 be able to handle with impartiality the cases, the
23 adjudicatory cases, based on the records that were
24 put together for the Agency and we will make our

1 decision based on the record here. And I think
2 we're already very interested in what we may have
3 here in Bloomington as testimony from all of you.
4 And it's clear that there's a lot of concern from
5 all of you and there's also a lot of heated
6 discussion to be had, and so I think that we can do
7 that.

8 BOARD MEMBER JOHNSON: The concern I
9 have is we're still right now as I understand it on
10 Subpart A that we all continue to ask questions
11 about Subpart H, and I think as we move into that
12 section and get more and more involved with the
13 questions there, the issue of reasonableness of rate
14 is bound to come up. And I have to assume that that
15 issue of reasonableness of rate is an issue that is
16 likely to be discussed on appeal in some of these
17 cases that are pending before the Board. So that's
18 the heart of my concern.

19 HEARING OFFICER TIPSORD: And the
20 Board will make a case-by-case decision on those
21 adjudicatory cases based on what's in the record on
22 those adjudicatory cases.

23 BOARD MEMBER JOHNSON: And, for the
24 record, those case-by-case decisions, as it pertains

1 to a certain rate, will they be precedential to
2 these hearings or --

3 HEARING OFFICER TIPSORD: They might
4 be and they might not be. I will tell you that I --
5 we have one of the cases that Dr. Girard authored
6 that we worked on together -- I'm Dr. Girard's
7 assistant -- was Ted Harrison, which is not on
8 appeal, it is a final decision, and it is one where
9 we found against the Agency.

10 There's also been cases recently
11 that the Board has decided for the Agency, and some
12 of those are on appeal in the appellate court. They
13 would be precedential only to the minor -- they
14 would only be precedential if someone introduced
15 them here and said, well, look, here's what the
16 Board said was reasonable based on the record in
17 that case. But, again, it would be based on the
18 record in that case.

19 It is the burden of proof of the
20 person seeking reimbursement in an adjudicatory case
21 to establish that what they request is reasonable.
22 In this instance, we're information-gathering.
23 There's no burden of proof. It's a matter of
24 everyone submitting the information and then the

1 Board as a whole will take that information and
2 weigh it and make a determination on rules.

3 You know, our decision in an
4 adjudicatory case, might it have some bearing in
5 this information-gathering, it might. But this is
6 information-gathering, not an adjudicatory. No one
7 is right, no one is wrong. And I think Gary's made
8 the point several times that the Board's expertise
9 will be relied on here. It will be. We will be
10 looking for information from all of you. This is
11 information-gathering, not adjudicatory.

12 Does that address your concern?

13 MR. COOK: I don't know that it fully
14 addresses my concern, but it certainly explains the
15 process, so thank you.

16 HEARING OFFICER TIPSORD: If there's
17 nothing else on Subpart A, I had originally planned
18 to take a short break after Subpart A and then come
19 back in and then go to lunch later, but since 12:00
20 has already arrived, I think we'll go ahead and have
21 lunch and come back at 1:00 and start with Subpart
22 B.

23 If anyone has any questions, I'll
24 hang around here for about five minutes. I'll

1 answer questions off the record. Thank you. Let's
2 go to lunch.

3 (Whereupon, the further taking
4 of proceedings was resumed
5 pursuant to the noon recess.)

6 HEARING OFFICER TIPSORD: Good
7 afternoon. I think we'll start now with Subpart B.

8 Are there any questions on
9 Subpart B?

10 Mr. Rieser?

11 MR. RIESER: Yes, I'll have to speak
12 over the music from outside.

13 In 200(h), under early action, the
14 Agency screens sites by comparing them to the --
15 changed the language by comparing the sites to the
16 information from the sites to the most stringent
17 Tier 1 remediation of 35 Ill. Adm. Code 732 for the
18 applicable educated guidelines. Could you talk
19 about what the basis for this change is, please?

20 HEARING OFFICER TIPSORD: Excuse me.
21 What was that section again, please?

22 MR. ROMINGER: I think it's 202(h). I
23 think you said 200, but I believe is 202(h) you're
24 referring to.

1 MR. RIESER: It's 202(h), that's
2 correct. Sorry about that.

3 I mean, it appears that the phrase
4 appears many times in the regulation.

5 MR. CLAY: Yeah, I think the -- what
6 we are trying to make clear is that you need to
7 define the extent of contamination to the most
8 stringent --

9 THE REPORTER: I'm sorry. I can't
10 hear you.

11 MR. CLAY: Okay.

12 You need to define the extent of
13 contamination to the most stringent levels in TACO.
14 You can develop your remediation objectives at any
15 point in the remediation process, during site
16 investigation or corrective action. But you're
17 still going to need -- even if you develop Tier 2
18 numbers, you still need to define to the most
19 stringent objectives because you have to determine
20 whether or not you need institution controls or
21 engineer barriers off-site to address that exposure
22 pathway.

23

24 MR. RIESER: So even in places -- for

1 example, you had a gas station in the city and found
2 an underground water ordinance, you would still be
3 looking at requiring people to talk about the extent
4 of soil contamination with respect to the sewer and
5 the ground water (inaudible) --

6 MR. CLAY: Yes, because you would have
7 to model that contamination of soil through the R26
8 and determine how far it's going to go so you'll
9 know who to notify as part of the ordinance
10 requirements in utilizing the ordinance. You still
11 have to notify those off-site property owners where
12 that is modeled.

13 MR. RIESER: Does this represent a
14 change in how the Agency approaches this issue?

15 MR. CLAY: No, this is no change.

16 MR. RIESER: Is there any concern that
17 by using this language they will -- the Agency will
18 de-emphasize the use of TACO in considering how
19 sites are resolved?

20 MR. CLAY: It is not our intention in
21 any way, shape, or form to minimize the use of TACO.
22 We need everybody to use TACO and -- you know,
23 whether or not you use Tier 1, Tier 2, or Tier 3 is
24 up to the owner and operator. But we certainly

1 encourage the use of TACO in all that goes with
2 that, the use of institution controls, the engineer
3 barriers. It would be less decisions the owner and
4 operator has to make, but it's not intended to
5 discourage the use in any way.

6 Also -- I forget the first part of
7 your question, but I had a comment on that.

8 (Laughter.)

9 MR. CLAY: Oh, the other thing was we
10 looked at using wording such as the appropriate
11 remediation objectives as opposed to the most
12 stringent, and we felt, you know, if this is the
13 Agency's interpretation let's say that. I mean, we
14 think -- the way the rules read and the way TACO
15 reads, you need to define the most stringent. So
16 instead of putting wording applicable remediation
17 objectives, let's put it in there so there's no
18 confusion that that's what the Agency's going to
19 expect. You still need to find the most stringent
20 and then, you know, you can develop your remediation
21 objectives in TACO in Tier 2 or Tier 3 for your site
22 specific situation.

23 MR. RIESER: Following that Subsection
24 H, there's a description of the analysis that would

1 have to be done to determine at the point of
2 completing early action of the site is meant the
3 most stringent remediation objectives, correct?

4 MR. CLAY: Correct.

5 MR. RIESER: Is there a reason that
6 you describe this incredible level of detail to say
7 that it's got to be all of these -- this type of
8 analysis?

9 MR. CLAY: You're referring to the --

10 MR. RIESER: Well, the Sub-Subsection
11 1, 2.

12 MR. CLAY: We just thought if we could
13 be specific we -- we based it on questions to what
14 the Agency is looking for and what was expected.

15 MR. RIESER: So for H2(a), for
16 example, you talked about a 30-foot boring to the
17 groundwater?

18 MR. CLAY: Yes.

19 MR. RIESER: What was the basis for
20 the 30 feet?

21 MR. CLAY: It was -- I think it's
22 consistent with the 15 foot -- under Method 2, the
23 15 foot beyond the invert, we figured roughly
24 15-foot excavation, so, I mean, there's no -- it's

1 no magical number, but we were just looking at some
2 reasonable, I mean, depth. We get that question --
3 and a lot of these is trying to address questions
4 that we have gotten over the years as to, well, how
5 far do I need to go? I mean, you can't ever say
6 there's no groundwater, but 30 feet, 50 feet,
7 100 feet, I mean -- you know, so we picked 30 feet
8 based on the 15 feet below the inverted tank, which
9 would be estimated roughly 15 feet.

10 MR. RIESER: In 732.203(a), this is
11 the language that you talked about in your testimony
12 about defining a presence of free product. And the
13 language you had it says, exceeding one-eighth of an
14 inch in depth for the presence of sheen on
15 groundwater in the tank removal of excavation or on
16 surface water.

17 Is the one-eighth of an inch in
18 depth, in that within a monitor well, is that the
19 intention there?

20 MR. CLAY: Yes, that's to be measured
21 in a monitoring well, correct.

22 MR. RIESER: And what review did the
23 Agency do to know that there were instruments that
24 can measure to that level of accuracy?

1 inch is to be measured in a groundwater monitoring
2 well, but it's not specifically in the regulations
3 that way, should we put that in there?

4 MR. CLAY: I don't think there's a
5 reason we couldn't state it that way.

6 MS. LIU: In the table that is
7 attached to Mr. Albarracin's testimony, they also
8 list the method of measurement that the other states
9 use, we don't specify in our regulations how that
10 would be measured, should that be something that
11 should be in the proposal?

12 MR. CLAY: We'll look at that too.

13 MR. ALBARRACIN: Yes, we'll think
14 about that.

15 MS. LIU: Thank you.

16 HEARING OFFICER TIPSORD: Mr. Rieser,
17 did you have a follow-up to that?

18 MR. RIESER: I'm sorry. I have one
19 more question, but it goes to something, sorry about
20 this, in A, but why don't we let someone else ask a
21 question.

22 HEARING OFFICER TIPSORD: Go ahead.

23 MR. COOK: Just a clarification on the
24 question that he asked with regard to 732.2(h).

1 You mentioned that that was
2 consistent with current practices; is that correct;
3 did I misunderstand that?

4 MR. CLAY: Defining the extent most
5 stringent?

6 MR. COOK: Right.

7 MR. CLAY: Correct.

8 MR. COOK: So that's not really a
9 change to the approach, it's just a codification of
10 requirements?

11 MR. CLAY: That's correct.

12 HEARING OFFICER TIPSORD: Go ahead,
13 Mr. Rieser.

14 MR. RIESER: I'm sorry. Going back to
15 the definition section and looking at the definition
16 of property damage, you've included the statutory
17 definition, you've added some language.

18 To limit the property damage is
19 something being other than property owned by a
20 person other than the owner or operator of the UST
21 and located off of the site where the release
22 occurred?

23 MR. CLAY: Yeah, I think that's
24 existing language.

1 HEARING OFFICER TIPSORD: So the
2 definition in 734 is identical to the existing
3 language in 732?

4 MR. CLAY: Correct.

5 MR. RIESER: What's the basis for
6 changing the statutory definition?

7 MR. ROMINGER: There was no change to
8 that definition.

9 MR. RIESER: But just in general,
10 what's the basis?

11 MR. KING: I mean, why we did that
12 several years ago, made that change? I guess we're
13 not prepared to speak to what we've given in
14 previous regulatory proceedings.

15 MR. CLAY: Well, I'm sure there's
16 testimony on it.

17 (Laughter.)

18 HEARING OFFICER TIPSORD: I would just
19 point out you might want to check because, again,
20 with my JCAR hat on, 734 is all new language, even
21 though it's identical, it's technically new, so...

22 MR. CLAY: We'll check on that.

23 MR. RIESER: Thank you.

24 MR. SINK: Barry Sink with United

1 Science.

2 Concerning the discovery of free
3 product, if free product is discovered maybe during
4 site clarification or site investigation activities
5 or even sometimes during a water well survey or a
6 monitoring well for groundwater level or something,
7 is that early -- I mean, there's a separation here
8 somewhere between what's early action and what's --
9 I mean, free product removal has been changed
10 somewhat here to -- usually it was -- as I
11 understood it, it was all Subpart B. It was an
12 early action but as a part of the modifications
13 here, for that 45-day period, is there a
14 different -- if you discovered it during a tank pull
15 (phonetic), I think I understand that. What happens
16 if you discover it during a well survey during site
17 investigation or even during corrective action?

18 MR. ALBARRACIN: One of the issues
19 that the Agency wants to address is that particular
20 issue that when free product is discovered beyond
21 early action, what happens? People don't know how
22 to get paid for those costs. They get submitted as
23 early action costs sometimes, and we accept that
24 just because there's no better way of addressing the

1 cost. So when that happens, when you find free
2 product at any given time after early action, you
3 have 45 days to take care of that, you know, to
4 respond to that, there's a 45-day time frame. And
5 in order to get a handle on the cost, we are
6 requiring a plan and a budget with that. So in
7 order to get paid for those costs, you submit a plan
8 and a budget, we review it and respond accordingly
9 and understanding that, you know, we need time
10 limits involved here because the process continues.
11 We want you to continue to remove free product, not
12 stop and wait till you get approval of the plan or
13 the budget. So our intent is to respond to those
14 plans and budgets in a timely manner, not the
15 perhaps typical fashion, you know wait a while, 60,
16 90 days, we will respond to those as quickly as
17 possible, so the process continues, the work
18 continues.

19 So that was our spent intent.
20 There's a slight change. It's the matter of getting
21 a handle on what work is being done and what it
22 costs.

23 MR. CLAY: And the wording on the
24 45 days from the confirmation and presence of free

1 product, that hasn't changed. I mean, that was the
2 way it was before. It's just that after 45 days
3 from the discovery of free product there needs to
4 be a free product plan and budgets, you know,
5 submitted and approved by the Agency.

6 MR. KELLY: Joseph Kelly, USI. I have
7 some questions regarding this Subpart. I think in
8 the errata sheet it mentions that for tanks equal to
9 or above 15,000 gallons the Agency is going to
10 require additional samples. I think one comment
11 says may and then I think the regulation errata may
12 say may, one of them says will, is there any
13 indication as to how many more are going to be
14 required, you know, like every 20 feet or -- I'm
15 talking about the additional floor samples,
16 15,000-gallon tanks?

17 HEARING OFFICER TIPSORD: Excuse me.
18 Are you talking about the language proposed in
19 732.202(h)(1)(b), or is it --

20 MR. KELLY: Well, it came in the -- I
21 was referring to the initial submittal as referring
22 to early action sampling, and I think in the errata
23 sheet there was additional language in that as it
24 pertains to over and above 15,000 so people know up

1 front, you know, don't go out and collect samples
2 and then come back later and go, oh, you should have
3 gotten one more over here, so I was just wondering
4 if the Agency had thought about how many -- are they
5 going to say every 20 feet, the length of tank? I
6 don't know what number you're looking at here.

7 MR. BAUER: In the errata sheet, just
8 to clarify it, you're looking at 1(b), and that just
9 talks about the floor samples. If you go on up and
10 look at the regular regulations, 1(a), it talks
11 about the wall sampling, and it's one per wall. And
12 it does go on to say for walls exceeding 20 feet in
13 length.

14 MR. KELLY: Well, I think the Board
15 eventually said, I think, two for larger tanks, but
16 I think the Agency is trying to say that it --
17 recognizing the 15,000-gallon tank is much longer,
18 they require more than two floor samples, the way I
19 read that. Maybe three, maybe four.

20 MR. ALBARRACIN: I think you can use
21 the 20-foot rule on that one.

22 MR. BAUER: Yeah.

23 MR. KELLY: Another question I have
24 regarding the submission of free product plans and

1 free product removal activities.

2 As it stands now is not --
3 according to the regulations, with the free product
4 removal and the work associated with that would
5 still be considered an early action because that's
6 historically the way the Agency handled it in past.
7 Whenever you discovered free product, it's kind of
8 like for that specific amount of work you're kind of
9 under "early action." But I know that there's been
10 instances in the past where costs have been rejected
11 for that or removal even though it's on schedule and
12 consistent with early action work, so I'm just
13 wondered -- I mean, I know these are proposed, but
14 to get clarification on the proposal versus the way
15 it stands now, I'm just trying to make a distinction
16 there.

17 MR. ALBARRACIN: The way it stands
18 now, you know, one of the criteria that we use is,
19 do we have a free product in-house; if so, that's
20 what we use to determine what is being billed. So
21 the time frame is the key, when was the work done?

22 If it's something that happens
23 during early action, it's billed as early action.
24 If it's after that, you know, I think we're handling

1 it as a "early action cost" even though it's not
2 really during early action activities. But as was
3 proposed -- that's why we're asking -- you know,
4 we're proposing to have a plan and a budget
5 submittal so that we have a clear picture of what's
6 being done, what's proposed and what it costs, and,
7 of course, the free product removal report still is
8 part of the process.

9 MR. CLAY: The idea here is to, you
10 know, make sure everybody's got a handle on the
11 cost, because, in the past, we -- you know,
12 consultants and owners and operators have racked up
13 hundreds of thousands of dollars without ever coming
14 to the Agency for any approvals, okay. So under
15 the free product, we've seen soils removed as free
16 product because they were weeping and oozing, and
17 we've seen, you know, a lot of things that were that
18 identified as free product that the Agency didn't
19 agree with that characterization of it.

20 So if you've got free product, we
21 want you to do it immediately, remove it, you
22 know -- you can remove it without Agency approval up
23 to 45 days, but after that time -- and I would stake
24 well into -- you know, if you see you got a real

1 free product problem, I wouldn't expect seeing a
2 free product plan on the 45th day, I would expect to
3 see it a lot sooner, and this is how I'm going to
4 address free product so that, you know, the Agency,
5 you know, has time to turn that around and get that
6 approved so there's no interruption in your free
7 product removal without agency approval.

8 MR. KELLY: One other please is
9 that -- just for clarification, it talks about if
10 early action samples, and I'm reading through
11 testimony that was referring to the regulations, if
12 early action samples do not exceed Tier 1 and
13 groundwater investigation is not required, a report
14 is to be submitted requesting the NFR after a
15 completion of early action activities, yet for
16 purposes of paying the UST fund, the Board has got a
17 corrective action completion report. Then what is,
18 I mean, is it going to be an expanded 45-day report
19 or, I mean -- it's not a corrective action
20 completion report, so is there an expanded
21 45-day or --

22 MR. ALBARRACIN: We're working on the
23 forms to address that, and I'm not part of that
24 group. But the intent is -- I'm not sure if we come

1 up with a name for that report, but -- expanded is
2 easier wording, an expanded 45-day action report.
3 You meet the objectives, no groundwater
4 investigation requesting NFR.

5 HEARING OFFICER TIPSORD: Mr.
6 Truesdale?

7 MR. TRUESDALE: I had a question again
8 about the errata sheet about the 15,000-gallon tanks
9 also and the backfill, and I guess I'm just curious
10 how operationally, since it says the Agency may
11 require collection of more than two samples,
12 operationally, how is that going to be conducted, is
13 it to be assumed that multiple samples are collected
14 or are we going to have to rely on contacting a
15 project manager while in the field because
16 remobilization and repetition of work in order to
17 fill in those data gaps that the Agency may or not
18 require is a huge operational difficulty?

19 MR. CLAY: I guess you can contact the
20 Agency ahead of time, but I would think you would
21 know that you've got a 20,000-gallon tank ahead of
22 time and not call us later in the field, so, you
23 know, as long as you contact the Agency ahead of
24 time.

1 MR. TRUESDALE: So the assumption is
2 going to be that any tanks that are greater than
3 15,000 gallons will require more sampling rather
4 than may require?

5 MR. CLAY: Well, I think you need to
6 tell us what you expect the situation to be.

7 MR. TRUESDALE: Well, before you get
8 in field, you can't make that determination, that's
9 the problem. If we're assuming -- if we contact the
10 Agency prior to mobilization of the field, we have
11 to work under the assumption that the Agency will
12 require additional sampling.

13 MR. CLAY: I think you need to contact
14 the Agency.

15 HEARING OFFICER TIPSORD: Mr. Rieser?

16 MR. RIESER: What criteria will the
17 Agency use to make the decision as to whether
18 samples are required for tanks that are larger than
19 15,000 gallons?

20 MR. CLAY: Every 20 feet of floor,
21 would that be better to put that in there?

22 MR. TRUESDALE: That doesn't address
23 the backfill criteria, which is identical in
24 wording --

1 MR. CLAY: We'll put it in there too.

2 MR. TRUESDALE: -- twenty feet in
3 backfill.

4 MR. CLAY: So you want a volume?

5 MR. TRUESDALE: Something that gives
6 us some kind of direction so that there's not just
7 an arbitrary may require something if this occurs
8 that we have no basis to work from.

9 MR. CLAY: We can put that in there.
10 I mean, it's just that we wanted to leave some
11 flexibility so that -- because we rarely see that
12 big of tanks, but if you think it's best to make it
13 very specific with no flexibility, we'll do that.

14 MR. TRUESDALE: I'm just more
15 concerned with, you know, like I said, the
16 operational problems of --

17 MR. CLAY: We can do that. We'll make
18 it very specific so there's no --

19 MR. TRUESDALE: Especially, I mean,
20 we're talking about lump sum pricing here, the scope
21 of work becomes very critical and if you don't have
22 a very clear scope of work, then the lump sums don't
23 work.

24 MR. ALBARRACIN: One of the issues

1 that we have with requiring more than two samples
2 when the tank is greater than 15,000 gallons is the
3 fact that you could have a very large tank, which I
4 don't think is common, but you can have a very, very
5 large tank where the excavation then becomes,
6 obviously, large, and you may need a grid rather
7 than just saying, these many samples for excavation.

8 So, I mean, we can put that in the
9 regulation or we can put in our -- we're working on
10 a fact sheet to expand on the regulations, people
11 could go in there.

12 MR. TRUESDALE: I just -- like I said,
13 I'm concerned with scope on lump sums, if the scope
14 is not clearly defined, then it's impossible to make
15 any type of evaluation as to whether or not the lump
16 sums are adequate.

17 MR. CLAY: We will recommend to the
18 Board something specific to these two.

19 HEARING OFFICER TIPSORD: I have Ms.
20 Hesse next.

21 MS. HESSE: A couple of points where
22 I'd like clarification on, free product removal,
23 emergency situations, and the early action time
24 frame.

1 If you could expand or explain, if
2 someone is involved in an emergency situation, for
3 example, where vapors or fumes are leaking into a
4 nearby building and the work is progressing but it's
5 at the end of -- and it's keeping going and it's the
6 end of 45 days where the work plan would need to be
7 submitted to Illinois EPA. Is there going to be
8 some allowance for flexibility for the emergency
9 work to continue pending review of the work plan to
10 do work beyond the 45-day cutoff?

11 MR. CLAY: Well, if it's an emergency
12 situation and you don't expect it to go very long at
13 all. Like I said earlier, I don't think that you
14 should be waiting until the 45th day to say, oh, my
15 gosh, I've still got an emergency here. I need to
16 submit something to the Agency. I mean, if you want
17 to, you can submit it on that first day for Agency
18 approval, continue to do the work for those 45 days,
19 and, you know, we would have a response to you
20 within that time period.

21 MS. HESSE: But what if the response
22 isn't back within that time period?

23 MR. CLAY: Our intention is to have it
24 back in that time period.

1 MS. HESSE: Are you going to propose
2 something to that effect in your rules?

3 MR. CLAY: We're not proposing to put
4 specific time frames in there, but, you know, we
5 will commit to turning those around in an
6 expeditious manner.

7 MS. HESSE: Would the Agency consider
8 putting something in the regulations that, in an
9 emergency situation, where a work plan is proposed
10 and if the Agency has not responded, then the person
11 doing the emergency response work could have that
12 work to be deemed approved until hearing back from
13 the Agency?

14 MR. CLAY: I don't think we're going
15 to deem anything as approved. I mean, even if it
16 were free product done today without these
17 regulations, if we didn't think it was appropriate,
18 we wouldn't approve it for reimbursement even after
19 the fact, so, I mean, I don't think we would be
20 willing to propose anything that's automatically
21 approved without some Agency review.

22 MS. HESSE: The second question I have
23 goes to free product removal, and, basically, what
24 triggers the 45-day time period? It appears that

1 one trigger event is finding out a tank leaks and
2 then if you learn, say, 30 days after you've
3 reported the tank as leaking that there's free
4 product over the property line, does that begin the
5 45 days again?

6 MR. CLAY: The 45 days for free
7 product removal would begin the confirmation of the
8 presence of free product, so that could be 30 days
9 past the IEMA date, but that would not extend your
10 45-day early action period automatically. You would
11 still have to request that extension. But it
12 would -- your 45 days for free product removal
13 without Agency approval would be from that -- from
14 this example, 30 days after the IEMA date to 45
15 days, which would be 75 days after the IEMA date. I
16 think that's what it states in the regulations.

17 MS. HESSE: Under the regulations for
18 reimbursement of early action, is there a limit on
19 the amount of soil that can be excavated?

20 MR. CLAY: I'm sorry. Would you say
21 that again?

22 MS. HESSE: In the rules on early
23 action removal, is there a limit on the amount of
24 soil that can be removed as part of early action?

1 MR. CLAY: Yes.

2 MS. HESSE: What happens then if
3 you're in there removing the tank and there's some
4 very visibly contaminated additional soil beyond
5 their minimum, can that be removed during early
6 action?

7 MR. CLAY: It's not reimbursable as
8 early action. I mean, it can conceivably be
9 removed, but then there's an issue of was it
10 contaminated, and, you know, that's -- there's a big
11 question as to whether or not you can, you know --
12 there's been a problem in the past where people just
13 dug and dug and dug until their H noon didn't pick
14 up anything without doing site investigation work,
15 so that's why -- and this is something that is not
16 new to these rules. That has been in there for a
17 long time where you're limited to the amount you can
18 remove under early action soil excavation. That is
19 not new to these rules.

20 HEARING OFFICER TIPSORD: I'm sorry.
21 I didn't get your name earlier.

22 MR. COOK: Jay Cook, USI.

23 Doug, you mentioned that the
24 requirements of 732.202(h) were reflected in current

1 Agency practice, how long has what's presented here
2 in the proposed regulations been the Agency
3 practice?

4 MR. CLAY: What specifically are you
5 referring to?

6 MR. COOK: Well, as I understood, the
7 answer that you gave to an earlier question that
8 the sampling and investigation requirement
9 represented in 732.202(h) reflect current Agency
10 practice or protocol, it's not a deviation from what
11 you'd expect today.

12 MR. CLAY: The most stringent wording
13 or the 20 foot or the --

14 MR. COOK: Essentially, the 20 foot
15 and the investigation.

16 MR. CLAY: (H)(1) was added at the
17 last rulemaking and then we added (2) as part of
18 this rulemaking.

19 MR. COOK: Does (2) reflect the way
20 that the internal procedure currently works?

21 MR. CLAY: We don't usually ask for
22 this in early action. It usually comes up in site
23 investigation, so it doesn't fit in --

24 MR. COOK: Yes or no. You would

1 eventually get to this point utilizing current
2 procedure?

3 MR. CLAY: Correct.

4 MR. COOK: And how long has the Agency
5 utilized that protocol?

6 MR. CLAY: Well, I don't think it --

7 MR. COOK: In terms of the spacing of
8 the borings and assuming that you've followed the
9 process through to corrective action investigation?

10 MR. CLAY: Well, we haven't had the
11 spacing of borings. I mean, that's where --

12 MR. COOK: It's not been presented in
13 any regulations in the past?

14 MR. CLAY: Right.

15 MR. COOK: But that spacing has
16 generally been accepted or required?

17 MR. CLAY: No, there hasn't been any
18 spacing guidance to staff or anything else. You
19 know, that's why you're putting it in there now. I
20 mean, that's always been an issue. I mean, you guys
21 have had that issue as -- you know, where do we
22 put -- identify where we're going to put our borings
23 at.

24 MR. COOK: So that leads me to my next

1 question, which is, is part of the reason that this
2 is presented in these regulations, the spacing and
3 the vertical -- in vertical spacing and samples, is
4 part of the reason to help delineate a specific
5 scope of work to help expedite the reimbursement
6 process?

7 MR. CLAY: That's true. I mean, we're
8 studying the numbers in regulations. We want to try
9 to be as specific as we could so that in the scope
10 of work --

11 MR. COOK: So you've identified a
12 specific scope of work to hopefully --

13 MR. CLAY: Correct.

14 MR. COOK: Okay. Thank you.

15 HEARING OFFICER TIPSORD: Mr.
16 Truesdale?

17 MR. TRUESDALE: Just one general
18 comment, and it goes back to the 45-day reporting in
19 the early action and free product release.

20 I agree, I think it states exactly
21 what you said, but I think that it is kind of
22 ambiguous when you read through it. When I look at
23 732.203(a) and B and C and D when it talks about the
24 time period of initial free product recovery versus,

1 you know, 202.3(c) saying that it's not early
2 action. And then 204 goes back to upon confirmation
3 of a release. I think there's a lot of ambiguity in
4 there and there probably needs to be some more clear
5 distinction between 45 days for free product
6 recovery versus 45 days for early reaction
7 activities written in the regulations to eliminate
8 ambiguity.

9 MR. CLAY: We'll look at that to see
10 if there's a way to make it clearer.

11 HEARING OFFICER TIPSORD: Any other
12 questions on Subpart B?

13 MR. PULFREY (phonetic): I have
14 questions about the investigation methods under this
15 proposed regulation.

16 I guess the general question is
17 not the investigation really driven by the data
18 that's generated during investigation?

19 MR. ALBARRACIN: What part are you
20 talking about? Are you talking about early action?

21 MR. PULFREY: Let's say vertical
22 extent, is that not driven by what data is generated
23 in the field?

24 MR. CLAY: Well, the --

1 MR. PULFREY: I'll give a situation.

2 If you're doing a soil boring, and
3 it says here in the regulations that you're not
4 going to collect any samples from the water table,
5 okay.

6 If you have a situation where
7 you've got heavily contaminated soils just above the
8 water table floor, would it not behoove you to go
9 ahead and find out what that vertical extent is at
10 the time of the investigation rather than coming
11 back and finding out the vertical extent of
12 contamination thereby really saving some costs?
13 Sounds like to me there's a duplication of effort.

14 MR. CLAY: So you're suggesting if you
15 take samples below the water table?

16 MR. PULFREY: As a geologist, if I'm
17 in the field and I see a salt boring and it's
18 heavily contaminated just above the water table, I
19 think it would behoove anyone here to go ahead and
20 find out what's below the water table at that
21 particular time rather than saying, okay, the Agency
22 said no more contamination above -- you know, if we
23 don't find out what it is then, you're going to have
24 to come back at a later date and do the same thing?

1 correct?

2 MR. CLAY: Right.

3 MR. PULFREY: Currently, under site
4 classification, many times, more often than not,
5 will have contamination right up to the property
6 boundaries, okay. As somebody who has a fiduciary
7 responsibility to protect the human health
8 environment, right now, as currently, I have the
9 right to go ahead off-site to determine how many
10 properties are affected off-site.

11 What you're proposing in here, in
12 fact, is stop everything. Give us the data that you
13 want, that you need, and then only after a hundred
14 and twenty days review, possibly, then we're going
15 to have you proceed, how is that expediting the
16 situation?

17 MR. CLAY: Well, first of all, that's
18 not true. There's nothing in these rules that
19 prevents you from going ahead and doing that work.

20 MR. PULFREY: Excuse me. But state
21 street says very specifically off-site. What I'm
22 saying is that we have a problem on-site,
23 indications are that it's going to go off-site, as
24 it currently stands, I have the opportunity to go

1 off-site, what you're saying, we're going to hold
2 this whole process, we're going to submit the data
3 to you and wait a hundred and twenty days, that's
4 not expediting the process is it?

5 MR. CLAY: No, sir. I just got done
6 telling you, there's nothing that would prevent you
7 from going out and doing that work, both Stage 2 and
8 Stage 3, without ever having Agency approval. You
9 could go out and do that work, but then you take the
10 chance of the Agency not agreeing with that, just
11 like it is today, but there's nothing to prevent you
12 from going out, and if you think it's critical to do
13 that off-site work, then there's nothing to prevent
14 you from doing that in these rules.

15 MR. ALBARRACIN: I'll add that you can
16 submit a -- after you're done with Stage 1, you can
17 submit your plan for a Stage 2 and Stage 3. There's
18 nothing that could prevent you from doing. We will
19 review it that way. We will review it with that in
20 mind. And you would have to have a plan that has
21 got contingencies involve, included in the plan.

22 For example, if you suspect that
23 you're going to be -- you're going to find
24 contamination at a certain distance, but you're

1 going to go ahead and still for additional borings
2 on wells with the understanding that you found
3 contamination compared to Tear 1, and then at the
4 end, what's paid is only with work as completed. So
5 you could potentially propose, let's say, 100
6 borings for a site, but you may only need 30, and
7 that's what you're going to be paid for, 30, not for
8 a hundred.

9 MR. CLAY: And that's -- we're looking
10 on a guidance document now where you would outline
11 that contingency approach where right now a lot of
12 consultant, they've got their initial site
13 investigation plan, they go out and they do their
14 mobilization. They identify the contaminated
15 borings and they submit to the Agency again for the
16 next mobilization.

17 MR. PULFREY: That's because they had
18 gotten burned.

19 MR. CLAY: Right. And what we would
20 propose now is that you outline all that in your
21 Stage 2 or Stage 3 site investigation plan, which is
22 here's my initial mobilization, if there's -- if any
23 of the wells are above Tier 1, our most stringent
24 numbers, then I'm going out, you know, 20 feet or 30

1 feet, whatever. And if those are hot, you're going
2 on another 20 or 30 feet. And that would all be
3 approved in one plan, so these additional
4 remobilizations don't have to come back to the
5 Agency for pre-approval. By the same token, you
6 stick to that plan so that -- you know, you've got a
7 clean well. You don't have approval to keep going,
8 obviously, nor would you want to, so it is -- we
9 call it a contingent plan where those numbers can
10 be -- or those budgets can be approved with those
11 multiple mobilizations, you know, if they're written
12 that way.

13 MR. PULFREY: Well, let me -- I want
14 to make sure I get clarification on this as far as
15 the vertical extent. You're limiting soil sampling
16 above the water table, correct?

17 MR. ALBARRACIN: During an
18 investigation, what we have are the proposed
19 regulations, that us correct. During the
20 investigation phase, we want people to stop at the
21 ground water table. Our thinking is at that point
22 that information may or may not be helpful depending
23 on what your corrective action is going to be later.
24 You may not need it later. If you think that we

1 should consider that, then we will be willing to,
2 you know, consider your comment on it. That's the
3 thinking. The thinking is during delineation,
4 during investigation, stop at a certain point, once
5 she --

6 MR. PULFREY: Despite the data, is
7 that what you're saying, in spite of her data? In
8 other words, we don't have any leeway as
9 professionals to make our own decisions in the
10 field; is that what you're saying?

11 MR. CLAY: Let me ask him a question.

12 What criteria are you using as a
13 geologist in the field to determine whether or not
14 you should go further?

15 MR. PULFREY: At the Agency, we used
16 to use data quality objectives. First it's visual;
17 seconds, it's olfactory; third is instrumentation,
18 like a PID; and fourth would be confirmation with
19 the sample, those criteria, those four criteria. So
20 what you're doing is going up in class, okay. You
21 can use a visual, an olfactory, that's the first
22 class, the second class is with instrumentation,
23 third class is with a sample. Those are the
24 criteria that we use. If anybody wants to add

1 anything, that's fine. But what I'm saying is the
2 fact that what seems to be happening here is that
3 you're are putting handcuffs on us here. The fact
4 of the matter is if you've got some contaminated
5 soils that are in a PPM range, okay, they're above
6 water table, that you're only limited as to above
7 water table?

8 MR. CLAY: No.

9 MR. PULFREY: I propose that you not
10 limit that, that we could be given the leeway and
11 something of a, you know, depending upon our
12 professional experience, and we're PE's and PG's
13 here, that you'll be able to give us some leeway as
14 to go ahead and collect that data now rather than
15 come back at a second time and continue that and
16 what you're doing is duplication of effort, is that
17 reasonable?

18 MR. CLAY: Well, you still didn't
19 answer my questions as to what criteria. I mean,
20 you told me how you determine whether or not it's
21 contaminated, but what's your criteria as to whether
22 you go below the water table and how far you go?

23 MR. PULFREY: The fact of the matter
24 is that if you -- in order to determine full

1 vertical extent, okay, full extent, whether
2 vertically or horizontally, that's the main
3 determination. I mean, that's what all this
4 investigation is about, in order to determine both
5 fully, determine fully, with the vertical or
6 horizontal extent during investigation, correct?

7 MR. CLAY: Yes.

8 MR. PULFREY: That's the
9 determination?

10 MR. CLAY: So you're basically
11 saying --

12 MR. CHAPPEL: How do you do that by
13 looking at the sample? You just said your criteria
14 is to look at the sample and say, I need to go
15 deeper --

16 MR. COOK: So if I could interrupt for
17 a minute?

18 MR. CHAPPEL: No, you can't. I asked
19 him a question.

20 HEARING OFFICER TIPSORD: Mr. Chappel,
21 let's be a little polite here. And if you have
22 something to ask, go ahead, Mr. Cook.

23 MR. COOK: Well, I wish that an answer
24 was simple. Historically, it has been relatively

1 simple and straightforward. The standards that the
2 Agency has used historically has been pretty solid.
3 Unfortunately, for the last couple of years,
4 financial decisions have weighed heavily into
5 second-guessing what will and won't be approved and
6 there's very little rationale that we can tell as to
7 what standards should be utilized to make that
8 determination, and with all respect, I'm just trying
9 to provide an honest answer.

10 HEARING OFFICER TIPSORD: And, Mr.
11 Clay, I think that's sort of your point. You're
12 asking them for a standard and they can't give you
13 one either, am I correct; am I putting words in your
14 mouth?

15 MR. CLAY: Correct.

16 MR. COOK: We can give a standard that
17 we believe, but that standard has not been applied
18 consistently, and we can't tell what -- the standard
19 should be we have regulatory authority that --

20 HEARING OFFICER TIPSORD: Excuse me,
21 Mr. Cook, I don't think I've had you sworn in yet,
22 so I'll let you get sworn in now.

23 (Witness sworn.)

24 MR. COOK: We've got a regulatory

1 authority that to a large degree dictates the
2 standards, they dictate what's required. They
3 outline in the regulations different standards that
4 should be applicable, and now those standards are
5 actually being closed. We have tried to follow,
6 over the last decade, those standards that even
7 though they have not been printed in the
8 regulations, have been de facto standards within the
9 industry by virtue of the fact that the EPA's LUST
10 Section's technical unit has guided, informed that
11 process over the last decade, so we've tried to
12 follow that lead.

13 The difficulty over the course of
14 the last couple of years has been that what has been
15 a standard, and a fairly uniformed standard over a
16 period of time, has now become very, very -- it's
17 very, very arbitrary, and we never know what may be
18 required from one project manager to the next and
19 what unit to the next and what side to the next.
20 That's our answer.

21 HEARING OFFICER TIPSORD: Mr. Chappel,
22 does that answer your question?

23 MR. CHAPPEL: Well, enough.

24 HEARING OFFICER TIPSORD: Thank you.

1 MR. PULFREY: In Southern Illinois,
2 the clays, instead of being brown or gray turned
3 green when there's soil contamination. That's the
4 visual indication.

5 MR. CHAPPEL: So you would drill until
6 the clay is no longer green?

7 MR. PULFREY: I said I used a number
8 of criteria.

9 MR. CHAPPEL: I guess I'm asking what
10 criteria do you use to stop -- you're in the field,
11 you just said you drill until it's no longer green,
12 then what did you do? What if you still smell it,
13 do you keep drilling?

14 MR. PULFREY: And also use
15 instrumentation. The technician has an instrument
16 there that --

17 MR. CHAPPEL: So now it's not green
18 any more and you can't smell it, but the
19 instrumentation says it's 6 PPM, do you keep
20 drilling?

21 MR. PULFREY: No.

22 MR. CHAPPEL: Why not?

23 MR. PULFREY: Indications are from my
24 data quality that it's no longer there.

1 MR. CHAPPEL: Even though your
2 instrumentation says there's 6 part per million
3 still there?

4 MR. PULFREY: That's still below
5 the --

6 MR. CHAPPEL: Six part per million is?

7 MR. PULFREY: Excuse me. I'm sorry.
8 Six part per million?

9 MR. CHAPPEL: Yeah.

10 MR. PULFREY: I'm sorry. I thought
11 you said 6 PPP.

12 MR. CHAPPEL: No.

13 MR. ALBARRACIN: I'd like to comment
14 on Mr. Cook's comment about the standard.

15 I mean, can you elaborate a little
16 bit on what our standard has been, our standard
17 practice has been over the past ten years
18 approximately? And I don't mean that to put you on
19 the spot, I'm -- in order to formulate my answer.

20 MR. COOK: Sure, I'd be more than
21 happy to elaborate on that. In fact, I'd like
22 to bring to everyone's attention the most recent
23 interaction here between Mr. Pulfrey (phonetic) and
24 Mr. Chappel. I think this is very indicative of the

1 process and the dialogue that is taking place over
2 the last 24 months or so between the Agency and the
3 consultants and contractors, and I think that is an
4 unfortunate thing that that has taken place.

5 Historically, we had proposed
6 borings, performed borings under the guidance from
7 the Agency our firm had, and I know that our firm is
8 not the only firm because I've spoken with other
9 consultants about this same thing, and over the
10 course of the last couple years, we have not been
11 able to determine whether or not what we -- the work
12 that we would perform if we went out and did the
13 work without prior Agency approval, we have not been
14 able to make a determination on whether that work
15 would be considered technically required or not by
16 the Agency. We had a number of cases last year that
17 we opted to settle without bringing those before the
18 Board. In those particular instances, we were told
19 on at last one instance that comes to mind
20 immediately that there were a number of borings that
21 were not technically justified. There were ten
22 borings in this case that were not technically
23 justified, and therefore, the cost associated with
24 those borings were denied.

1 When we asked the reviewer which
2 borings those were, they would not tell us. They
3 refused to tell us what borings were justified and
4 which ones weren't. So in the absence of that kind
5 of guidance from the Agency, how can we work to --
6 as a regulated community, how can we work to
7 determine some common standard, and that's the
8 difficult we've had.

9 MR. ALBARRACIN: And you're bringing
10 up what I see as far as number of boring locations,
11 one issue, and another issue has to do with a number
12 of samples in those borings.

13 MR. COOK: That's correct.

14 MR. ALBARRACIN: And as far as the
15 number of borings, I mean, that's what we're trying
16 to help to address with this rulemaking is trying to
17 get a handle on what's necessary. I mean, you've
18 always had the option of going out and doing the
19 work ahead of time as long as you can back it up
20 with your data. In other words, as long as you
21 still show that you have five samples and you need
22 to go further. Now, how many more, I think there's
23 a give and take there, I mean, I would offer that.

24 And how do you determine that in

1 the field? If you're in the field and you're trying
2 to figure out do I go any further or not, like he
3 stated, you rely on a number of things. Now, a
4 sample, unless you have a laboratory sitting at the
5 site, a mobile laboratory, you're not going to have
6 that assurance. I mean, you'll have instrumentation
7 and visual and that kind of thing, and that, my
8 understanding or my experience has been, it can
9 fail. So when it does, you're in the situation
10 where you have perhaps additional borings after
11 you've gotten the results back from the laboratory
12 that were not necessary. And that might be without
13 going into detail about what happened last year,
14 that may be the main part of the problem. So, I
15 mean, we're trying to -- you know, maybe we've -- in
16 some areas maybe we went too far and in some areas
17 we didn't go far enough as far as giving guidance as
18 to how many more samples do you need and, you know,
19 still be able to use what you've been using for the
20 past however many years, the PID, your experience,
21 the visual and so forth.

22 MR. COOK: And we appreciate that
23 guidance. In the absence of specific and
24 standardized guidance, what happens is we have

1 matters of professional opinion, and especially with
2 regard to the area of site investigation and
3 classification. This is largely an area that's
4 subject to professional opinion, and to me we have
5 to look at what's reasonable under the
6 circumstances, and relying on Bob's experience in
7 the field, his regulatory experience and the fact
8 that he's in the field making these decisions, I
9 would like to think that he makes sound, reasonable
10 decisions based upon the data that he has available
11 to him at the time and that other professionals in
12 this room do the same thing.

13 MR. ALBARRACIN: You know, and I think
14 that if we were talking about a case where, you
15 know, maybe there was one or two more borings that
16 were extra, let's call it, I don't know that the
17 Agency wants to get into an argument over that and
18 waste time on that, you know, and that's been our
19 discussion entirely.

20 Now, when we talk about a vast
21 difference, whatever that is, then that's when, you
22 know, we would have a problem.

23 MR. CLAY: I think there's two things
24 here. One, if you explain to us your rationale,

1 that's exactly what we're talking about in a
2 contingency. Okay, this is what I'm going to rely
3 on, this is how, I'm going to do it, if these are
4 dirty, I'm going to go out further, okay. That's
5 one thing. So that prevents multiple amendments in
6 your site investigation plan.

7 Two things. It's just a -- you
8 know, whether or not you should go below the water
9 table or not, I mean, that's just a -- I have, you
10 know, more people that say you shouldn't go below
11 the water table than say you should.

12 Now, there are instances where you
13 could, but that's more in the corrective action
14 stage. If you've got real tight clays, for example,
15 and the contamination, you know, you go down another
16 foot and you could get all the contamination and
17 that may also address your groundwater problem now,
18 well, yeah, that makes sense. But that's corrective
19 action. We're talking early action samples here.
20 And so that may be a good reason to do that. But to
21 say all samples at all times, you know, you drill
22 until it meets cleanup objectives, yeah, I don't --
23 I don't think that's a good practice. My geologists
24 at the Agency have said that's not a good practice,

1 so --

2 MR. COOK: Doug, without arguing the
3 technical merits one way or the other, I know
4 there's arguments on both sides, this appears to be
5 a cost benefit issue.

6 What is the additional cost for
7 all these mobilizations, potentially extra
8 mobilizations as opposed to the risk posed by
9 intentionally drilling through confining layer as an
10 example? And I have a question for you, has the
11 Agency reviewed that cost benefit type relationship
12 to determine how much additional cost may be spent
13 due to the additional mobilizations because that
14 sample is not collected potentially?

15 MR. CLAY: Actually, on that issue,
16 there is not an issue of cost. This is not a are we
17 going to pay more than we need to. This was an
18 issue of my geologist saying you don't want to do
19 that because if you drill through those confining
20 layers, we've got a bigger problem. And if you do
21 that one time, it outweighs the, you know -- cost
22 didn't come into it. I mean, it wasn't a cost
23 benefit analysis, it was, you know, we just -- this
24 is not what we recommend, so...

1 MR. COOK: So, essentially, you needed
2 the requirement of the program handled in this
3 manner and if there's extra costs incurred, so be
4 it?

5 MR. CLAY: Actually, there was
6 discussion also with the site remediation program
7 and other programs is the Agency as to what their
8 practices were, what they required, didn't require,
9 didn't allow, and so I think it's consistent with
10 that.

11 HEARING OFFICER TIPSORD: I think we
12 have a question back here (indicating). Did you
13 have a question?

14 MR. MAGAN: Yes. My name is Tom
15 Magan. In regards to the contingency planning in
16 recent Stage 1, 2, and 3 in the public act, we, last
17 fall and earlier this year, submitted a number of
18 plans with contingency planning in it before you
19 even proposed these Steps 1, 2, 3, they were all
20 denied. We gave reasonable justification and our
21 costs were, I think, reasonable as well. But, there
22 again, the Agency rejected all of these work plans.
23 You're taking the tools of judgment out of our
24 hands. You're dunning down the program, and I don't

1 know why you're doing it other -- you hide behind
2 that you're saving and protecting the fund, but I
3 don't see how when, in essence, you're hurting the
4 people of the State of Illinois. They're not
5 getting cost-effective response from the Agency and
6 they're not letting the consultants who -- yes, can
7 we make a profit, but that is the nature of the
8 business we're in. And if we didn't make a profit,
9 there would be nobody doing this work, there'd be no
10 sites cleaned up, and the State of Illinois would
11 not have a successful fund. So there's give and
12 take here. But to say that you're now acknowledging
13 the need for contingency where just three months ago
14 to a year ago you've been shutting down all our
15 contingency planning where prior to that you were
16 accepting it, so there's no rhyme or reason here.
17 All of a sudden things were going smoothly and then
18 all of a sudden there's a wrench in the road, and
19 there's no justification. You cover it with this
20 big, nice, bold thing, we're protecting the fund.
21 The fund is not yours, it's the people of the State
22 of Illinois to use. There's mom and pops out there
23 who would never clean up their property that through
24 the consultants are addressing these concerns and

1 cleaning them up. There's a number of sites that
2 need to be addressed that are polluting people's
3 drinking water that you haven't touched in ten
4 years.

5 HEARING OFFICER TIPSORD: Excuse me.

6 MR. MAGAN: So I just want to say, you
7 know, you gotta get your priorities right here.
8 You're gonna have to work to help us work with you.
9 Thank you.

10 HEARING OFFICER TIPSORD: I did have
11 you sworn in earlier, correct?

12 MR. MAGAN: Yes, ma'am.

13 HEARING OFFICER TIPSORD: And I do
14 remind everyone that everyone will get a chance to
15 testify at the next hearing. Please keep comments
16 short and in question form. I appreciate your
17 comments, but I do -- we could be here forever if
18 everybody comments, to a large extent, on
19 everything, so -- and I believe I had a question
20 back here (indicating). I'm getting to you, Mr.
21 Truesdale.

22 MR. TRUESDALE: Thank you.

23 MR. WALTON: My name is Harry Walton
24 and I'm representing the Illinois Environmental

1 Regulatory Group, I'm chairman of the (inaudible).

2 And, Doug, aren't we trying to
3 take the LUST program to the top of risk based
4 corrective action, and under TACO we have a set of
5 objectives that are soil based soil. Now, we have a
6 side characterization, that's what we're talking
7 about. When you do a side characterization, are we
8 not going to compare those to something? Those
9 numbers are soil numbers. If something is below the
10 saturate zone, don't we then have a groundwater
11 problem and these are groundwater characterizations?

12 MR. CLAY: Right, and that's
13 exactly -- Harry, you're right, that's exactly the
14 argument that I get from most consultants and from
15 the Agency people is that that should be considered
16 in the groundwater evaluation, not in the soil
17 evaluation. So that's exactly the argument we get
18 and that we've agreed with.

19 HEARING OFFICER TIPSORD: Mr.
20 Truesdale?

21 MR. TRUESDALE: Two issues, and I
22 understand the contingency planning and what you say
23 about the flexibility and you'll consider things on
24 a site specific basis, but my experience is what

1 happens is you can say that legitimately as a
2 manager, your project managers deny the plans and
3 then we have to go through multiple meetings and so
4 forth in order to get those site specific issues
5 resolved that increase our management costs but
6 won't be included under lump sum protocols or
7 whatever.

8 Two, for samples below the water
9 table. We're dealing with hydrophobic contaminants
10 here. These are contaminants that don't partition
11 readily into the aqueous phase. Ninety percent of
12 the contaminant mass it sorbed to soil particles or
13 organic material below the water table. In
14 Illinois, most of our tank systems extend below the
15 water table. Ninety percent of the state is the
16 exact same geology, we have fine grain, oil/soap
17 deposits overlying glacial till.

18 In any site investigation, the
19 first step is to develop conceptual model of what
20 you expect to find at that site. That's required
21 under 45-day report and is outlined in "Expedited
22 Site Assessment Tools for Underground Storage Tank
23 Sites: A Guide for Regulators" published by United
24 States Environmental Protection Agency in March of

1 1997. It's not a new concept. They discuss
2 sampling below the water table.

3 I'll agree a hundred percent that
4 once you, and I'm very familiar with ASTM equations
5 and the Rebecca Standards, and once a contaminant is
6 intimately associated with the groundwater, then the
7 migration to groundwater objectives no longer apply.
8 You're looking at an equilibrium partitioning
9 condition. And these two items are not usually
10 exclusive soil and groundwater contamination, they
11 exist in equilibrium with one another once they each
12 the water table.

13 Ninety-five percent of the sites
14 in Illinois are going to have the mass -- the
15 largest majority of the contaminant mass sorbed as
16 residual saturation beneath the water table because
17 the tank system extends to a depth of ten feet, the
18 water tables at six or seven feet. There is no neat
19 soil contamination, it's lateral spreading of
20 dissolved phase mass that then partitions back and
21 forth from the aqueous phase to the absorbed phase.
22 It's retardation. When you do contaminant transport
23 modeling, this non-aqueous phased liquid reaches the
24 water table --

1 HEARING OFFICER TIPSORD: Mr.

2 Truesdale, are we getting to a question?

3 MR. TRUESDALE: That's a good point.

4 (Laughter.)

5 HEARING OFFICER TIPSORD: The problem
6 we have is that by allowing --

7 MR. TRUESDALE: I'll reserve that for
8 testimony. I'm sorry.

9 HEARING OFFICER TIPSORD: -- you guys
10 to testify, at this point, the Agency doesn't get
11 the opportunity to cross-examine you yet, so if you
12 don't mind, we really need to stick with questions
13 of the Agency.

14 MR. TRUESDALE: I'll reserve that for
15 testimony. I apologize.

16 HEARING OFFICER TIPSORD: That's okay.

17 MR. TRUESDALE: The question was, I
18 disagreed with the geologists at the Agency and
19 that's my reasoning.

20 HEARING OFFICER TIPSORD: Sorry to cut
21 you off.

22 UNIDENTIFIED SPEAKER NO. 1: I have a
23 question.

24 If, in fact, it identifies most of

1 the contamination like two feet below the water
2 table at 90 percent, as you said, nine percent of
3 the contaminant phase, the soil below the water
4 table, and then, in fact, I identify that and say
5 also in conjunction with that that we can remove
6 that sorp. phase of contamination in a dig and haul
7 and thereby improve our groundwater problem, would
8 that not behoove protection of the human health
9 environmental?

10 MR. ALBARRACIN: I don't think we
11 would disagree with that, I think the issue is, you
12 brought it up earlier, why not collect the samples
13 during site investigation? We're back to the same
14 issue.

15 UNIDENTIFIED SPEAKER NO. 1: So you're
16 agreeing with me that by doing the vertical extent
17 even below the water table, I can identify, say, two
18 feet below the water table, that there's a sorp.
19 phase in that therefore improving our chances of
20 groundwater remediation, you would agree that?

21 MR. ALBARRACIN: I would agree with
22 that if we're talking about -- if the method of
23 remediation is going to be to dig it up and take it
24 off-site. This is the issue with when do we want

1 those samples taken. When you do inside
2 investigation, you don't know the extent of
3 contamination, you don't know how big the problem
4 is, were it goes.

5 Now, I know what I heard about the
6 90 percent, but is that -- are we going to be
7 remediating 90 percent of the sites in Illinois with
8 dig and hauls, probably not. So that's what it
9 comes down to.

10 When do you know what you're doing
11 for corrective action?

12 UNIDENTIFIED SPEAKER NO. 1: My answer
13 to that is by the data that's being developed as we
14 proceed. If I have some heavily contaminated soil,
15 it demands a dig and haul or something else. I
16 mean, it's a decision as a professional that I'm
17 dealing with all the time, and it's driven by the
18 data that's being generated in the field. That's
19 all.

20 HEARING OFFICER TIPSORD: We've got a
21 question at the back of the room?

22 MR. GOODIEL: Russ Goodiel, Applied
23 Environmental Solutions.

24 Going back to revisit the 45, the

1 extension to the 45-day report, if you take your
2 samples and the samples of (inaudible) and -- so
3 you've not really addressed what that report
4 involved, but have you addressed the pay schedule
5 for that report, because it was going to actually
6 serve as a PD certification correct action report.
7 What is the pay schedule for the placement of that
8 report.

9 MR. CLAY: I think it was \$4800 plus
10 an additional \$500 and it's completion report as
11 well.

12 HEARING OFFICER TIPSORD: Let's go
13 ahead and move on.

14 MS. HESSE: With respect to the amount
15 of investigation you're allowing during the early
16 action activity, it appears in the regulations
17 you're proposing to cut it off as soon as you hit
18 the water table; is your proposal then to find out
19 if the water itself is contaminated and to wait and
20 do that as part of the site investigation?

21 MR. ALBARRACIN: Yes, that's part of
22 Stage 1, which is prescribed in the regulations, in
23 the proposed regulations at this time. And so at
24 that point you would have -- when you finish

1 Stage 1, you would have one underground monitoring
2 well near the most contaminated area, potentially,
3 the source, and, 4,200 feet away or the property
4 behind it, so the groundwater would also be
5 monitored. I mean, you would have some sampling to
6 know whether it's contaminated or not.

7 MS. HESSE: And, in your proposal,
8 that would be two separate mobilizations?

9 MR. CLAY: It wouldn't have to be.
10 See, that would all -- the Stage 1 would be done
11 under the proposal without coming to the Agency for
12 prior approval. So if it's -- obviously, it's
13 contaminated under the early action, Stage 1, and
14 have your results come back and half the side walls
15 weren't contaminated but these others were, then
16 there may be an issue of what gets reimbursed, but
17 through field experience you know it's contaminated,
18 then you could do that, I assume, in one
19 mobilization.

20 MS. HESSE: But under the early action
21 rules, it limits drilling without the 15 feet or if
22 well water is encountered, whichever is less?

23 MR. CLAY: Correct.

24 MS. HESSE: Would you agree that

1 there's maybe a little bit of an inconsistency?

2 MR. CLAY: I don't understand the --
3 what's inconsistent?

4 MR. TRUESDALE: Maybe I can help --

5 MR. ALBARRACIN: The 15 foot that
6 you're quoting, are you quoting that from the
7 samples along a piping run?

8 MS. HESSE: That's, for example,
9 samples along a piping run, there's other places
10 where it talks about drilling to a depth of 30 feet
11 or until groundwater is encountered where you're
12 closer to the tank, and it talks about going till
13 groundwater, bedrocks, whichever is less, so it
14 appears that in the section for early action you're
15 limiting the extent of billing that is allowed so
16 that if you're stopping at the top of the
17 groundwater, my question is, how are you going to
18 know if groundwater is -- through your initial --

19 MR. CLAY: Well, I mean, again, you
20 could do it under the 1, I think it's typically
21 going to be 2 mobilization, but if it -- depending
22 then on the site conditions, it's obvious it's
23 contaminated, but I guess normally it would be 2
24 mobilization, but it's not required in 2

1 mobilization, I think that's what your initial
2 question is.

3 HEARING OFFICER TIPSORD: Is it a
4 question, Mr. Truesdale?

5 MR. TRUESDALE: I think so. I think
6 so. And just going back to the same thing, I guess
7 I don't -- the inconsistency I think that she was
8 discussing is some items you're referring us to rely
9 on our professional judgment and other items we're
10 not to do that, and I guess there's -- I have some
11 confusion about -- it's not clear when we're to rely
12 on professional judgment to reduce the number of
13 mobilizations or when we can legitimately rely on
14 professional judgment versus when we shouldn't
15 legitimately rely on professional judgment. I'm
16 getting both sides and it's just not clear to me.

17 HEARING OFFICER TIPSORD: Anything
18 further on Subpart B?

19 MR. RANGUSO: Bob Ranguso with Marlin
20 Environmental. I think a lot of the confusion where
21 questions are arising from is the fact that in the
22 last two years I'm wondering why the Agency has gone
23 away from their last 15 years of experience doing
24 investigations on LUST sites. These rules and some

1 of these ideas that we're debating technicalities on
2 are issues that are things that people with 15 years
3 of experience should not be debating anymore. We've
4 learned we're assailable or (inaudible), we've
5 learned what we've done over the last few years and
6 I'm just wondering what has changed within the
7 Agency that they're trying to cookie-cutter geology
8 and studies of sites compared to what we were doing
9 a few years ago or five years ago with site
10 classification? What has changed in the last two
11 years?

12 MR. CLAY: What has changed is we're
13 seeing what we perceive to be more and more abused
14 submitted, and we will providing examples of those
15 for the next hearing.

16 MR. RANGUSO: That's the primary
17 reason for justifying where our borings are placed
18 in the Stage 1, 2, or 3 mechanism; is that what
19 you're saying?

20 MR. CLAY: Stage 1, 2, and 3 was
21 proposed by consultants as a way of, one, getting
22 more information by having a Stage 1, which is
23 approved basically in the rules. There's no agency
24 approval, you know, and to do that, you need to be

1 prescriptive, I think, but it's a way of getting
2 more information before you ever come to the Agency
3 for approval of the site investigation under Stage
4 2, okay, was suggested by a consultants.

5 The second thing is by doing the
6 Stages, it's a mechanism for -- they used to approve
7 the previous stage so that the owner and operator
8 can get reimbursed. Currently, the owner and
9 operator gets reimbursed for site investigation
10 activities once their site investigation completion
11 report has been submitted.

12 Well, it's a very complicated
13 site, they're talking about contamination, there's
14 several submittals to the Agency, and we take the
15 maximum time allowed by statute and regulations,
16 and, you know, you can be talking over a year. So
17 this is a mechanism to get the consultants and the
18 owners and operators and ultimately their
19 consultants' paid along that process after
20 completion of Stage 1, after completion of Stage 2,
21 after completion of Stage 3, so those are the two
22 main reasons for putting in the three stages.

23 MR. RANGUSO: Has the Agency done any
24 predictions, for instance, some of the models that

1 you created so far of what a typical project might
2 look like and estimated much additional increase in
3 speed in cost savings will be conducted by these new
4 regulations?

5 MR. CLAY: Well, I mean, it's not a
6 cost savings as far as the amount approved, it's
7 more of a fewer amendment, if you will, which
8 ultimately results in less consultants who are
9 having to put together those amendments. We've got
10 some examples, an example over there as far as any
11 detailed study as far as how much time we may have
12 saved and we didn't do that.

13 MR. RANGUSO: But earlier you did say
14 part of the reason this was coming through was to
15 speed up investigations of UST sites in the state of
16 Illinois as well as produce costs from Illinois?

17 MR. RANGUSO: Yeah, I mean, the
18 reduced cost comes from the quicker remediation
19 process, but -- and then, also, if the consultants,
20 as part of these rules, know what we're looking for,
21 have a better idea of what we're looking for, a
22 better idea of what they're getting paid and that
23 generates less amendments, a lot of consultants,
24 like I said before, wait for an approval of their

1 budgets prior to doing work so there's less
2 submittals and the work can proceed in a more timely
3 fashion.

4 MR. RANGUSO: But the answer is that
5 you have not done any -- look at what that cost
6 savings or what that time frame savings is going to
7 be, that's not what you -- it's just a feeling?

8 MR. CLAY: I think there's without a
9 doubt some cost savings when there's fewer
10 amendments required to be submitted, and, you know,
11 you're not waiting for two or three amendments 140
12 days on each one, I think there's obviously some
13 time saved.

14 MR. RANGUSO: In developing the
15 stages of investigation, Stage 1, 2, and 3,
16 my understanding is that was done with the
17 recommendations of the Council of Consulting
18 Engineers; is that correct?

19 MR. CLAY: Consulting Engineers
20 Council of Illinois.

21 MR. RANGUSO: Are the meeting minutes
22 available from that meeting?

23 MR. CLAY: I don't think we have -- I
24 don't have minutes personally, and the --

1 MR. RANGUSO: I would like to request
2 the Board to obtain the meeting minutes so that the
3 public would understand exactly what went on in that
4 meeting?

5 HEARING OFFICER TIPSORD: The Board --
6 if Mr. Clay doesn't have them, we would have to ask
7 if anyone is here who's a member of that group that
8 might have minutes --

9 MR. TRUESDALE: There was a proposal
10 that was submitted and documented, I think that
11 would be. There's a volume of information.

12 HEARING OFFICER TIPSORD: Then I would
13 ask that anyone who might have that available to
14 present that to us, it would be wonderful.

15 MR. TRUESDALE: I probably have a
16 portion of it with me right now.

17 HEARING OFFICER TIPSORD: If that's
18 the case, Mr. Truesdale, if you're planning on
19 testifying in Bloomington on May 25th, if you want
20 to wait and just present all of it as a part of your
21 testimony, would that be okay?

22 MR. TRUESDALE: That would be fine.

23 HEARING OFFICER TIPSORD: Thank you
24 very much.

1 And you had a question?

2 MR. TRUESDALE: Probably. I usually
3 do.

4 HEARING OFFICER TIPSORD: And did you
5 have any other questions? Okay. We'll go ahead and
6 move on to Subpart C since I think we've already
7 sort of gotten into that in our discussion of early
8 action and site evaluation.

9 Are there any questions on Subpart
10 C? Mr. Rieser?

11 MR. RIESER: Relating to Section
12 327.300(b), again, this is following up on
13 interaction between TACO and how TACO relates to
14 activities under the revised proposal provision.

15 At the end of (b), there is --
16 and (b) provides, as I understand it, for an
17 owner/operator to sort of proceed with a type of
18 that remediation of their property including
19 additional groundwater work as required under this
20 regulation of additional work for groundwater wells.
21 But then it's followed by a Board note that says
22 operators or owners proceeding under Subsection B
23 are advised that they are not entitled to completion
24 activities in accordance with Subpart B, and the

1 question is, why not?

2 MR. CLAY: You mean the change from
3 are not instead of may not be?

4 MR. RIESER: Correct.

5 MR. CLAY: This is a situation where
6 they basically just continue today after early
7 action. Beyond the early action, the amounts sought
8 on early action and continue today because they feel
9 they've remediated -- take their closure samples and
10 submit their closure. In that case, they didn't
11 define the extent, you know, of the soil and
12 groundwater for soil boring in monitoring wells, so
13 I'm not sure how -- we didn't know how we would,
14 this May, if it would ever come into play. If you
15 didn't do that, we're not going to let you define
16 the extent with a backhoe.

17 MR. RIESER: Well, I guess my
18 question right off the bat is I don't see how it's
19 limited to digging holes. It's an owner/operator
20 refuses to conduct remediations by the remediation
21 objectives in 732, which I -- my recollection is
22 those brought in the TACO regulations of the group
23 path, although we'll get to that, but any of the
24 other TACO issues, and I assume that you wouldn't

1 find that somebody had satisfied those requirements
2 unless they had, in your determination, defined the
3 extent of contamination without doing it. So I
4 guess I'm still not clear on why they categorically
5 may not obtain reversal. And I understand may
6 not be to my understanding that language that has to
7 do with hostility that the budget wasn't
8 previously -- but now we're seeing categorically
9 cannot get those costs. Again, the question is why
10 not?

11 MR. CLAY: Again, it goes back to just
12 not doing a site classification. I mean, there's --
13 they've opted to whether it's dig and haul or
14 anything else, yeah, they'll probably have to do
15 some sampling to show the Agency the remediation
16 objectives, but they're not doing site
17 classification and then corrective action the way
18 the regulations are set up for reimbursement.
19 They're just doing something right after early
20 action, no site classification, you know -- we
21 didn't envision -- if someone was going to do what
22 you're saying, they probably did site investigation,
23 you know, and then developed some remediation plan
24 and we just wouldn't see him going in and doing ORC

1 injection right after early action and expecting to
2 get paid for it?

3 MR. RIESER: But wasn't the original
4 purpose of this -- well, this was part of the
5 original -- well, was part of the rules after 742
6 was adopted with the purpose of this to allow people
7 to exit the site classification program mandated by
8 the statute, go directly to TACO and get a TACO
9 closure by exclusion pathways or taken some other
10 action as far as TACO, is that what this was for?

11 MR. CLAY: I have to check. I think
12 300(b) was in there from the very beginning in '93,
13 and it was meant -- it was to not prohibit somebody
14 from going ahead and -- if they want to go ahead and
15 just dig up until they get clean as part of their
16 tank excavation, not prohibit them from doing that,
17 having to -- and at the time do a 50-foot boring
18 under Method 1 and get that information back and,
19 you know, reuse -- it was a method to -- they wanted
20 to go ahead and dig up the contamination without
21 defining the extent, without classifying the site,
22 they can do so, but then put them on notice that
23 we're going to be able to reimburse them.

24 MR. RIESER: But they wouldn't have

1 been deemed to complete it unless they submitted a
2 corrective action completion report but not the
3 requirements, I assume that would not meet those
4 requirements from 300(b), that corrective action
5 completion report, unless the Agency determines that
6 they have sufficiently identified the scope of
7 contamination so they could determine that the
8 corrective action is complete?

9 MR. CLAY: But you could dig up, you
10 know, a thousand yards and maybe you only need to
11 dig up a hundred yards, I mean, it doesn't mean that
12 you don't have a clean hole, you know, with clean
13 samples around the perimeter and the bottom, but it
14 doesn't mean you went beyond the minimum
15 requirements either.

16 MR. RIESER: But then why is it
17 categorically excluded for reimbursement, if I
18 understand, people have to justify their costs, this
19 Board note categorically excludes reimbursement for
20 whatever people under this section?

21 MR. CLAY: I'm sorry. Could you just
22 repeat that?

23 MR. RIESER: Sure.

24 I guess the fundamental question

1 is why are the activities categorically askew? It's
2 not a question of, well, we'll pay what's
3 reasonable, it's if you do this, you will not get
4 reimbursement.

5 MR. CHAPPEL: There's no way for us to
6 determine what was reasonable once the dirt is gone.
7 If you remove four feet of dirt under early action
8 and the next report we get shows you've removed a
9 thousand feet and it's now clean, we have no way of
10 knowing between that four feet and a thousand feet
11 what amount was or was not cleaned. All we have is
12 a report showing you removed that thousand feet. It
13 meets the closure requirements that final excavation
14 is clean and you can get an NFR, but for purposes of
15 reimbursement between that four feet and 1,000 feet,
16 I have no idea where it stopped being dirty and
17 started being clean.

18 MR. CLAY: And we saw no scenario
19 where you would do this and we would make the
20 decision, oh, yeah, you're right. This is something
21 that we could define and the may kicks in. We just
22 didn't see it. I don't think we -- we hadn't
23 reimbursed anybody under the 300(b) revisions --

24 MR. RIESER: Had you rejected

1 reimbursement requests submitted on 300(b)?

2 MR. CLAY: Sure. Yes.

3 MR. RIESER: And the basis for the
4 rejection was that it was impossible to determine
5 the reasonability of the cost?

6 MR. CHAPPEL: No.

7 MR. CLAY: It was that they cleaned up
8 under 300(b) and, you know, we pointed to the Board
9 note.

10 MR. RIESER: So there may not be?

11 MR. CLAY: Right. And we don't think
12 you are eligible because you didn't do
13 classification, you didn't do --

14 MR. RIESER: So even if somebody
15 submitted data that documented why they took the
16 approach that they did, and, remember, it's not just
17 dig and haul, it could be anything, even if they
18 submitted data as to why that approach was the most
19 reasonable approach as to why those costs were
20 testified, they'd still reject you?

21 MR. CLAY: There's also, under Z,
22 732.606(z), it's as an ineligible, if you clean up
23 under 300(b), it's not eligible for reimbursement,
24 so -- Brian pointed out that it's a matter of being

1 consistent too. I mean, that wording hasn't changed
2 where we said it's clearly an ineligible item and
3 that we're just making that Board note consistent
4 with that.

5 MR. ALBARRACIN: And I will add that
6 when that happens, another concern is that if the
7 site was classified -- if they were in the
8 classification crowd and the site was classified as
9 NFA or low priority, that work would not have been
10 required under that classification.

11 MR. RIESER: My question would be --

12 BOARD MEMBER JOHNSON: Before you
13 leave, to me, the question becomes is there any
14 conceivable instance where the owner-operator
15 preceding under Section (b) might be reimbursed for
16 costs incurred after completion, if the answer to
17 that is no, then that's an appropriate Board note,
18 and if the answer is yes, then you ought to go back
19 to the wording that you had previously.

20 MR. CLAY: Yeah, I think that's -- the
21 answer is that there is no way that can be
22 reimbursed. For example, you have to do
23 classification. You're assuming that this is a high
24 priority site. If you didn't do classification --

1 you know, you could be NFA or you could be low
2 priority. You're assuming that you're high priority
3 so you could do something else to remediate that,
4 and you haven't done classification. You don't
5 even know that at this point whether you're NFA, low
6 priority or high priority.

7 MR. RIESER: Would it be the case that
8 anyone using TACO under 732 who used TACO at this
9 point in the process would not be eligible for
10 reimbursement?

11 MR. CHAPPEL: At what point, at a
12 300(b) where they've dug it all out and it's clean?

13 MR. RIESER: My understanding of
14 300(b) is it simply says 732.408. It doesn't say
15 anything about the --

16 MR. CLAY: Yeah, I mean, I don't think
17 -- if someone does -- suppose they just do the --
18 you're saying they do the -- for example, the room
19 tank and the four-foot round tank and now they're
20 going to do TACO evaluation to get their NFR letter,
21 I would say in that case that they would not be
22 eligible for reimbursement for that TACO evaluation.

23 For example --

24 MR. KING: Hang on. Hang on.

1 We're going to take another look
2 at this and then we can sit down and have an
3 explanation that's a little more concrete. I think
4 we understand the gist of the questions being
5 raised. We'll come back at the next hearing and
6 have a more complete response. Thank you.

7 MR. RIESER: The other question really
8 probably goes to about where I was going, and it's
9 in Section 732.212 that talks about any halfway --
10 as opposed to -- in the 732 classification for our
11 enclosure pathway, if you do that, then this --
12 whoever does that has to -- this 732 and go on to
13 734; is that the correct reading?

14 MR. CLAY: That's correct.

15 MR. RIESER: So if you want to use
16 TACO and then use your pathways, for example, aside
17 from Chicago and its municipalities and everything
18 that is held at the groundwater level, you would
19 automatically have to go into 734, correct?

20 MR. CLAY: If you haven't completed
21 your -- yeah, site classification.

22 MR. RIESER: And if you go into 734,
23 are you automatically doing the -- staying the three
24 stage site investigation towards justifying a

1 pathway solution?

2 MR. CLAY: I would say yes.

3 MR. ALBARRACIN: That's correct.

4 MR. RIESER: So if you had a site
5 where -- again, ground water ordinance, the only
6 thing that identified soil contamination is -- the
7 only values you would see are the soil and ground
8 water numbers and you're seeing the data in such a
9 way that you realize you've got it all and you've
10 done your four feet and this is all that's left,
11 even in that circumstance you would be required to
12 do a three stage investigation?

13 MR. ALBARRACIN: No. If you have
14 defined the extent -- I mean, this is the premise,
15 if you have defined the extent so you know that it
16 doesn't go that far, you've somehow defined your
17 extent already, call it a Stage 1/Stage 2, whenever
18 that happens, you give somebody the completion
19 report and get an NFR letter based on industrial,
20 commercial, land use or whatever the case may be.

21 MR. CLAY: Excluding pathways?

22 MR. RIESER: But that would require --
23 soft of modifying the requirements of Stage 1
24 and Stage 2 standards that are written into

1 investigation standards or at least modifying them
2 so that they make sense in those circumstances?

3 MR. ALBARRACIN: Are you talking about
4 a side that some work has been done and now let's
5 say it's an older incident and now they want to
6 complete the process and -- so we don't know where
7 they are, we just stage --

8 MR. RIESER: That's one example.
9 That's entirely right. What's the answer to that?

10 MR. ALBARRACIN: The decision would
11 have to be made on the data that has been obtained.
12 I mean, if you have sufficient data and, again,
13 we're talking in law firms that has defined the
14 extent, horizontally and vertically and you've
15 modeled and it doesn't go off-site, for example, you
16 can submit your completion report at that point and
17 say, I'm -- you know, I'm done. This is -- more
18 samples are needed. See, that -- it's hard to get
19 into --

20 MR. CLAY: Well, no. If more samples
21 are needed, you haven't defined the extent. And if
22 you define the extent, you can develop the radiation
23 objectives on TACO using all the tools at your
24 disposal under TACO and submit a completion report.

1 MR. RIESER: Why don't you define the
2 extent that you have performed the Stage 1 and Stage
3 2 investigations as they're described in the
4 regulations?

5 MR. CLAY: You can still do your type
6 of evaluation and submit your completion report. If
7 that's not clear, we'll look at that to make sure
8 that the intent is that you're opting in, we're
9 going to look at where you're at, you've already
10 done some site investigation work under 312 and you
11 opt into 734, we're going to look at where you're at
12 in that process and it may be, yeah, you just submit
13 a completion report and you're done. You need to
14 define the extent.

15 MR. RIESER: Well, even for a new
16 release, say, for whatever reason you have the data
17 that doesn't meet the -- it doesn't meet the Stage 1
18 and Stage 2 requirements, would that mean he'd have
19 to go back to Stage 1 and Stage 2 or would that be
20 acceptable?

21 MR. CLAY: It think that would be
22 acceptable. I mean, it would be acceptable. The
23 only question would be if that investigation work is
24 reversible, certainly you would be able to close out

1 at that time without doing Stage 1 and Stage 2.

2 MR. RIESER: Would it not be
3 reimbursable because it didn't meet -- it was less
4 than Stage 1 and Stage 2?

5 MR. CLAY: Well, I think it would be
6 reimbursable under -- if you were proceeding under
7 312, for example, and you collected some of that
8 work, that information under 312 and defined the
9 extent, it would be reimbursement under 312. Once
10 these rules are adopted and you start doing work
11 under 315 and, you know, when it says you have to
12 proceed under 734, that would be in question.
13 You've already done the work prior to these rules
14 requiring you to proceed in 734, then that, you
15 know, should be reimbursable. I'm not --

16 MR. RIESER: Well, I guess my question
17 is, as if you're in position to use the discretion
18 and judgment of some of these gentlemen that they're
19 talking about to say, okay, we've just -- you know,
20 I've done my early action, I've got a sense of what
21 I got there, I don't have -- not clean yet, but I
22 know another bunch of borings, you know,
23 appropriately placed because of what I'm seeing, I
24 can get the -- but that doesn't meet the very

1 prescriptive requirements of the Stage 1 and Stage 2
2 investigation, what I'm hearing is that that would
3 be significant -- that may provide sufficient data
4 to get the NFR letter, but it may not be
5 reimbursable because it doesn't meet Stage 1, Stage
6 2, even if it's less than what Stage 1 and Stage 2
7 require?

8 MR. CLAY: I think that's correct.

9 MR. ALBARRACIN: Again, I mean, I go
10 to the bottom line as I see it and I just mean
11 it's -- our position is if you have the extent
12 defined, that's what we're concerned about. You
13 have the extent defined, now you want to use TACO
14 and get an NFR letter, that's fine. Maybe you
15 did -- you know, now we're getting into scenarios --
16 fewer borings than Stage 1 or who knows, but if we
17 had the extent defined vertically and horizontally,
18 you can get an NFR letter. And paying for that is
19 just a matter of figuring out how many feet you
20 drill, how many borings, why are you charging for
21 preparing a completion report and we have the amount
22 in here.

23 MR. RIESER: So -- I'm hearing a
24 different answer than the one that I just heard,

1 which is that it would be reimbursable just on a
2 straight, you know, 100 feet or whatever, an
3 absolute cost, and just because it didn't meet the
4 requirements of Stage 1, Stage 2, it could still be
5 reimbursable so long as it --

6 MR. ALBARRACIN: That's correct.

7 MR. RIESER: And Mr. Clay believes
8 that?

9 MR. KING: Mr. Clay had to go to the
10 bathroom.

11 HEARING OFFICER TIPSORD: I was going
12 to say, perhaps this might be a good time to take a
13 ten-minute break and we'll come back and pick it up
14 with Mr. Rieser and so on.

15 (Whereupon, a break was taken,
16 after which the following
17 proceedings were had:)

18 HEARING OFFICER TIPSORD: And,
19 Mr. Rieser, you were asking questions on Subpart C?

20 MR. RIESER: Well, I just wanted -- my
21 next question is to clarify what seemed to be a
22 dispute --

23 MR. KING: When we come back for the
24 next hearing, I think we've got a fairly precise

1 question by Mr. Rieser, if we can come back and
2 answer that at the next hearing, we'll get through
3 it a little better.

4 HEARING OFFICER TIPSORD: All right.

5 MR. RIESER: My next question is
6 really on that Stage 1, Stage 2, and Stage 3
7 investigation, what is the purpose of the
8 prescriptive nature of those requirements?

9 MR. CLAY: Well, Stage 1 is
10 prescriptive because it's something that's done
11 without ever coming to the Agency, without Agency
12 approval, and it was again suggested by consultants
13 to get more information prior to coming to the
14 Agency for the first time with a site investigation
15 plan and so, you know, we felt we needed to be, you
16 know, fairly prescriptive as far as, you know, the
17 number of wells and borings and that type of thing.

18 MR. RIESER: And Stage 2 is also
19 fairly prescriptive in terms of borings and wells
20 and things of that nature?

21 MR. CLAY: I don't think it is.

22 I mean, it really just talks about
23 going out from the borings that exceed the mediation
24 objectives and early action in Stage 1, but it

1 doesn't talk about distances, it doesn't talk -- I
2 mean, it talks about the sample, the way we found
3 the contamination of previous borings.

4 MR. RIESER: Do you think that having
5 a Stage 1, Stage 2, Stage 3 with intermediate stops
6 per Agency involvement between two and three, are
7 you concerned that that might not be consistent with
8 your goal of streamlining this process?

9 MR. CLAY: There would be nothing to
10 prevent someone, for example, from submitting a
11 Stage 2 and Stage 3 at the same time. The reason we
12 broke it up that way is to allow for reimbursement
13 multiple times during the same investigation
14 process. So, you know, once the results of your
15 Stage 1 are submitted and your Stage 2 plan and
16 the Agency approves them, you can submit for
17 reimbursement for all that Stage 1 work. Once you
18 submit the results of your Stage 2 and your Stage 3
19 plan, you can submit for -- if we approve it, you
20 submit for reimbursement, all of that work. If you
21 wanted to do it Stage 2 and Stage 3 together, that
22 would be fine, you just wouldn't be reimbursed until
23 your site investigation completion report.

24 MR. RIESER: Do you have an

1 understanding of why the consultants submitted this
2 proposal to you?

3 MR. CLAY: Well, I think two factors.
4 One, because in 732 now, under Method 1 or Method 2,
5 I think it was envisioned back then that, you know,
6 this is a classification, this is something --
7 you're not defining the extent. It's going to be
8 something that's done over a fairly short period of
9 time and it was put in there that you couldn't be
10 reimbursed for any site classification work until
11 such time that your site classification completion
12 report was approved.

13 With 312 coming in, where you're
14 defining the full extent of contamination, actually,
15 the consultants found that, well, this takes a
16 little while, and it could take, you know, six
17 months, a year, whatever, to define the extent the
18 Agency approves and so forth. So that's waiting a
19 lot of time for the owner and operator to get paid,
20 so that was one reason. And then the Stage 1, I
21 think, was to get more information before ever
22 coming to the Agency.

23 MR. RIESER: The statute which
24 rules are responding to in terms of the site

1 classification seem to envision a process that
2 mimics the site remediation program in terms of
3 having the site investigation, investigation report,
4 corrective action report, why did you seem to get
5 away from that sort of simpler process?

6 MR. CLAY: It really -- you know, the
7 site remediation program doesn't have a
8 reimbursement aspect, so, again, it was to address
9 more being able to pay -- reimburse owners and
10 operators sooner rather than later for site
11 investigation costs. Other than not having those
12 interim approvals by the Agency, we didn't see how
13 we could do that.

14 MR. RIESER: Thank you.

15 HEARING OFFICER TIPSORD: Mr.
16 Truesdale?

17 MR. TRUESDALE: I'm trying to stay
18 just 732 Subpart C. 306(b)(4) talks about owner
19 operators who defer site classification under
20 Subsection A, the section you just submitted, the
21 report certified by a professional engineer, a
22 professional geologist demonstrating a number of
23 things which groundwater contamination cannot exceed
24 the stringent Tier 1 remediation objectives for the

1 contaminant as a result of a release of 742 shows
2 the groundwater contamination in the remediation
3 objective and the appropriate water supply levels
4 that are impacted as a result of the release, I
5 guess my question is, how are we supposed to make
6 those determinations at that stage without
7 conducting some of the site investigation or site
8 classification activities. There's no provisions
9 for collecting site specific Tier 2 numbers to
10 conduct modeling, and we're talking about only soil
11 samples, not evaluating them for exceedences, I
12 would assume that that could be done with just the
13 migration of groundwater parameters, but I don't --
14 it's not clear what the Agency would accept, I
15 guess, as supporting documentation in that report
16 that we would have to submit. And I guess then
17 along with that where would that be included in the
18 reimbursement or costs, because I didn't see that
19 either?

20 MR. CLAY: Well, I think the intent
21 here is that you would have to define the extent of
22 contamination.

23 MR. TRUESDALE: So you'd have to do
24 site investigation in order to defer site

1 investigation?

2 MR. CLAY: To some degree, yes, that's
3 correct. But I'm not sure from the consultant side.
4 I don't know how you certify that this is protective
5 of human, health, and environment without finding
6 the extent of contamination.

7 MR. TRUESDALE: How is it applicable?
8 I mean, I don't understand where this would fall
9 because you would essentially have to do site
10 investigation in order to defer site investigation?

11 MR. CLAY: That's correct.

12 BOARD MEMBER RAO: Now, when it comes
13 to determining if there's groundwater contamination,
14 is that only on-site or -- we just need information
15 if there's any contamination outside the property
16 line?

17 MR. CLAY: I think it's -- any
18 groundwater contamination, period.

19 BOARD MEMBER RAO: And when you talk
20 about using a model to determine whether there will
21 be any groundwater contamination, will that also
22 apply to investigating whether any other portable
23 water supply wells are impacted, is that done
24 through modeling or do you have a good sample of any

1 of these wells or --

2 MR. CLAY: It's not envisioned that
3 you'd have to sample the wells. What we would
4 envision is that you would model the migration of
5 the contamination soil to groundwater and then model
6 it horizontally and if it were in the setback of one
7 of those pothole wells or model-feeding setback,
8 then we would not allow deferral.

9 BOARD MEMBER RAO: And from your
10 testimony, I understand that these provisions were
11 proposed to replace that prior, you know, threat to
12 human health standard that was there in the rules?

13 MR. CLAY: Correct.

14 BOARD MEMBER RAO: This purpose
15 of requirements (b) just with groundwater
16 contamination, is there any concern regarding soil
17 contamination, specifically, on-site?

18 MR. CLAY: I think under (b), my page
19 44 in 306(b)(5). I guess are you talking about --

20 BOARD MEMBER RAO: Yeah, it talks
21 about --

22 MR. CLAY: -- protecting like
23 inhalation or ingestion exposure routes?

24 BOARD MEMBER RAO: Yes.

1 MR. CLAY: I guess that would not
2 prevent them from deferring classification. It was
3 anticipated that the owner and operator be aware of
4 that and, you know, they would be able to make that
5 determination whether or not they want it deferred.

6 BOARD MEMBER RAO: Okay.

7 BOARD MEMBER LIU: Along the lines of
8 human exposure routes and migration pathways, I was
9 wondering if you wouldn't mind if I asked a question
10 about the new role of the licensed professional
11 geologists in this arena.

12 Are the principles of human health
13 exposure to petroleum considered part of the
14 generally accepted principles of geology?

15 MR. CLAY: I guess we're not in a
16 position to enforce the Professional Engineers Act
17 or the Professional Geologists Act, so I don't
18 really think that we're going to make that
19 determination. And we're basing where we've allowed
20 professional geologists to certify based on the
21 acts, but there also is a caveat that it, you know,
22 falls under what's allowed under your act being
23 certified.

24 BOARD MEMBER LIU: So in some

1 instances, it would be more appropriate for an
2 engineer perhaps to certify or a geologist perhaps,
3 but not necessarily interchangeable on an equal
4 basis all the time; is that correct?

5 MR. CLAY: Yes, that's correct.

6 BOARD MEMBER LIU: Thank you.

7 HEARING OFFICER TIPSORD: Mr.
8 Truesdale?

9 MR. TRUESDALE: I guess just on the
10 same lines, as a professional geologist,
11 professional engineer, I have degrees in both. I'm
12 a licensed professional engineer in Illinois and I
13 just received my license as a professional
14 geologist, I just became a licensed professional
15 geologist in Illinois, and the exam to become a
16 licensed professional geologist actually
17 surprisingly had a lot of information dealing with
18 contaminant transport, location -- well, obviously,
19 because a vast majority of geologists now work in
20 the environmental field, so, surprisingly, a lot of
21 the questions on the exam related to environmental
22 issues, just maybe to set your mind at ease a little
23 bit. But I feel the same way, I think that there
24 are certain criteria where I would feel more

1 comfortable as someone with a geology and an
2 engineering background have a geologist certified,
3 for instance, in site classification versus having
4 an engineer certify, such as in corrective action,
5 my opinion.

6 HEARING OFFICER TIPSORD: Thank you,
7 Mr. Truesdale.

8 MR. KELLY: Joe Kelly, USI. I have a
9 quick couple questions about the well survey. I
10 noticed that the proposed regulations are stating it
11 would be 2500 feet, instead of just being from the
12 side, it would be from all sides of properties that
13 are contaminated, correct?

14 MR. CLAY: That's correct.

15 MR. KELLY: So like on one side you
16 may be up against the side, the other side you may
17 be, just for demonstration purposes, a mile away, so
18 you would go another 2500 feet to the extent of that
19 farthest off-site property?

20 MR. CLAY: That's correct.

21 MR. KELLY: I think the way the
22 proposed rates are written there's additional
23 information being asked in terms of the well survey
24 which might include interviews or property

1 inspections and information in reference to door
2 hangers and things of that nature, is that an
3 additional scope of work to be in the site
4 investigation completion report as far as, you know,
5 the technical information itself and the payment of
6 that work?

7 MR. CLAY: In most cases, it's not
8 envisioned that a physical well survey would be
9 required. It would be -- as an example, if you've
10 got a subdivision adjacent to that site and you
11 contacted the utilities and half of them are
12 supplied with public water and the other half aren't
13 but they didn't show up on well survey either from
14 ISGS, well, I think we can assume that they're
15 getting their water from somewhere, and it's not
16 being delivered by the utility. So in those
17 situations, we would expect -- I mean, there would
18 be communication with the project manager. In those
19 situations, we would expect it.

20 In most cases, they're contacting
21 ISGS and contacting local utility, you know as a
22 phone call or a letter and we didn't see it as
23 overly burdensome, so, yes, that would be included.
24 If you got into a situation where there was, you

1 know, a significant amount of time because you had
2 the deep door hangers or the physical survey, that's
3 something that I think we would look at reimbursing
4 for the usual circumstances.

5 MR. KELLY: Part of the reason I'm
6 bringing that up is when you start doing them
7 off-site, it could Stage 3 and that's where you get
8 into some time, you know, going to courthouses.
9 Sometimes you don't look at who owns the property
10 and you got to find that out. You get into a lot of
11 extra initial hours because I know we're going to
12 get into Subpart H later, but, you know, the reason
13 I brought that up is if there were additional costs
14 incurred, you know, because the scope of work has
15 increased but the current pay schedule is based on
16 what the current scope of work is, now we've kind
17 of -- we've got an apples to oranges comparison
18 there.

19 MR. CLAY: Right, in most cases,
20 you're not going to have to do that, and in the
21 Tier 3 site investigation there is some -- you know,
22 there's expected to be some time for off-site access
23 and that type of thing in there. But, also, we
24 realize that, you know, if you've got a large plume

1 off-site, there may be situations where -- and you
2 have to go to, you know, 20 different properties,
3 well, that's not what we built in for the time to be
4 in access to 20 different properties.

5 HEARING OFFICER TIPSORD: Ms. Hesse
6 was next.

7 MS. HESSE: I'd like to go back up to
8 the Board note with respect to doing work under
9 734.310, and that's one of the references and
10 there's one specific portion of that I'd like to ask
11 you about at this point and that part is regarding
12 the application for payment must be submitted no
13 later than one year after the Agency -- and why was
14 the period of one year chosen?

15 MR. CLAY: We felt that was ample time
16 to get all the bills submitted, and we also wanted
17 to, you know -- we felt like we needed to put a
18 deadline so that from a management of the UST fund,
19 you know, standpoint, we knew what the outstanding
20 liabilities were in that time. I'm not sure why
21 anybody when they're owed money like that would not
22 want to get their bills in. When they complete the
23 project, now they want to get their bills in right
24 away. So we just felt like one year was a

1 sufficient amount of time.

2 HEARING OFFICER TIPSORD: Excuse me.

3 Before you go on, I actually have a follow-up on
4 that one-year issue.

5 You have that several places
6 throughout the rule that, you know, you have to have
7 all your bills submitted within one year of no
8 further remediation letter, but you also have
9 provisions in the rule that can't begin happening --
10 like I think the replacement concrete is one, until
11 the no further remediation letter had been issued,
12 is that one year enough time for those things to be
13 completed and still get in a reimbursement cost?

14 MR. CLAY: We felt it was, but, I
15 mean, that's -- you know, that's up for debate or --
16 we were looking for some finite date though rather
17 than, you know, you can submit them, you know, ten
18 years or whatever afterwards when, you know, we're
19 trying to manage the fund, make sure that, you know,
20 there's solvency of the funds maintained, and if you
21 have all these potential outstanding liabilities
22 that -- was it the -- the building for reimbursement
23 hasn't been, you know, deadlined, there is no
24 deadline and it's just a difficult situation from a

1 management standpoint.

2 HEARING OFFICER TIPSORD: Has that
3 been a real problem that you have bills coming in,
4 three, four, five, six years after no further
5 remediation on it?

6 MR. OAKLEY: Yes, it has, on some
7 occasions, adequate documentation we've had problems
8 with, but a lot of the cases invoices can't be
9 found, things of that nature.

10 HEARING OFFICER TIPSORD: Thank you.

11 MS. HESSE: Going back to the issue of
12 the no further remediation letter, are you aware
13 that with NFR letters there are situations where the
14 NRF letter may be void and further work needs to be
15 done?

16 MR. CLAY: I'm not sure --

17 MS. HESSE: Okay. For example, if a
18 concrete cap is put on top, typically -- and not
19 meaning to testify here, but typically, it requires
20 that the concrete be monitored, that cracks be
21 repaired and that other additional costs be
22 incurred, are you aware of that?

23 MR. CLAY: Yes, I am.

24 MS. HESSE: So it's quite conceivable

1 that there could be costs that are incurred after
2 the NFR letter is issued?

3 MR. CLAY: The costs incurred as a
4 result of maintaining a barrier are not an eligible
5 cost, so, yes, those barriers must be maintained.
6 If they're not maintained, an NFR could be voided,
7 but once the NFR is issued, no reimbursement is
8 eligible after that point, so...

9 MS. HESSE: What about the situation
10 where an NFR letter may become void where even
11 though you think you did a good site investigation
12 that something is subsequently found so that the NFR
13 letter would be void?

14 MR. CLAY: The position we'd take in
15 the past is you're no longer eligible for that
16 occurrence, the owner/operator. I mean, I think
17 that comes down to the professional engineer
18 certification or professional geologist
19 certification.

20 MS. HESSE: With respect to the
21 various stages of site investigation, at what point
22 would one look at, for example, the various types of
23 soil characteristics, there were other parameters we
24 need to look at if you wanted to do it under Tier 2?

1 MR. CLAY: You can collect your
2 Tier 2, you know, physical soil property data as
3 part of your site investigation, as part of your
4 corrective action, that could be reimbursed at any
5 point in the remediation process.

6 MS. HESSE: And is that type of cost
7 reimbursable?

8 MR. CLAY: Yes.

9 MS. HESSE: With respect to the
10 Stage 3 site investigation, which is off-site, what
11 happens if the vacant property owners won't allow
12 you access?

13 MR. CLAY: There are provisions under,
14 I think it's 410, for off-site access denial, and if
15 you take those steps and they're still -- the owner
16 and operator and the consultant are still denied
17 access, the Agency could still issue an NFR letter
18 for that occurrence even though there may be
19 contamination of off-site property. As long as you
20 meet the criteria outlined in 734.350 and 732.411.

21 HEARING OFFICER TIPSORD: Mr. Rieser?

22 MR. RIESER: Just a couple of
23 follow-ups. On the one-year limit on submitting
24 costs, what about the situations where you have a

1 highway access and as a result of highway activities
2 had to extend additional money for material for
3 reimbursement for the highway department for work
4 that they do and submit it after the one-year time
5 frame?

6 MR. CLAY: The way the rates read --
7 well, now, and with the proposed rules, any cost
8 after issuance of an NFR letter with a few
9 exceptions are not eligible for reimbursement. So
10 if there's highway work that needs to be done, the
11 agreement is between the owner and operator and the
12 highway authority.

13 MR. RIESER: In response to an earlier
14 question, you talked about the reimbursement for
15 work done to develop the Tier 2 information. I
16 believe in your addendum you proposed 734.140 that
17 addresses the development for remediation. Is it
18 correct that you could only get -- is it correct
19 that you could get -- only assured a reimbursement
20 if you propose a budget for doing the Tier 2, Tier 3
21 work prior to actually doing it?

22 MR. CLAY: You can get reimbursement
23 by putting it ahead of time or you could be
24 reimbursed if you go ahead and do the work and be

1 reimbursed at a later time.

2 MR. RIESER: So you can do it either
3 way?

4 MR. CLAY: Correct.

5 MR. RIESER: 734.140(c), it talks
6 about upon the Agency's approval, and it includes
7 development of remediation objectives in
8 accordance -- but, in fact, they could do that at
9 any time?

10 MR. CLAY: Correct.

11 HEARING OFFICER TIPSORD: Anything
12 further?

13 BOARD MEMBER RAO: I have a question
14 on 732.300(b)(3)(a). Under Subsection A, you
15 require that the owner and operator shall supply
16 water supply wells located at the site or within 200
17 feet at the site or within 200 feet of the site,
18 and, also, all community water supply was located at
19 the site or within 2500 feet, so there is a chart
20 given to the owner or the operator so they can
21 either locate the valve on-site or within a certain
22 distance?

23 MR. CLAY: I'm sorry. Can you say
24 that again?

1 BOARD MEMBER RAO: Yes.

2 If you read the rule, it gives the
3 option of either identifying the wells on-site or
4 within a certain distance.

5 MR. CLAY: It's meant to be both.

6 BOARD MEMBER RAO: It's meant to be
7 both?

8 MR. CLAY: Yes. If it's not stated
9 that way, it should be.

10 BOARD MEMBER RAO: So is the intent to
11 say that they shall identify the wells located at
12 the site are within a certain distance, whichever is
13 greater or both?

14 MR. CLAY: Well, I think it's both.
15 We didn't want to say 200 feet of the site and
16 someone read that as, well, they didn't include the
17 ones on-site or, you know, say -- well, obviously,
18 just say the ones on-site, we don't want to do that,
19 so we wanted to go within -- Kyle you want to speak
20 to that? I think he said in other Board rules where
21 it says or, it really means and/or; is that right?

22 MR. ROMINGER: It's somewhat identical
23 in substance rules.

24 HEARING OFFICER TIPSORD: That would

1 be identical in substance rules.

2 MR. ROMINGER: Right, that was the
3 intent of this here also.

4 HEARING OFFICER TIPSORD: Identical in
5 substance because we're adapting USEPA language
6 identical in substance.

7 BOARD MEMBER RAO: Even if it doesn't
8 make clear sense, we allowed those rules.

9 MR. ROMINGER: But there's a
10 preference to have like an and/or, we can do that.

11 HEARING OFFICER TIPSORD: Well, unless
12 you mean or. But what that just said is -- Mr. Clay
13 just stated that you want both. I was on-site and
14 everything was in 200 feet, so you don't mean or at
15 all, you mean all of these.

16 MR. ROMINGER: Yeah.

17 HEARING OFFICER TIPSORD: And would be
18 preferred.

19 MR. ROMINGER: Okay.

20 MR. TRUESDALE: And distances can act
21 unfavorably due to maximum setbacks for private
22 roads versus -- I think that's where the distances
23 originate actually.

24 MR. CLAY: Yeah, that's the setbacks,

1 distances, but we're really looking -- we're
2 concerned about both wells on-site and within those
3 distances.

4 BOARD MEMBER RAO: And the way you
5 measure those distances, is it from the excavation
6 or from the property line?

7 MR. CLAY: We've changed that in these
8 rules to be from the property line, from the site.

9 BOARD MEMBER RAO: Thank you.

10 HEARING OFFICER TIPSORD: Mr. Cook?

11 MR. COOK: Just as a broad
12 characterization, under these proposed rules, the
13 number of data points should be collected to provide
14 for your decision-making, would you characterize the
15 number of data points as being greater than, less
16 than, equal to the number of data points that should
17 be presented to the Agency under the existing
18 regulation?

19 MR. CLAY: When you say data points,
20 you mean --

21 MR. COOK: If you have sampling
22 activities that are early action proceedings under
23 site investigation --

24 MR. CLAY: I characterize it as

1 greater because there were actually identifying data
2 points to identify the three dimensional, which a
3 lot of these we hadn't done in the past. For
4 example, now we're saying, you know, you've got ten
5 feet of overburn that's not contaminated, pull that
6 off, set it aside and backfill it, where in the past
7 everything, you know, just standard practice when we
8 reimburse. You just dig up the whole thing and
9 dispose of it. Now we would expect by taking the
10 multiple samples in each boring, setting that aside
11 and putting it back to backfill.

12 MR. COOK: Can you quantify in general
13 terms the increase in the scope, the increased
14 number, and you estimate that it would be a 25
15 percent increase in data points at a five percent
16 increase, do you have a quantification that you
17 provide?

18 MR. CLAY: I don't have a specific
19 number, no. We didn't look at it from that
20 standpoint.

21 MR. COOK: On a related matter, as the
22 Agency, because you have an increased number of data
23 points, has the Agency evaluated additional
24 man-hours necessary to comply with these proposed

1 requirements as compared to current regulations?

2 MR. CLAY: We took that into affect
3 when we looked at the amount of time it would take
4 for oversight and that type of thing, and that was
5 taken into account given the numbers we -- you know,
6 as far as, you know, taking so many samples from the
7 borings, the number of borings, and that was all
8 taken into account.

9 MR. COOK: Additionally, potential
10 additional reporting time and/or review time to
11 analyze those results relative to the degree, the
12 extent of contamination, there's additional time
13 required for that?

14 MR. CLAY: You know, it's more -- it's
15 the number of samples taken for borings, not
16 necessarily the number of borings, but, yes, that
17 was taken into account.

18 MR. COOK: And can you share with us
19 the estimated increase in hours that were added to
20 the Subpart H figures to accommodate the increased
21 scope of work between these regulations, these
22 proposed regulations, and what's currently in place?

23 MR. CLAY: I mean, I -- we can talk
24 about that in Subpart H. I mean, it should have

1 been covered to some degree. I mean, we didn't look
2 at it as comparing, well, 732 and 734, it was, well,
3 what could be done for oversight by a consultant in
4 this amount of time and this number of borings,
5 samples. And so, you know, when we go through
6 Subpart H, on the specific item in question, we can
7 talk about that.

8 MR. COOK: Can you just acknowledge
9 that the historical data that the Agency has because
10 these activities provided for within the scope of
11 work that would be expecting for the proposed
12 regulation is not very clear in historical
13 regulations, that information relating to the cost
14 is also not in you historical cost data that the
15 Agency has?

16 MR. CLAY: Well, the only difference
17 that I can think of as far as taking the sample is
18 taking the time to take the additional sample out of
19 the core. I mean, you're still, you know, doing
20 your -- you're still logging the boring, you're
21 still paying the payments per sample for analytical,
22 so there's no -- I mean, no additional costs were
23 taken into account there, it was just for taking
24 that, you know, multiple samples per boring that may

1 or may not be taken down, so...

2 MR. COOK: So if I understand this
3 correctly, then the additional borings that you
4 described in the example where there was a clean
5 overburn that needed to be characterized in order to
6 avoid those costs would be levied against the fund
7 for removal and disposal of the overburn, you
8 mentioned that you thought that that probably had
9 happened in the past --

10 MR. CLAY: I'm sure of it.

11 MR. COOK: So the purpose of these
12 additional borings is to avoid situations like that
13 where we just are going to have to try and identify
14 what costs might be associated because that's not
15 included or it is, I'm a bit confused, in the
16 historical Agency cost data? I'm a bit confused.

17 MR. CLAY: The cost to do the sampling
18 and collect those samples are all included.

19 MR. COOK: As it relates to
20 professional review time, which is included in that
21 review time of the data, is that included in the
22 rates for the reports?

23 MR. CLAY: Yes.

24 MR. COOK: So we have a situation

1 where we've got an increased scope of work that we'd
2 be reviewing more data, more analytical results that
3 we don't know what costs might be associated with
4 that because we don't have any history? That's a
5 question.

6 MR. CLAY: The costs are based on the
7 time table it would take to do these specific tasks.
8 You know, as far as -- I think what you're trying to
9 get at is -- or you're asking us to do a lot more
10 evaluation than you're basing on historical numbers.
11 That's not the case. We're basing it on the tasks
12 that we're asking the consultant to perform.

13 MR. COOK: That task that consultants
14 we asked to perform, these particular tasks, have
15 any of the trade associations that participated in
16 this rulemaking, and many of them seeing these
17 tasks, is it additional data points that was
18 required in their final form as presented in the --

19 MR. CLAY: Well, I mean, they've seen,
20 you know -- or they provided a list of this is what
21 goes into the site investigation plans, what goes
22 into the site classification completion report, this
23 is what goes into the corrective action plans, what
24 goes in the corrective action completion report, and

1 all of those -- I mean, the site investigation
2 completion report included an evaluation of
3 analytical data, so, yes, it was included in what
4 the consultant --

5 MR. COOK: Some analytical data?

6 MR. CLAY: Yes.

7 MR. COOK: And the cost to compile the
8 completion reports?

9 MR. CLAY: Well, I mean, you gotta
10 remember there is variables too. I mean, in some
11 sites, you're gonna have -- you may have -- define
12 the extent with eight borings and other sites you
13 may define the extent as 40 borings. That doesn't
14 mean that it took five times as long to do one
15 report versus the other.

16 MR. COOK: Do you have an estimate how
17 much longer it might take?

18 MR. CLAY: No.

19 MR. COOK: You mentioned variation?

20 MR. CLAY: I mean, there's a
21 variation, but, I mean, you know, we didn't get into
22 that kind of detail.

23 MR. COOK: And we do have, just to
24 clarify, we do have a specified maximum payment

1 amount in the absence of that detail?

2 MR. CLAY: That's correct.

3 HEARING OFFICER TIPSORD: Mr.
4 Truesdale?

5 MR. TRUESDALE: I guess my question is
6 similar.

7 In the CECI group, we recommended
8 that both Stage 2 and Stage 3 could not be assigned
9 lump sum costs because of that variability, and in
10 addition to the additional time for collecting
11 samples, you also have shipment time and tabulation
12 evaluation of the data that we didn't feel could be
13 quantified. That variability could be quantified
14 and assigned a lump sum for every Stage 2 and
15 Stage 3 situation.

16 So I guess my curiosity is how did
17 the Agency determine how to address that potential
18 variability in those lump sum costs?

19 HEARING OFFICER TIPSORD: Mr. Clay,
20 before you answer, could you define what CECI means?

21 MR. TRUESDALE: The CECI committee
22 that they reference in their testimony.

23 HEARING OFFICER TIPSORD: Consulting
24 engineers?

1 MR. TRUESDALE: Yes.

2 MR. CLAY: Could we answer that part
3 in Subpart H when we get to --

4 HEARING OFFICER TIPSORD: Yes, that's
5 fine.

6 MR. CLAY: Sorry.

7 HEARING OFFICER TIPSORD: No, that's
8 okay. We were venturing off into costs.

9 Anything else on Subpart C?

10 Moving on to Subpart D, correct action.

11 HEARING OFFICER TIPSORD: Mr. Kelly,
12 we'll start with you.

13 MR. KELLY: I have some technical
14 questions here provided in that Subpart.

15 It talks about the cost of
16 proposed -- actually, comparing -- how is
17 remediation compared to other methods not just a
18 visual. And since it's not intended to be a
19 standard, just for more costly a method, how is the
20 owner/operator going to know ahead of time that this
21 information is going to be required because this
22 could be grounds for a cap rejection or additional
23 submittals, so...

24 MR. CLAY: What section are you

1 referring to?

2 MR. KELLY: I think it's in 405. Some
3 of this was taken from the testimony that relates to
4 732.530, how does the proposed remediation compare
5 to other methods? Hang on a minute.

6 HEARING OFFICER TIPSORD: Do you know
7 which testifier that it came from?

8 MR. KELLY: It was from Doug's
9 testimony on page 4.

10 BOARD MEMBER RAO: It's subsection B,
11 Subsection B of 405.

12 HEARING OFFICER TIPSORD: Thank you.

13 MR. CLAY: The reason that it says
14 made under 407, 732.407, we've added wording for
15 alternative technologies that we may look at the
16 costs of other alternative technologies besides just
17 dig and haul. I mean, in the past it was always
18 compare the two possible alternative technologies to
19 dig and haul. Now, I guess we want to be able to
20 look at the cost of other overall alternative
21 technologies as well.

22 MR. KELLY: Well, I think the context
23 here in this -- because I'm getting to that as well
24 in the next question, but I think the intent of the

1 testimony there was that not in all cases, but there
2 are going to be some cases where if somebody is
3 proposing alternative technology, normally, they're
4 going to compare it to conventional technology. But
5 there may be some instances where -- and let's not
6 just do it like he said, did enough to compare it to
7 conventional, but maybe some other alternatives, but
8 how are you going to know that ahead of time because
9 it talks like -- that this is not going to be
10 standard, just for more positive methods. I don't
11 know what --

12 MR. CLAY: I guess you won't know that
13 ahead of time. I mean, that would be something
14 that -- you know, I think as part of your corrective
15 action plan when you're using an alternative
16 technology, to some degree, you need to make that
17 comparison. You know, I'm not saying every
18 alternative technology, but if you're using some new
19 technology and some type of -- by remediation is
20 half the cost, then you need to be aware of that and
21 we will definitely have questions about that, you
22 know, why you chose that technology over another.

23 MR. KELLY: My other question is kind
24 of along the same line. It talks about in 407(b)

1 the very last sentence it says, not substantially
2 higher than other available alternative technology.
3 What about the -- would the Agency address also the
4 technical adequacy of it, because there may be some
5 site specific conditions that may dictate a more --

6 MR. CLAY: Sure.

7 MR. KELLY: -- costly method. I mean,
8 you know, historically, Method A may be cheapest,
9 but in this application, B or C may be the better
10 alternative to address remediation.

11 MR. CLAY: No, we would definitely
12 take that into account.

13 MR. KELLY: And how do you define
14 substantially though? It's written substantially,
15 how do you define that?

16 MR. CLAY: We didn't want to get into
17 the situation where, you know, something was five
18 percent higher, you know, not that much higher but,
19 you know, we require a detailed cost analysis. We
20 just -- I mean, we wanted to be able to require --
21 we would also take that into consideration, but not
22 necessarily be held to a -- thou shalt not be any
23 higher than another alternative technology.

24 MR. KELLY: One last question.

1 On 407(d), it talks about remote
2 monitoring and the Agency named fire remote
3 monitoring, does this mean implementing technology
4 that allows for a remote monitoring system, which is
5 available, and, if so, how is the Agency going to be
6 remote monitored? So the Agency has that ability as
7 well and may choose to do so.

8 MR. CLAY: Well, I think there's a
9 couple of things. In the technology that's
10 proposed, it requires a lot of -- maybe not physical
11 maintenance, but we're going to go out there every
12 week and see if it's still running. Well, that can
13 be done. I mean, we're going to have to drive 200
14 miles to do it. That can be done monitored
15 remotely. And so it may be that the consultant sets
16 up something at their office and monitors that and
17 we just want to reserve the right for us to set
18 something up in Harry's office to have him monitor
19 it to see if it's still running. And, you know, the
20 technology is out there. You know, some of the
21 technologies we've seen literally require weekly --
22 or, you know, they're proposed as weekly visits, and
23 that's very costly, especially when you're traveling
24 very far.

1 MR. KELLY: And, basically, the
2 Agency, was that in light of the fact that you might
3 have had more capital investments up front, but, in
4 the long run, it's going to save technician time
5 rather than time to go out there ourselves. And
6 they're retrofitting systems that have the
7 ability -- or new systems having that problem put
8 into place to allow for what you just stated?

9 MR. CLAY: Right, we would take that
10 into account, and we understand there would be a
11 higher capital cost.

12 HEARING OFFICER TIPSORD: Mr. Rieser?

13 MR. RIESER: Doug, I heard you say
14 with respect to 732.407 you thought it was true with
15 respect to the 734 counterpart, one of the things
16 that you might do is to compare the cost of
17 conventional technology to the alternative
18 technology, and I was wondering if there's language
19 in here that provides for this?

20 MR. CLAY: In 734?

21 MR. RIESER: Well, let's start with
22 732-407.

23 MR. CLAY: Yeah, under 407(b), at the
24 very end it says, budget plan must demonstrate the

1 cost of alternative technology will not exceed the
2 cost of conventional technology, which is already
3 there, and then we added the other alternative --

4 MR. RIESER: I guess I heard you
5 incorrectly say that you were going to be looking
6 at whether an alternative technology would be
7 significantly lower --

8 MR. CLAY: If I said that, I misspoke.
9 It needs to be lower than the conventional
10 technology. We'll also compare it to other -- or
11 ask that it be compared to other alternative
12 technologies.

13 MR. RIESER: But you're not going to
14 be looking -- or are you going to go looking at
15 whether the conventional technology exceeds the cost
16 of available alternatives?

17 MR. CLAY: No, you always have the
18 right to.

19

20 HEARING OFFICER TIPSORD: Mr.
21 Truesdale?

22 MR. TRUESDALE: A couple questions.
23 732.409(a)(1) is the provision that allows
24 professional geologists certified low priority

1 corrective action completion reports, but then
2 there's the exclusion for high priority corrective
3 action completion reports, and I just don't
4 understand the differentiation there.

5 Essentially, both involved review
6 of groundwater quality data and drawing conclusions
7 regarding exceedences or non-exceedences in aqueous
8 concentrations or soil concentrations, and I just
9 don't see why there's a differentiation there,
10 first question?

11 MR. CLAY: It's the way we felt the
12 statutes read. I mean, we just followed the
13 statutory provisions and --

14 MR. TRUESDALE: So it's just the
15 statutory language essentially?

16 MR. CLAY: Correct.

17 MR. TRUESDALE: Not a reason, just
18 following statute?

19 MR. CLAY: Right, following statutes.

20 MR. TRUESDALE: Second question is
21 732.411(b)(2) with regards to off-site access and
22 states that if a property owner denies access to the
23 owner/operator, the owner/operator may seek to gain
24 entrance by a Court order subject to 22.2(c) the

1 act, but it doesn't require attempts to gain access,
2 and I guess my question there is is that adequately
3 protective of human health and environment, or is it
4 just the nomenclature may that just included to
5 limit the amount of personnel time spent and legal
6 costs spent gaining access to
7 off-site properties exclusive of the protection of
8 human health and the environment?

9 MR. CLAY: It's not required. And
10 these items are what you must put in the letter to
11 that off-site property owner. So the owner and the
12 operator and the user consultant must tell them that
13 you may seek access under 22.2(c) of the act, so, I
14 mean, that's what you have to say in your letter.
15 But, in most cases, you wouldn't require that. I
16 won't say never, but if there's a situation that
17 there's a daycare and you got, you know, not quite
18 free product but very high levels going off-site,
19 you deny access and there's a well over there and
20 serving the daycare, we're probably going to say,
21 why don't you go to the Courts and --

22 MR. TRUESDALE: And would those costs
23 be considered eligible then for reimbursement?

24 MR. CLAY: As long as they're

1 not legal fees.

2 MR. TRUESDALE: And I guess my last
3 question is 411(f), which is kind of related, the
4 owner/operator is not relieved of responsibility to
5 clean up a lease that has migrated beyond the
6 property boundaries, even their off-site access is
7 denied. Why would the owner/operator ever want to
8 do that since their eligibility for payment is
9 limited by receiving an NFR letter to help obtain
10 access, essentially, that site can stay open and
11 fatuity without obtaining an NFR letter just to
12 potentially relieve the owner/operator of future
13 liability associated with results of that impact?

14 MR. CLAY: Well, part of it, I don't
15 think that in these rules that we could limit
16 someone's liability.

17 HEARING OFFICER TIPSORD: Mr. Clay, we
18 need you to speak up. I know it's getting late in
19 the day.

20 MR. CLAY: I'm sorry. As part of
21 these rules, we couldn't limit someone's liability.
22 The reason why someone would do this is because they
23 need their NFR letter to sell their property, and if
24 someone was denied access we could go to Courts and

1 force them to gain access, but that may be -- I may
2 have missed that opportunity with a property sale.

3 MR. TRUESDALE: I guess my question is
4 then why wouldn't there be a mechanism for the
5 owner/operator for the NFR letter to be voided, and
6 this is a question that was raised previously, and
7 then that owner/operator be eligible for funding
8 since that was identified as a potential impact
9 resulting from the release that couldn't be
10 quantified at the time, yet becomes an issue later?

11 MR. CLAY: I think the owner/operator
12 is making that business decision.

13 MR. TRUESDALE: So there wouldn't be
14 any options available?

15 MR. CLAY: No, they -- once they --
16 they're not eligible for anything.

17 MR. TRUESDALE: And why is that I
18 guess is the question? Logically and reasonably,
19 why is that true?

20 MR. KING: This is a provision that
21 was included in a previous regulatory proceeding
22 before the Board, and we did have quite a bit of
23 debate relative to this provision at that time, so,
24 I mean, I guess we can go into -- continue the

1 debate on something that was debated before, but I
2 guess I don't see the --

3 MR. CLAY: We're not proposing any
4 change.

5 MR. KING: Yeah, we're not proposing
6 any changes.

7 HEARING OFFICER TIPSORD: Right, but
8 as I pointed out earlier, 734 by being a new section
9 does re-open the -- perhaps we can just refer Mr.
10 Truesdale to that rulemaking and take a look at it
11 and if you have any additional questions, you can
12 come back. And that's why I did a lot of the
13 questioning so long, because it is technically new
14 even though it's the same language.

15 MR. CLAY: Might I add, I was just --
16 somebody whispered in my ear that they thought the
17 Board maybe added this the last proceeding, but
18 we'll investigate that.

19 HEARING OFFICER TIPSORD: Well, if you
20 would take a look back at the previous rulemaking...

21 MR. CLAY: Yeah.

22 HEARING OFFICER TIPSORD: Mr. Kelly?

23 MR. KELLY: Yes, I have a question in
24 regard to comparing alternative technology to

1 conventional. Just for clarification, you might
2 have an instance where a remote area or a
3 particular -- you know, some regions of the state
4 would not allow conventional technology to be within
5 the guidelines of the -- 57, 55, whatever it happens
6 to be, and, therefore, alternative technology may be
7 necessary -- when comparing with the conventional
8 technology, they're always going to be compared to
9 what the number that's been set by the Agency or
10 what is being compared -- in other instances, where
11 it can be compared to what it would cost to do it
12 conventionally. In other words, it may be higher
13 than that number because it's in a remote area of
14 the state and therefore making -- the alternative
15 may be cheaper, but still above what the Agency has
16 determined as the cutoff level.

17 MR. CLAY: Initially, we would always
18 compare it to the numbers of Subpart H. I guess if
19 there's a unique situation, we could always look at
20 it as an extenuating circumstance and be -- where
21 you develop a new number and compare it to that.

22 MR. KELLY: How would we do that? I
23 mean, I realize we'll get to Subpart H later, but, I
24 mean, it's pretty well cut and dry.

1 MR. CLAY: Well, but when you say
2 conventional technology, I don't think it says
3 conventional technology which is \$77 a cubic yard.
4 I think it -- you can make an argument that this is
5 an extraordinary situation, so that the conventional
6 technology costs would be whatever it would be and
7 then compare it to that. But, you know, I think
8 those are going to be very limited situations.

9 HEARING OFFICER TIPSORD: Are there
10 any other questions on Subpart D?

11 MR. SINK: Barry Sink with United
12 Science.

13 In the record it says --
14 concerning engineering barriers --

15 MR. CLAY: What section?

16 HEARING OFFICER TIPSORD: Could you
17 tell us what page you're on of the proposal
18 specifically?

19 MR. SINK: 734.335(a)(6).

20 HEARING OFFICER TIPSORD: Thank you.

21 MR. SINK: The description of
22 engineering barriers for instituting controls, the
23 proposal is not something you relied upon to achieve
24 the remediation objectives, and a descriptive chart

1 includes but is not limited to an assessment for
2 long-term reliability in operating in the
3 maintenance plan, and part of this question, it kind
4 of goes back -- if we're jumping back to H where
5 testimony was given that the Agency -- that the cost
6 of a concrete barrier, I think the testimony was
7 one-third or more, therefore, the Agency wasn't
8 going to consider reimbursing anything for concrete
9 more than four inches of asphalt. That seems to be
10 in contradiction to what this item 6 says where
11 we're doing an assessment of a long-term reliability
12 taking into consideration that site specific uses --
13 and, you know, I guess I go back to that site
14 specific, there are instances where you do this
15 long-term reliability, and, you know, concrete, six
16 inches of concrete is what you need to do the job.
17 I'm asking do you see an inconsistency with maybe
18 that testimony concerning the reimbursement in this
19 line item 6?

20 MR. CLAY: I mean, we really don't see
21 an inconsistency. It's a matter of determining --
22 it's not a replacement issue, replacement concrete
23 or asphalt because you replace whatever in there,
24 but if you're replacing something as an engineering

1 barrier that wasn't there before, and to meet the
2 requirements of that barrier from a -- excluding a
3 pathway for inhalation or ingestion, we felt four
4 inches of asphalt is -- you know, was appropriate.
5 So if you want to put down concrete, we'll pay up to
6 four inches of asphalt, and then the rest would be
7 the owner/operator.

8 MR. KELLY: I guess what I'm saying is
9 if there's a -- this is another -- I guess -- if I
10 jump ahead, I'm sorry. If the assessment is that
11 you need -- because it's going to be an industrial
12 site that you need concrete that's six inches,
13 because of testimony of Subpart H, then the
14 owner/operator is going to have to come up with the
15 balance of that?

16 MR. CLAY: I guess the way we look at
17 it is that would exceed the minimum requirements of
18 acting as a barrier for the purposes of
19 inhalation/ingestion protection, and if you really
20 needed that, an industrial site, it wasn't there
21 before, what a placement, you know, so is it really
22 needed? And I think it just goes beyond the
23 requirements.

24 MR. KELLY: To quickly follow up on

1 that, what about the replacement, if it's an
2 industrial, you're still limited on what the Agency
3 will pay. But if it's replacement of asphalt or
4 concrete in an industrial facility, that's six
5 inches of concrete, what the justification for
6 limiting that?

7 MR. CLAY: I don't think we are
8 limiting the replacement. We'll pay for replacement
9 of what was there.

10 MR. KELLY: And replacement costs?

11 MR. CLAY: Well, I mean, we would
12 review those -- I mean, we have to review the
13 reasonableness of the replacement cost. I think the
14 rule actually reads a little bit different. Let us
15 look at that and we'll come back the next hearing.

16 HEARING OFFICER TIPSORD: Anything
17 else on Subtitle D?

18 MS. HESSE: Fortunately, I'm
19 backtracking a little bit here. The question is
20 with respect to the various stages of investigation,
21 Stage 2, Stage 3, is it the Agency's position that
22 all of the Stage 2 investigation would be done at
23 once, or could there be Stage 2(a), Stage 2(b) as
24 you're stepping out from the source area to try to

1 define the extent of contamination?

2 MR. CLAY: You could send in
3 amendments as part of your Stage 2 or Stage 3.
4 However, there's no cause for additional costs
5 reimbursed for those traditional amendments, and
6 that's what we talked about under Stage 2 submitting
7 that these contingency plans are -- you know, this,
8 then we're going to do this, get that then we're
9 going to go further out to get away from what we see
10 now, which is four, five and six amendments and
11 report preparation plans and costs for any one of
12 those. You can do it, but it's only going to get --
13 you're only going to get reimbursed for Stage 2 for
14 the one lump sum that's in Subpart H.

15 MS. HESSE: And then with respect to
16 Stage 3 investigation, what if you start out with
17 your initial plan based on what you have, based on
18 your models, thinking it's going to go to Property
19 Owner A next door, so you submit your plan, you get
20 it approved, you do the investigation and low and
21 behold when you're done investigating Property Owner
22 A's land, it looks like it's gone on to Property
23 Owner B, is the Agency going to allow for
24 reimbursement for the one stage site investigation?

1 MR. CLAY: Again, it should be written
2 as such that, you know, it's a contingent, if I get
3 this here, then I'm going to go out.

4 MS. HESSE: Well, I guess my question
5 is, given how far some clues can go and the
6 possibility of miles, how far do you need to go when
7 you come up with your Stage 3 investigation letter?

8 MR. CLAY: Well, I mean, I think --
9 I'm not saying there's never been one that's done
10 miles, let's not represent that as even close to it.
11 But I think that would be an exception case, but,
12 you know, I don't know why you couldn't build in
13 2 or 3 mobilization in that Stage 3 plan.

14 MS. HESSE: With respect to the site
15 that has been proceeding under 732 and has been
16 determined to be a high priority site, do you
17 continue at that point going forward under 732 and
18 submit your cap plan budget and then go to various
19 stages of investigation with respect to writing the
20 report?

21 MR. CLAY: Well, I guess how is it
22 determined high priority, determined under Method 1,
23 Method 2, or have you defined the full extent -- if
24 you had defined the full extent of the 312, there

1 would be no reason to do the stage approach because
2 you defined the extent. If it's Method 1 or Method
3 2, then I would say that -- at that point, you could
4 opt in to 734 and go through the stages, you get
5 classified under Method 1 or Method 2 or you could
6 continue to remediate under 732.

7 MS. HESSE: They would have an option?

8 MR. CLAY: Correct.

9 MS. ROLAND: Carol Roland with KA
10 Graham. Carol's part of the question was if you got
11 your high priority classification and the next step
12 in 732 would be to write a transaction plan where
13 -- you haven't delineated the plume yet so how do
14 you do that in terms of 734 and lay the plume -- the
15 old method was go out there and delineate the plume
16 and include those costs in your transaction plan
17 budget, but that step isn't there, so, in that case,
18 it would be easier to jump to 734?

19 MR. CLAY: Yeah, it would probably be
20 best to go 734. You could do either one. We've
21 seen people do just that, classify high priority
22 Method 1 or Method 2. Their first cap submittal is
23 actually a site investigation plan with a budget, so
24 they actually get it approved ahead of time, and

1 then their next corrective action plan is the actual
2 development of the remediation options.

3 MS. ROLAND: But it stated in 732 and
4 staying along those lines, did you submit what would
5 be a site investigation plan budget?

6 MR. CLAY: Well, I mean, it would be
7 under really a --

8 MS. ROLAND: A corrective action plan?

9 MR. CLAY: Yeah, a cap, but probably
10 the best thing to do would be to opt into a 734.

11 MS. HESSE: When/if someone submits a
12 work plan for a Stage 2 investigation and they
13 realize they're still working -- and the Agency
14 modifies it, the work plan, but it turns out that
15 the Stage 2 investigation does not completely
16 delineate the extent of the plume, is there an
17 opportunity under the rules to go in and amend the
18 work plan after the new data comes in and how would
19 this affect reimbursement?

20 MR. CLAY: Again, the amounts for
21 reimbursement are the total amount of that stage.
22 And you would get paid for additional borings, it's
23 just the Stage 2 plan itself is one lump sum, so,
24 you know, that's why what you want to see is that

1 contingent plan totally defining extent on-site.
2 And I guess if there's a question if an agency
3 modified a plan, it wouldn't do that. I think you
4 need to contact the agency and get a manager for
5 that unit prior to -- we wouldn't plan on buying
6 something that didn't define the full extent of
7 contamination on a site.

8 UNIDENTIFIED SPEAKER NO. 2: Could you
9 say that again, please?

10 MR. CLAY: We would not intentionally
11 modify something under the new rules, for example,
12 Stage 2, that wouldn't define the full extent of
13 contamination.

14 HEARING OFFICER TIPSORD: Anything
15 else?

16 Before we move on to Subpart E,
17 Subpart D in 734 is miscellaneous provisions. Are
18 any questions on 734 Subpart D, miscellaneous
19 provisions? Let's go on to Subpart E.

20 Mr. Truesdale?

21 MR. TRUESDALE: 732.503(a) says the
22 Agency may review any or all technical or financial
23 aid information or both relied upon by the
24 owner/operator or the licensed professional engineer

1 or licensed professional geologist in developing any
2 plan, budget, or report selected for review. The
3 Agency may also review any other plans, budgets, or
4 reports submitted in conjunction with the site.

5 Don't you think the Agency -- it
6 would be better if the Agency did, in fact, review
7 all information relied upon in determining the
8 conclusions for which the professional engineer and
9 professional geologist are so certifying to in
10 making their comparative determination?

11 And, secondly, in your testimony,
12 Doug, you said that it's the practice that all
13 reports, not just selected reports, are reviewed and
14 isn't that somewhat in conflict with Section
15 57.8(a)(1) of the Environmental Protection Act?

16 MR. CLAY: Well, I think I said that
17 the majority of those are reviewed --

18 HEARING OFFICER TIPSORD: Mr. Clay, we
19 need you to speak up.

20 MR. CLAY: Because the question in the
21 past used to only be 10 percent, why you doing more
22 now? I said I think we're doing the majority of
23 them. I don't think I used the word all.

24 MR. TRUESDALE: In the new

1 regulations, it does, in fact, specify all reports?

2 MR. CLAY: Correct.

3 MR. TRUESDALE: Isn't that also in
4 conflict with 57.8(a)(1)?

5 MR. CLAY: What section are you --

6 HEARING OFFICER TIPSORD: Let me
7 clarify because there are four different versions of
8 Section 57.7. Are you talking about 57.7 as amended
9 public act 735, 92.735?

10 MR. TRUESDALE: I'm actually
11 57.8(a)(1) of --

12 HEARING OFFICER TIPSORD: Okay.
13 That's also -- but, again, there's more than one
14 amendment to that, so public -- but what public
15 act?

16 MR. TRUESDALE: Good question.

17 HEARING OFFICER TIPSORD: Actually,
18 there's more than one current one, that's the
19 problem. Check 735. 735 is the one that most of
20 this is based on; is that not correct, 92.735?

21 MR. ROMINGER: 554 is the technical
22 requirements.

23 HEARING OFFICER TIPSORD: Okay, 554.
24 There's more than one version. They were supposed

1 to be revised, and as far as I know have not yet
2 been, so there's several versions.

3 MR. TRUESDALE: There might be some
4 difference there. I don't know the answer.

5 HEARING OFFICER TIPSORD: Okay. So
6 57.8.

7 MR. CLAY: We'll check that. I don't
8 have a copy right here, so we'll look at 57.8(a).

9 HEARING OFFICER TIPSORD: I do if you
10 want to, but...

11 MR. CLAY: Okay. Well -- yeah, we'll
12 get back on that, okay?

13 HEARING OFFICER TIPSORD: Okay.

14 MR. CLAY: Thank you.

15 MR. TRUESDALE: And then also, the
16 initial question about review of technical may
17 versus should or must review. I would think that it
18 would be pertinent that the Agency must review all
19 documentations, especially if they were in a
20 position to review the certification of the
21 professional engineer and professional geologist
22 submitting information to the Agency.

23 MR. CLAY: Okay, Joe, we'll look at
24 that and whether it's consistent or inconsistent

1 with the proposed rules.

2 HEARING OFFICER TIPSORD: Mr. Kelly?

3 MR. KELLY: Kelly with USI.

4 I have a question I guess really
5 more -- at the beginning of this submittal, there's
6 a statement of reasons and synopsis of testimony
7 from the original submittal on January 13th, and I
8 don't know who provided this information, basically,
9 it refers to the completeness review, which is
10 732.502 and 732.503(f). Whoever wrote this, I guess
11 attorneys or whomever, stated that the Agency wanted
12 to delete the sections for completeness review
13 because they felt that the level of staff needed --
14 to provide a timely review was there, and, also,
15 that the staff was able to review all plans and
16 reports within a 140-day deadline.

17 Just speaking from our
18 experiences, and I don't have statistics, but I do
19 know there have been a number of situations -- I
20 guess my question is -- I guess in the form of a
21 question, are you sure, the Agency sure, that they,
22 by deleting this provision, that they can in the
23 future still continue a timely review because we've
24 had instances of deletions on the 119th day or

1 people asking for 60-day extensions, so is the
2 Agency comfortable that they still have a staff to
3 do that?

4 MR. CLAY: Still have the staff to?

5 MR. KELLY: To provide a complete
6 review in a timely manner here in the future?

7 MR. CLAY: Yes, we believe that we
8 will be able to do them in our 20 days. The
9 completion report would just add time to -- we were
10 doing complete reports, responding to those, and
11 then doing the technical reviews that would
12 create -- that would require more time.

13 HEARING OFFICER TIPSORD: Mr. Cook?

14 MR. COOK: Do you have any statistics
15 that show the percentage of the time that the Agency
16 requests some sort of extension report for decisions
17 not made until 119th or 20th day?

18 MR. CLAY: I don't have that
19 information.

20 HEARING OFFICER TIPSORD: Anything
21 else from Subpart E? Subpart F? Mr. Cook?

22 MR. COOK: The testimony about
23 732.505(b), the proof of payment for subcontractor
24 in which handling charges were the -- and I don't

1 know that this specifies that, but I believe it
2 mentioned union labors or other forms of written
3 payment?

4 MR. OAKLEY: Canceled checks front and
5 back or affidavits from a contractor and have them
6 dated from the subcontractor and hand them back.

7 MR. COOK: Before the handling charges
8 would be eligible?

9 MR. OAKLEY: Correct.

10 MR. COOK: And then I believe you also
11 mentioned in your testimony today that this did not
12 preclude an owner/operator who also owned a
13 consulting contracting business from hiring his or
14 her own firm and then being paid a reasonable level
15 of profit?

16 MR. OAKLEY: Actually, the prime
17 contractor hiring their own firm to do subcontracted
18 work. It doesn't preclude them from hiring that
19 firm, but it does preclude them from getting
20 handling charges.

21 HEARING OFFICER TIPSORD: I have a
22 follow-up on that actually on the handling charges.

23 I'd like a little more explanation
24 on why if you hired someone that your firm, as the

1 subcontractor, why you're not allowing handling
2 charges?

3 MR. OAKLEY: Well, traditionally, and,
4 you know, I started in this program in 1990. When
5 we set it up, initially, we based a lot of stuff on
6 the state contracts that we had, the idea being
7 that's a prime contractor would go out and seek out
8 the cheapest firm to do the subcontracted work
9 because they were paying them, and that was the
10 idea, the procurement issue, and it seems to me that
11 there wouldn't be a lot of costs associated with
12 procurement if you hired your own firm. Now, that's
13 opening for discussion, obviously, but that was our
14 intent originally.

15 HEARING OFFICER TIPSORD: Thank you.
16 I'm sorry to interrupt, Mr. Cook.

17 MR. COOK: I believe that's all the
18 questions I have at this time.

19 HEARING OFFICER TIPSORD: Mr.
20 Truesdale? And then we'll come to you, Mr. Kelly.

21 MR. TRUESDALE: Back to Mr. Oakley's
22 statement about contracting with the cheapest firm.
23 I personally don't agree with that in and of itself.
24 I don't like the thought of compromising quality of

1 work for cheapest contractor, but that's a personal
2 opinion. On the other hand, the definition, once
3 again, of handling charges, Mr. Oakley specified
4 cheap procurement costs, but the definition of
5 handling charges includes many other items over and
6 above simply procurement costs that are, once again,
7 incurred by individual companies even if they're
8 independently owned by someone with financial
9 interest in a parent company.

10 HEARING OFFICER TIPSORD: Question,
11 Mr. --

12 MR. TRUESDALE: The question is, I
13 don't see the differentiation there either going
14 back to the Hearing Officer's comment. I guess I'm
15 looking for something else that describes what -- I
16 understand procurement, but how then does the
17 Agency address reduction of the other administrative
18 insurance interest and --

19 MR. OAKLEY: She does not procure --
20 those, to me, are indirect costs, and those costs
21 would be included in the application for payment
22 from the subcontractor.

23 MR. TRUESDALE: But once again, the
24 prime contractor, and this is not insurance

1 and administrative costs associated with a
2 subcontractor, as the prime contractor, even if I
3 hired someone that was out of state, my company has
4 to carry insurance to cover their costs also because
5 our insurance premiums are based on our work plus
6 the amount of subcontracting work we contract over a
7 calendar year. Our insurance rates aren't based
8 solely on our workout, but it's also based on our
9 subcontracting work.

10 Once again, the administrative
11 costs, if they're independent companies that hold
12 separate sets of books, we receive invoices from the
13 alternate company. There's absolutely no difference
14 involved in these administrative costs, insurance
15 costs and oversight costs associated with the firm
16 even if there is some kind of direction or indirect
17 financial interest.

18 MR. OAKLEY: I respectfully disagree.

19 MR. CLAY: I would think the level of
20 oversight for a company that you own would not be
21 the same for a company you don't own.

22 MR. TRUESDALE: I would agree but,
23 once again, handling charges describes many facets,
24 and I think we've made a proposal to you for a

1 reduction in handling charges, but I don't see the
2 logic behind excluding all of those costs because
3 they are real costs.

4 MR. KING: You know, one of the things
5 that -- there used to be a five-set of handling
6 charges in the statute, and that was removed from
7 the statute, so, I mean, in essence, there was not a
8 requirement to continue to pay those included as a
9 reasonable cost.

10 MR. TRUESDALE: But they are included
11 currently.

12 MR. KING: Excuse me.

13 MR. TRUESDALE: Oh, I'm sorry.

14 MR. KING: Please. And so we
15 continued to pay those. But we have seen what he
16 thinks is the situation where we don't think they
17 should pay in this context.

18 If you have a prime contractor and
19 you have an independent sub, we think that that's an
20 appropriate area for those handling charges to be
21 paid where there that closeness of identity, as
22 we've defined it, we don't think that's appropriate.

23 Now, one way to solve this whole
24 question is just to take it all out and not

1 reimburse any of it, and I think that certainly
2 could be -- you know, again, if the responsibility
3 of the state is to pay for reasonable costs and the
4 legislature no longer has that in there as a
5 provision, that would solve that discrepancy. But
6 we think the more middle of the road approach that
7 we proposed makes more sense.

8 HEARING OFFICER TIPSORD: Did you have
9 a follow-up to that, Mr. Truesdale?

10 MR. TRUESDALE: Yes.

11 HEARING OFFICER TIPSORD: And please
12 keep this to question.

13 MR. TRUESDALE: I understand.

14 My question before was I guess
15 what is the Agency's reason for making that
16 determination? You said that it was -- you believed
17 that it was not reasonable currently, but what I'm
18 asking you is what are you basing that on?

19 MR. KING: I think you asked the
20 question and you got an answer to it.

21 HEARING OFFICER TIPSORD: Let's move
22 on at this point. Mr. Kelly was next.

23 MR. KELLY: In regard to Mr. Oakley's
24 testimony, he was talking about the fact that the

1 Agency tends to only pay for concrete, asphalt or
2 replacement after the NFR. I would ask what if that
3 owner/operator paid for this one time, but what if
4 the owner/operator needs that payment now, isn't
5 that kind of putting him at a disadvantage?

6 MR. CLAY: I think we need to discuss
7 that a little further in terms -- that's something
8 that we -- the idea was just what you said, Joe, is
9 that -- the issue we had was under early action
10 where someone would pick up a tank in early action,
11 repave it, you know, two years later complete their
12 corrective action and wants to be reimbursed for it
13 again? I think we need to look at that because we
14 understand that there may be long-term corrective
15 actions that -- you know, where you're not going to
16 be actually putting -- or getting your NFR letter
17 for several years and you're obviously going to want
18 to have that pavement in place with you and since
19 you -- corrective action plans.

20 Let us look at that and we'll come
21 back to the Board with a proposal next time.

22 MR. PULFREY: Mr. Pulfrey with USI.
23 Let me follow up on that a little bit. Can the
24 regulations not say that the Agency will only

1 reimburse once?

2 MR. CLAY: Well, that's what I said,
3 we'll look at that.

4 HEARING OFFICER TIPSORD: And, Mr.
5 Truesdale, you had additional questions?

6 MR. TRUESDALE: 732.606(d)(d)(d), the
7 ineligible cost section. Costs an owner-operator is
8 required to pay to a governmental entity or other
9 person or the corrective action including but not
10 limited to net fees, institutional control fees,
11 property access fees, I still don't understand why
12 that's not an eligible cost under the same
13 732.407(a)(3).

14 MR. KING: Yeah, let me answer that.
15 I know it's kind of complicated, this
16 is 606(d)(d)(d).

17 When the legislature imposed fees,
18 increased in fees last year, one of the things that
19 was institutionalized that we saw for the first time
20 was an NPDS fee, and that does end up being a
21 substantial fee. And what we saw happening is if
22 the LUST fund was going to be paying those NPDS
23 fees, and what we're going to be seeing is a
24 transfer of money from the LUST fund into the NPDS

1 fund, and as we saw that, our conclusion was that
2 the legislature really was now intending that kind
3 of interfund transfer. Because if the legislature
4 wanted to transfer money from their LUST to the NPDS
5 fund, they would have done it. And I need to
6 transfer from the LUST fund to other funds, so we,
7 for the interim, we have continued to pay those
8 costs until -- because we did not want to make that
9 kind of change without having the Board -- you know,
10 in essence, this has gone through this proceeding
11 before the Board here. So that's what triggered
12 that, the way we set it up and --

13 MR. CLAY: Just adding to what Gary
14 said, I mean, and I guess our position with putting
15 it here is an ineligible cause that fee should be
16 taken into account in corrective action, that if
17 you've got a pump and drink system, it's going to
18 run for ten years and it's going to be \$15,000 a
19 year at the owner and operator's cost that that
20 should be taken into account.

21 MR. TRUESDALE: And by extension then,
22 it's figured into your maximum payment amount as
23 well?

24 MR. CLAY: No, no, it's not a

1 reimbursable item, so that needs to be figured in
2 your selection of remediation technology.

3 HEARING OFFICER TIPSORD: You both
4 have your hands up, did you have a follow-up to
5 that?

6 MR. TRUESDALE: I guess essentially
7 what that accomplishes then is it puts additional
8 financial burden on the owner/operators, it
9 preserves the LUST fund, it still gets money in the
10 permit section, but the owner/operator is
11 responsible, and my question is, how does that
12 affect the Federal Financial Assurance Requirements
13 that the LUST fund was established to provide to
14 these owners/operators?

15 MR. CLAY: I don't think it affects
16 the Financial Assurance Requirements at all. I
17 mean, there are other options that don't require NDS
18 permits, or, for that matter, permits of any kind.

19 MR. TRUESDALE: But if the permit
20 was -- like you said, if you did an economic
21 comparison and the permit fees were still reasonable
22 in comparison, why would they be determined to be
23 ineligible?

24 MR. KING: Actually, in terms of what

1 review that UST gave it to, this would make it more
2 favorable as far as their approval because it would
3 be less to drain on the UST fund and it would become
4 a more secure financial instrument.

5 HEARING OFFICER TIPSORD: Mr. Cook?

6 MR. COOK: Before I ask the question,
7 I'd like to -- well, let me make sure I can clarify.

8 Mr. King, you said that the Agency had
9 decided that you would not make a ruling on those
10 costs from 2003, that this all results from the
11 governor's permitting the appropriate committee, you
12 wouldn't make a ruling on that, you'd bring that
13 before the Board and want them to make a ruling on
14 whether that fee should be reimbursed or not?

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

16 That's what I said.

17 MR. COOK: And I'd like to applaud the
18 EPA on taking that approach, and the question is why
19 would you apply these other rates today and that
20 particular rate you didn't make a determination,
21 that it needed to go before the Board before it
22 could be implemented and why are the other rates
23 implemented prior to allowing them to go through the
24 formal rulemaking process?

1 MR. KING: First, I'm not sure what
2 you mean by other rates. I don't know what you're
3 talking about.

4 MR. COOK: The rates that we see in
5 these proposed regulations.

6 MR. CLAY: Well, I mean, I think the
7 reason is it's a matter of determining what's a
8 reasonable rate versus what's an ineligible item,
9 and so this is, you know, a new fee that was never
10 there before. I don't think there's any fee
11 that wasn't greatly increased versus, you know,
12 determine reasonableness of rates throughout, so --
13 throughout the reimbursement program, I mean, what
14 we could have done is said, you know, we're not
15 reimbursing anything until the Board rules go
16 through it, which, obviously, won't have been a
17 popular decision on what to do, but I think there's
18 a distinction between, you know, adding something as
19 an ineligible item and saying, well, we've done all
20 this work to develop what we feel are reasonable
21 rates, and even though we're not implementing the
22 rules, we're not going to be inconsistent with the
23 rules that we currently have before the Board and
24 continue to make, you know, on a basically basis,

1 any consistent determinations with the rules we have
2 before the Board, so, I mean...

3 MR. COOK: And we currently believe
4 that has a required corrective action cost currently
5 that is considered to be currently a reasonable fee
6 and are a fully reimbursable permit fee?

7 MR. CLAY: State that question again?

8 MR. COOK: The current permitting fee
9 is currently considered to be a corrective action
10 cost required in those instances requiring an NPDS
11 permit, and it has been reimbursed by the Agency and
12 is therefore considered to be a reasonable charge by
13 the Agency; is that a fair statement?

14 MR. KING: Pending the outcome of this
15 proceeding, yes, that would be correct.

16 MR. COOK: Going back to something
17 that Joe had mentioned, with regard to financial
18 responsibility, I think what he may been alluding
19 to is the fact that the Federal Financial
20 Responsibility Requirements require that moneys be
21 available on a timely basis necessary to pay for
22 corrective action costs.

23 I have a question with regard to
24 that, and I think I'll refrain to ask that question

1 until we get to Subpart H. I think it's more
2 applicable there.

3 HEARING OFFICER TIPSORD: Thank you.
4 Mr. Truesdale?

5 MR. TRUESDALE: Once again,
6 606(e)(e)(e), costs associated with maintenance
7 repair or replacement of leased or subcontracting
8 equipment. And it goes along the same line of
9 argument if those costs are included in cost
10 comparison and determined to be reasonable by
11 comparison, why would they be specified as
12 ineligible cost? Wouldn't it be more appropriate to
13 be determined on a site specific basis based on that
14 mechanic comparison that was discussed previously?

15 MR. CLAY: Well, I think it's a
16 subcontractor.

17 MR. TRUESDALE: I mean, isn't it, in
18 fact, the necessary part of corrective action to
19 maintain these questions, and if those costs are
20 included in the original proposal and still shown to
21 have economic merit versus alternate technology, why
22 would they be determined to be ineligible costs?

23 MR. CLAY: The idea here was it -- you
24 know, I guess it depends on what we're talking about

1 here. If I lease a car or truck and I have a flat
2 tire, I'm going to -- I don't think that the Agency
3 should reimburse for that flat tire. I don't think
4 the Agency should reimburse for the oil change.
5 Those kind of things I think that -- now, if there's
6 a lease of equipment and there's required
7 maintenance as part of that lease agreement, I think
8 that would be something that would be --

9 MR. TRUESDALE: Which is actually
10 usually how it is, a leased piece of equipment comes
11 with a service contract and an equipment contract,
12 and that's where I think -- well, I don't think it's
13 clear there, if that is, in fact, the case. That
14 needs some clarification.

15 And then, alternately, in
16 732.614(a)(b), the Agency has the authority to audit
17 data reports, plans, documents or budgets including
18 but not limited to all financial information but not
19 limited to all financial information and data used
20 in the preparation or support of applications for
21 payment. However, in the act, Section 57.15, it
22 states authority to audit, that the Agency has the
23 authority to audit all data reports, plans,
24 documents, budgets submitted pursuant to this title.

1 Do you think that that previous
2 statement in 732.614(a)(b) is consistent with
3 Section 57.15 of the act?

4 MR. CLAY: Yes.

5 MR. TRUESDALE: Which references no
6 financial information at all.

7 MR. KING: You said 57.15, is that
8 what you said? And I'm looking at -- we stated
9 right here in the room, are you saying what we have
10 here is not accurate?

11 MR. CLAY: You're saying (a) and
12 (b) are -- are (a) and (b) consistent with the
13 medium?

14 MR. TRUESDALE: 57.15, correct.

15 MR. CLAY: I didn't think -- the way
16 we would read it is the statutory language
17 references all documents, and we provided an issue
18 of clarification on your (a) and (b).

19 MR. TRUESDALE: That's your
20 interpretation then. You include all documents in
21 the statement but then add the additional and I'm
22 just asking if you feel you interpreted the
23 provisions of 57.5 accurately in the additional
24 information provided in 732.614(a)(b)?

1 MR. CLAY: Yes, we do.

2 MR. TRUESDALE: And has that stood up
3 to any other evaluation by anyone else such as the
4 Pollution Control Board?

5 MR. CLAY: Yes, we actually took this
6 language from other Board and Agency rules, so, yes,
7 we can provide those references.

8 HEARING OFFICER TIPSORD: Mr. Rieser
9 had a question?

10 MR. RIESER: Yeah, looking at
11 732.610 dealing with indemnification issues, the
12 Agency has added some additional language in terms
13 of requirements for application and costs which are
14 ineligible, and I guess the first question is in
15 response to particular issues that the Agency had
16 with indemnification, application for coming into
17 it?

18 MR. OAKLEY: I believe the
19 reasoning -- we wanted to clarify the
20 indemnification process as opposed to -- previously,
21 there was very little information there seemed to
22 be, and, actually, this was written in hopes of
23 clarifying the steps necessary for indemnification.

24 MR. RIESER: Have you had a lot of

1 applications for indemnification?

2 MR. OAKLEY: Not a whole lot, I think
3 ten or less.

4 MR. RIESER: Ten or less through the
5 whole program?

6 MR. OAKLEY: For the whole program.

7 MR. RIESER: At D it identifies costs
8 ineligible for indemnification for the funds, which
9 include but are not limited -- what other costs
10 would you see ineligible other than those
11 that violate the other things that we talked about
12 in the regulations, understand this regulation in
13 this section?

14 MR. OAKLEY: From experience, on
15 indemnification claims, we have seen in some cases,
16 what we consider excessive amounts of -- it was
17 submitted at the Florida corrective action claim as
18 opposed to an indemnification, although it's been
19 submitted in the indemnification process. However,
20 it was corrective action activities, and they appear
21 to be excessive so we suggested to the Attorney
22 General's Office that we came up with an amount that
23 we deemed reasonable, and that was the amount that
24 was paid for that particular claim.

1 I think the ineligible costs would
2 probably mirror what were ineligible under the
3 regulations.

4 MR. RIESER: With respect to --
5 looking at 4, (d)(4) which talks about non-prepared
6 prior to notification of the release, isn't it
7 possible that a -- the land owner might defer costs
8 if address contamination on its property prior to
9 the time that the owner-operator of the underground
10 storage tank was aware of a release?

11 MR. OAKLEY: I believe that that
12 notification -- the IEMA triggers the whole program.

13 MR. RIESER: But with respect to
14 indemnifications with respect to -- this is the
15 first time it's been imposed as a limitation on
16 indemnification?

17 MR. KING: I think that's true that an
18 off-site person may have encouraged the philosophy
19 for that IEMA notification date, but then where do
20 you cut it off? I mean, is it a cost they incurred
21 50 years ago, 40 years ago, 30 years ago, you know,
22 where do we do that kind of cutoff on determining
23 what the fund has been paid for? We felt that this
24 has always been kind of a traditional trigger date

1 that's been used as far as when the LUST program
2 kicks in, so we were just trying to mirror that
3 here.

4 MR. RIESER: Of course, that cut off
5 with respect to that date I believe is included in
6 the statutes somewhere with respect to the other
7 part of the programing. I'm not sure if it's
8 included with respect to the indemnification.

9 MR. KING: You got me. I don't know.

10 MR. RIESER: Similarly, if you look at
11 seven amounts associated with activities for
12 violating the act or Board could have costs incurred
13 by an adjacent property owner as a result of
14 violations of the act by the owner/operator, the
15 adjacent property owner wouldn't be responsible for
16 or penalized for violations by the owner/operator.

17 MR. OAKLEY: Basically, we have looked
18 at what the Court had ordered is against those
19 indemnifications accordingly.

20 MR. RIESER: So if the Court ordered
21 to increase ineligible costs, limit the fee from
22 what the Court had ordered with these ineligible
23 costs --

24 MR. KING: If there's a Court order in

1 effect, it says we're supposed to pay a specific
2 amount as far as indemnification, and that's already
3 gone through a process with AG's office that
4 negotiated something, we're going to pay from the
5 reporter says. These are used to establish what
6 that reasonable amount should be.

7 MR. RIESER: So those are intended to
8 be limitations on what the Court's authority is on
9 the order?

10 MR. KING: No, these are intended for
11 us to establish the costs that we consider to be
12 ineligible.

13 MR. RIESER: But if the court ordered
14 you, you would pay whatever was ordered be have been
15 deemed to pay?

16 MR. KING: Yes.

17 MR. RIESER: Similarly, at ten, if the
18 owner/operator ended the site remediations program
19 to address that, those costs would not be eligible
20 even if they're with costs and you heard about an
21 adjacent property owner?

22 MR. KING: Right, correct.

23 MR. RIESER: Thank you.

24 HEARING OFFICER TIPSORD: Ms. Hesse?

1 MS. HESSE: With respect to in the new
2 rules of 734.655 in the provisions and audits,
3 looking at the language under the act, isn't a lot
4 of what the Agency does now in terms of reviewing
5 budgets, request for reimbursements, data, that
6 reports of the land as far as what's been done,
7 what's supposed to be done, couldn't that have
8 already pretty much covered -- I mean, isn't the
9 language in the act already pretty much covered by
10 what you --

11 MR. CLAY: I think there's a lot of
12 things that aren't covered that we don't require to
13 be submitted.

14 MS. HESSE: Such as?

15 MR. CLAY: Things such as contracts,
16 with subs, time sheets, that type of thing, only
17 lump sum payments. There may be -- looking at some
18 of the subcontractors associated with that.

19 MS. HESSE: Then at the present time,
20 in order to pay for time and materials, for example,
21 so many hours that somebody works, you still have
22 information with respect to how many hours that
23 persons works, don't you?

24 MR. CLAY: Yeah, but it's more

1 difficult compared to other sites.

2 MS. HESSE: I'm not sure I follow that
3 answer.

4 MR. CLAY: If we so chose and we get
5 audited, make sure that there wasn't two people at
6 two different sites at the same time or one
7 person -- I'm sorry, at two different sites at the
8 same time. We have had that situation.

9 MS. HESSE: And how does the proposed
10 regulations deal with that?

11 MR. CHAPPEL: We will be able to audit
12 the time records of the contractor to see what their
13 people charged on those dates at those locations.

14 MS. HESSE: The underground storage
15 tank rules typically impose all the liability for
16 clean up on the owners and operators, it also has
17 and addresses what's reimbursable to the owners and
18 operators, where is the Agency getting its authority
19 to monitor consultants and contractors?

20 MR. CLAY: The statute.

21 MS. HESSE: Could you give me the
22 site?

23 MR. CLAY: It's "publicact0554." It
24 may have been in the statute prior to that, that

1 public act.

2 HEARING OFFICER TIPSORD: Excuse me.

3 If I may? 57.15 of existing language was not
4 amended by public acts.

5 MR. ROMINGER: Yeah, I believe it's
6 preexisting prior to 554.

7 HEARING OFFICER TIPSORD: Yes, it is.

8 MS. HESSE: Are you referring to the
9 language that's cited at the beginning of those
10 regulations?

11 MR. CLAY: Yes, the statutory
12 language.

13 MS. HESSE: Well, that still doesn't
14 really go to addressing my question.

15 HEARING OFFICER TIPSORD: If I may?

16 Section 57.15 has the authority to
17 audit -- I have it -- it's the -- let's take a short
18 off the record break, give court reporter a break.
19 Let's go back on the record.

20

21 (Whereupon, a break was taken,
22 after which the following
23 proceedings were had:)

24 HEARING OFFICER TIPSORD: While we

1 were off the record, we had a discussion about
2 deadlines to require prefiling of questions for the
3 Agency and only the Agency. Those questions would
4 be anything that we do not get to today by the end
5 of the session or, frankly, if you have a follow-up
6 after you've read the transcript, I would also ask
7 that you address that in writing to the Agency. If
8 you do not file prefiled questions, that does not
9 mean you won't be allowed to ask questions, but it
10 would certainly help things to go along faster if we
11 can get them prefiled. The date for filing a
12 prefiled question will be May 4th, 2004. And then,
13 for anyone who wants to testify on May 25th, I ask
14 that you prefile your testimony by May 11th, 2004.
15 If you do not prefile, you're probably not going to
16 get to testify at least at that hearing, so please
17 prefile your testimony by May 11, 2004.

18 Also, as an aside, I will be
19 checking with the Agency. If anyone has a problem
20 with the potential of continuing the hearing on the
21 25th until the 26th, please let me know afterwards.
22 We can't stay in the same room in Bloomington
23 because it's the Grand Jury Room and Grand Jury
24 needs it on Wednesdays. But what we might do is

1 associated with oversight by an owner or operator,
2 the question I have is is this currently a
3 reimbursable expense under the program?

4 MR. CLAY: No, that's not currently
5 reversed.

6 MR. COOK: And how long has it been an
7 eligible cost?

8 MR. OAKLEY: Oversight by an owner or
9 an operator?

10 MR. COOK: Right.

11 MR. OAKLEY: All along as far as --

12 MR. COOK: All along?

13 MR. OAKLEY: Yeah.

14 BOARD MEMBER RAO: Can I ask a
15 follow-up on that?

16 MR. COOK: Sure.

17 BOARD MEMBER RAO: Could this
18 provision preclude owner or operator who is a
19 qualified PE or a professional geologist who
20 employees himself to do the corrective action?

21 MR. CLAY: Well, I think we paid some
22 owners and operators that do the technical, like
23 you're describing, the professional services, but,
24 you know, on-site, oversight by an owner operator,

1 we have not; is that correct?

2 MR. COOK: To clarify, the station
3 would be licensed professional versus some other
4 either younger operator or an employee of the
5 owner/operator?

6 MR. OAKLEY: We have owner/operators
7 that actually own the construction companies and
8 have done their own digging, and in those days, we
9 have paid those costs. However, oversight costs
10 we've limited.

11 MR. COOK: So, as an example, an
12 owner/operator owned a chain of convenient stores
13 and that was their extent of their ownership, that
14 type of owner-operator would or would not be
15 eligible for overnight costs?

16 MR. OAKLEY: I'd say he would not.

17 MR. COOK: If he had certified such
18 charges and submitted those to the fund, would that,
19 in your opinion, be grounds for suggesting to the
20 professional oversight Board that that was an
21 inappropriate certification?

22 MR. CLAY: You know, as far as what we
23 would submit to the Department of Regulation you
24 mean?

1 MR. COOK: Yes.

2 MR. CLAY: If we're submitting it as
3 an Agency, I'd have to talk to my legal counsel. I
4 mean, I don't know. I don't know as an Agency if we
5 submitted that many referrals to the Department of
6 Regulation, but -- I'd have to talk to my legal
7 counsel first.

8 MR. COOK: With regard to the double
9 wide, the treatment or disposal of soil does not
10 exceed the applicable remediation objectives for the
11 release unless approved by the Agency prior to the
12 treatment or disposal?

13 MR. CLAY: Can you elaborate on that?

14 MR. COOK: Would a work plan, triple
15 action work plan budget that specified a quantity of
16 soil to be removed, the sufficient evidence to
17 support from the Agency's standpoint that that soil
18 needed to be removed and should be disposed of and
19 should be considered an eligible cost?

20 MR. CLAY: Say that again.

21 MR. COOK: What I'm trying determine
22 is the number of borings and the subjectivity, I'm
23 trying to determine the level of subjectivity that
24 might be associated with this double wide, if a cap

1 and budget are approved, is that conclusive evidence
2 from your standpoint assuming that the cap and
3 budget are not presented to the Agency fraudulently,
4 but legitimate data presented to the Agency, then
5 that evidence, then once that cap and budget is
6 approved that that volume of soil is approved for
7 removal of a transport, it is acceptable and
8 therefore not considered subject to this provision
9 in (y)(y)?

10 MR. CLAY: Yes. The idea here is that
11 we don't want a disposal of clean soil, but, I mean,
12 there may be situations downtown Chicago where it's
13 actually more cost effective to dispose of the clean
14 soil than try to find a place to stockpile it.

15 So the answer is yes and an
16 approval of that in a cap would constitute Agency
17 written approval.

18 MR. COOK: Even if there were some
19 quantity that was not necessarily in an
20 exceedence -- quantity of soil was in exceedence on
21 the objectives?

22 MR. CLAY: Again, if it is part of
23 your cap, then we're approving it.

24 MR. COOK: In the same Subpart under

1 Section 732.614, and this relates to the ice.

2 As I read Subparagraph A, it seems
3 to be pretty broad in terms of what may or may not
4 be accessible to an audit, and just as a point of
5 clarification, can you elaborate on the types of
6 documents that would and would not be subject to
7 review and audit with one example being the income
8 or loss statements of the owner/operator,
9 consultant/contractor, and that's the agency's
10 intention, to review profit and loss, monthly profit
11 and loss and also show year-end audited financial
12 statements?

13 MR. CLAY: It's not our intention to
14 review profit and loss or -- but I think any
15 documents that have to do with the amounts that were
16 reimbursed, the -- you know, the personnel
17 associated with that, that type of thing, but it's
18 not intended to be, you know, to look at your tax
19 statements or look at, you know, your profit as a
20 company.

21 MR. COOK: Time sheets were mentioned
22 earlier, we're using the time sheets to support the
23 charts?

24 MR. CLAY: Right.

1 MR. COOK: Can you give other examples
2 of specific types of documents that --

3 MR. CLAY: Time sheets, invoices from
4 subcontractors, chain of custody documents, the
5 consultant invoices, the backups for -- if you look
6 in Appendix E where you've maybe got an alternative
7 technology, you're building on time and materials
8 and you're budgeting on time and materials, in
9 Appendix E, it talks about experienced requirements
10 for those individuals that had clearance.

11 MR. COOK: I think that's all the
12 questions I have.

13 HEARING OFFICER TIPSORD: Mr. Kelly?

14 MR. KELLY: Just for clarification,
15 732.606(d)(d)(d), so am I to understand that under
16 these proposed rules there would no longer be any
17 payments, permits or fees which would include
18 removal permits, air permits, over-the-road permits,
19 or any other type of permits to implement
20 remediation?

21 MR. CLAY: That would be our proposal.

22 MR. KELLY: And the other question is
23 on 732.614 about the audits. Will the
24 owner/operator and consultant be given reasonable

1 notice -- a statement as to when his Agency is going
2 to show at the door one day and say, yeah, we want
3 to do an audit, there's no time to prepare, you're
4 getting your act together.

5 MR. CLAY: Yes, I mean, we have to
6 schedule something so that -- you know, make sure
7 you're there and make sure the appropriate people
8 were there. You know, you may all be out in the
9 field and it's just administrative support staff
10 there. So, I mean, you know, I don't think we want
11 to put a time frame in there, but, you know, we'd
12 have to schedule that.

13 MR. KELLY: And just one follow-up to
14 that. I'm assuming here, I'm making an assumption
15 as to the form of the, and it would be -- it
16 mentioned specifically on or off radar, professional
17 engineers and professional geologists providing
18 facilities and that, could this conceivably continue
19 to trickle down to contractors, laboratories,
20 subcontractors? I mean, it doesn't state that
21 specifically, but I'm trying to get an understanding
22 of the scope of documentation that would be
23 required.

24 MR. CLAY: I mean, I guess it could.

1 If a consultant's invoice for a
2 specific job is different than the subcontractor's
3 invoice for that given job.

4 Is that what you're asking?

5 MR. KELLY: Well, I'm just saying as
6 the owner/operator and the PD and the PE,
7 you're supposed to basically provide all this
8 documentation, but I didn't know if the Agency found
9 something and for some reason you decided, no, let's
10 go check out the lab's data, you know, not just from
11 a financial standpoint. We could be financial, I
12 guess, but let's go to the laboratory. Maybe we'll
13 find something else. Well, let's go to -- I don't
14 know. I didn't write the -- I don't know what the
15 intent is here, I'm just asking for clarification.

16 MR. CLAY: I think the intent is to
17 verify the amounts requested for reimbursement and
18 reimbursed, and so I think that's possible.

19 HEARING OFFICER TIPSORD: Okay. Mr.
20 Truesdale's has had his hand up.

21 MR. TRUESDALE: This goes back to the
22 same thing about the authority to audit, and I guess
23 the item that you specified, the time -- and I
24 understand completely the necessity to have an

1 accounting time and so forth, but I guess I don't
2 understand how that falls into financial information
3 and all financial information. It goes back to my
4 previous question about the language in the act, and
5 the intention was to clarify. Wouldn't it be
6 appropriate to add those specific items rather than
7 all-encompassing, all financial information. The
8 items that you specified don't necessarily seem to
9 me to fall into a criteria of financial information,
10 time sheets, contracts, et cetera.

11 MR. CLAY: Well, I think it's just
12 going to put me at the statutory language, stating
13 all data reports, documents, it's all -- I mean, we
14 didn't want to get into an argument of, well, that's
15 a financial document, that's not what you specified
16 in here and we have to come up with the
17 all-inclusive list.

18 MR. TRUESDALE: And that's -- I guess
19 to me it's clear enough in the act and I'm not
20 understanding the necessity for adding the
21 additional language over and above what the act
22 specifies including but not limited to all financial
23 information.

24 MR. CLAY: I don't know what this is.

1 We thought it was best to clarify that.

2 HEARING OFFICER TIPSORD: Question in
3 the back?

4 MR. SCHUMACHER: Brad Schumacher,
5 Marlin Environmental.

6 Why do you have the option to
7 audit if you're going after lump sums for tasks,
8 doesn't that eliminate the aspect of going to have
9 to do an audit if you're telling us what you're
10 going to pay us and what scopes we're doing?

11 MR. CLAY: Well, I think, you know, we
12 always get these anecdotal stories, but one is, you
13 know, we're seeing a lot more alternative
14 technology, so that's not a lump sum. You know,
15 it's supposed to be -- Board members pointed out
16 it's reimbursement of cost not, you know, your
17 maximum amount, so if you didn't incur those costs,
18 then you shouldn't reimburse them. And then, you
19 know, we've heard stories here and there about
20 double invoicing and all this kind of stuff and --

21 MR. SCHUMACHER: But if you're saying
22 we can get \$5,000 for a port, I'm going to bill you
23 for \$5,000, you know, and then you're going to be
24 able to audit that? If you give me that's what I'm

1 allowed to make or be able to charge, if I'm allowed
2 to charge \$5,000 I'm not going to charge you \$3,000.

3 MR. TRUESDALE: Whatever the time is,
4 you'll get paid.

5 MR. SCHUMACHER: You're saying
6 basically, no, that's your ceiling.

7 MR. CLAY: Right, and, I mean, I think
8 our focus of the audits will be the time and
9 materials and those other items we are talking
10 about.

11 HEARING OFFICER TIPSORD: All right.
12 We may be beating a dead horse. Mr. Cook?

13 MR. COOK: I want to just assume that
14 these regulations will be applicable on the
15 effective date, not applied retroactively. There's
16 some record retention requirements that the owners
17 and operators -- and that they may or may not have
18 those -- that information retained, and so are we
19 safe in assuming that these will be effective for
20 work performed on or after their effective date but
21 not retroactive?

22 MR. CLAY: Yeah, it can be the
23 effective date unless the Court rules otherwise.

24 MR. COOK: With regard to the

1 retention of records for four years after the
2 issuance of a no further remediation letter,
3 considering the duration that some of these cleanups
4 can take and then we've got four years in addition
5 to that. You could be looking at a decade or more
6 to retain some of these records. And that record
7 retention, because of the records we're talking
8 about are either electronic or paper records, they
9 have to be in a controlled environment. Does the
10 Agency evaluate the cost that will be placed on the
11 owner/operator maintain those records?

12 I guess to maybe answer a question
13 with a question, don't you retain any records as it
14 is? I mean, four years doesn't seem very long. You
15 know, you have to maintain other records and retain
16 other records for IRS purposes and for everything
17 else, so, I mean --

18 MR. COOK: Yes, we retain records, but
19 I think that the breath of what is being requested
20 here is maybe more than what the IRS would require
21 and so if there's additional information that would
22 need to be retained that's not required to be
23 retained currently?

24 MR. CLAY: We didn't do an analysis of

1 what the cost would be for that. I guess part of
2 it is -- you know, I would think that as a
3 consultant you would be retaining records for a
4 certain period of time just for liability purposes.
5 We didn't do an evaluation of costs, additional
6 costs for consultants.

7 HEARING OFFICER TIPSORD: Mr.
8 Truesdale?

9 MR. TRUESDALE: I just want just the
10 basic question, I guess, the inconsistency between
11 the reimbursement eligibility period after the NFR
12 letter versus the record-holding time, the one-year
13 versus the four-year, the Agency makes the decisions
14 at that one-year point. I guess I don't understand
15 the consistency there, why the necessity for the
16 extra period of time, why those two items aren't
17 consistent.

18 MR. KING: Is there a question pending
19 here? I'm not sure.

20 HEARING OFFICER TIPSORD: Yeah, he's
21 asking about the inconsistency.

22 MR. TRUESDALE: Why is there --

23 MR. KING: I just didn't here a
24 question, I just heard a statement stated.

1 MR. TRUESDALE: Well, what is the
2 reasoning for the inconsistency?

3 MR. CLAY: Three years is from the
4 other -- the other retention time for -- the
5 standard retention time for records, and the one
6 year difference is you have up to a year to submit
7 all bills for payment under the proposed rules.

8 MR. TRUESDALE: No, that wasn't -- the
9 question was, why is the reimbursement eligibility
10 after receiving an NFR letter only one year, but the
11 recording holding time is four years; why is there
12 an inconsistency between those time periods after
13 the Agency make the decision after one year on those
14 reimbursements? I don't see the necessity for that.

15 MR. OAKLEY: I think they're two
16 separate and distinct entities.

17 MR. TRUESDALE: You conduct an audit
18 when you review a reimbursement application after a
19 year, correct? And is that your responsibility to
20 audit that and determine reasonableness at that
21 time?

22 MR. OAKLEY: This is a different
23 issue.

24 MR. TRUESDALE: I guess I don't see

1 the difference, that's what I'm saying.

2 MR. KING: Well, normally, I mean,
3 we're really talking about a potential fraud issue
4 here, and, normally, it takes a longer period of
5 time to determine whether some kind of fraudulent
6 activity has occurred.

7 You know, if we do a review and
8 it's within that one-year and we find everything is
9 fine, that's great. But then within the next year,
10 there's some other records that come in that
11 indicate that the site that we already reimbursed
12 on, that there was a problem here of a fraudulency
13 when it was submitted, then there's a reason for us
14 to be beyond that one-year period, not an additional
15 three years, a total of four years here, would make
16 a reasonable time to conclude that. I mean, could
17 it be a bit shorter, I suppose, could it be a little
18 bit longer, I suppose, but four years seem to be a
19 reasonable time frame for us to conclude any kind of
20 audit of the type we're talking about here.

21 HEARING OFFICER TIPSORD: Mr. Cook?

22 MR. COOK: The issue of fraud, it
23 would be a criminal act, and I would think another
24 authority would be available to the state to pursue

1 those types of actions.

2 HEARING OFFICER TIPSORD: Ms. Hesse,
3 did you have your hand up?

4 MS. HESSE: Yes, I did.

5 With respect to the time frame
6 when the records need to be kept, there's also a
7 provision that records should be kept for three
8 years after the date of the final disposition of an
9 appealed litigation, other dispute or claim, and my
10 question is sort of twofold. One is why does --
11 what is the purpose for this, and the second prong
12 of the question is, how can a disposition be final
13 if records are still required to be kept?

14 MR. CLAY: Well, I don't know what
15 disposition has to do with keeping these records. I
16 mean, he's talking about disposition from an appeal
17 litigation or other disputed claim. It's three
18 years after the conclusion of that for disposition
19 of that.

20 MS. HESSE: But if a dispute is
21 finally completely resolved, what is the purpose for
22 still requiring these records to be kept if it's
23 done and over with and closed?

24 MR. CLAY: Well, the claim or the

1 appeal may have nothing to do with what we would
2 audit. I mean, I don't know that they're directly
3 related.

4 MS. HESSE: It says records relating
5 to an appeal, litigation or dispute or claim.

6 MR. CLAY: I mean, it's my
7 understanding it's the standard language from other
8 rules. If you want to propose some other type of
9 language, we would be happy to review that and I'm
10 sure the Board would be happy to consider that.

11 HEARING OFFICER TIPSORD: If I may,
12 Mr. Clay, and Mr. Rominger can correct me also if
13 I'm wrong, but there are several different points
14 that an appeal can be taken to the Pollution Control
15 Board and then to the appellate court while your
16 process is ongoing. Would this section be referring
17 to an instance, for example, where perhaps we're
18 looking at a site classification but you've already
19 gone on to the next step in your review of an
20 underground storage tank, so there's several
21 processes and several places where the appeal could
22 be going on, but you might not have issued an NFR
23 yet, or you might have issued an NFR before the
24 litigation is complete, would that be correct?

1 MR. CLAY: That's correct.

2 HEARING OFFICER TIPSORD: Is there
3 anything else on Subpart F? I have just one
4 additional comment.

5 You talked about handling charges
6 a little bit earlier, and I particularly want to ask
7 you to take another look at handling charges and the
8 way you have them is not being eligible if it's a
9 subcontractor, because of the definition of a
10 financial interest, which Mr. Rieser pointed out
11 earlier, is a very broad definition of financial
12 interest. There's a potential that an attorney who
13 worked for two separate firms could be considered to
14 have a financial interest in both firms, so you
15 might want to take another look at that and the
16 definition of financial interest.

17 All right. Let's move on to
18 Subpart G. Questions on Subpart G? And we're
19 moving on to Subpart H.

20 BOARD MEMBER GIRARD: I have a
21 question on Subpart 732.955, and of course, there's
22 also the same language in 734.855. And this is the
23 unusual or extraordinary expenses Subpart where you
24 say that if there are unusual or extraordinary

1 expenses which substantially exceed the amounts set
2 forth in Subpart H, you know, the Agency may, on a
3 site specific basis, look at reimbursing those
4 costs. Is there any quantity associated with
5 substantially in terms of this Subpart?

6 MR. CLAY: No, we didn't have quantity
7 in mind. I think it was just to -- the costs
8 extraordinarily exceeded the costs set up in this
9 Subpart. We would allow this demonstration when
10 extraordinary circumstances warrant higher expenses.

11 BOARD MEMBER GIRARD: If someone came
12 in with costs that are five percent over your costs
13 in Subpart H, would you consider those substantial?

14 MR. CLAY: Yeah, I think -- I mean, we
15 would consider those. I think it's -- the key is
16 there's some reason that they're higher as opposed
17 to, well, here's my bill, see, they're higher. You
18 know, you're just turning over the bills, but
19 there's some extraordinary circumstances that are
20 higher. Let me give you an example.

21 If you're excavating in downtown
22 Chicago with all skyscrapers, anti-shoring and --
23 it's going to take a lot more time to do the
24 excavation than it would at some other indication,

1 and in that case, the \$77 per cubic yard for
2 transportation, excavation, disposal, backfill, you
3 know, would likely be exceeded, so, in that case,
4 that would be an extraordinary circumstance. But
5 just the mere fact that, well, you know, my bills
6 are higher, we wouldn't consider that an
7 extraordinary circumstance. In fact, in most cases,
8 a large majority of cases, and that's why we
9 established the numbers that we did, we feel we
10 won't fall under these rates.

11 BOARD MEMBER GIRARD: Well, in terms
12 of downstate, for instance, if you have to -- you
13 did a, you know, a dig and haul and you had to haul
14 the material 200 miles, would you consider that an
15 unusual circumstance and the reason for a
16 substantial ruling?

17 MR. CLAY: We'll look at the distance
18 we use for -- I mean, we did consider a reasonable
19 distance in putting together our numbers, but we
20 also built in variability because not only is it how
21 far the soil has to be hauled, but, also, what are
22 your other options.

23 We had a situation recently where
24 the cost for -- higher than the \$77 a cubic yard,

1 and we denied it. And when we got into it, there
2 was three landfills closer, but they couldn't get
3 credit on those landfills. Well, that wasn't the
4 reason for not going to those landfills for us, I
5 mean, we don't expect the landfill to give you
6 credit, so, I mean, I guess if it's an extraordinary
7 long distance and there was no other options, we
8 would consider that. But we can look into what
9 distance we felt was -- or was taken into account in
10 our figures.

11 BOARD MEMBER JOHNSON: Well, the focus
12 then is more on the extraordinary circumstances or
13 the extraordinary expenses than on the substantially
14 exceeded, right?

15 MR. CLAY: Yes.

16 BOARD MEMBER GIRARD: Just to amplify
17 that, so it's really the site specific basis is what
18 you're looking at?

19 MR. CLAY: Yes, that's correct.

20 BOARD MEMBER GIRARD: Is that going to
21 create more work for the Agency, because it seems
22 that many times if you have someone coming in and
23 they decided their expenses are more than the
24 expenses in Subpart H, aren't they going to try to

1 show that their site has the specific extra costs?

2 MR. CLAY: I think initially they'll
3 have -- I mean, like I said though, I think we feel
4 like a very large majority of the sites would fall
5 in these numbers. We will initially see people
6 coming in saying they have an extraordinary
7 circumstance. I think a lot of those situations
8 we're going to come back and say, no, this is
9 exactly what we took into account in developing
10 those numbers.

11 BOARD MEMBER GIRARD: Thank you.

12 HEARING OFFICER TIPSORD: As a
13 follow-up to that, and especially since we're
14 talking about the transportation costs and the 200
15 and the landfill.

16 Tipping fees can vary dramatically
17 throughout the state, and I'm just curious as to how
18 much different landfills you looked at in coming up
19 with or including this, or did you just base it
20 on --

21 MR. CLAY: Well, we looked at -- and
22 I'll let these guys add to it, but we looked at
23 transportation costs, tipping costs, you know, I had
24 somebody that was, you know -- the consultant we

1 were talking with said, well, you know, I'm in the
2 Chicago area, and, you know, everything is more
3 expensive in the Chicago area and the Atlantic coast
4 costs are higher, and I said, well, I just got out
5 of a meeting last week with someone from downstate
6 that said the competition isn't as good downstate,
7 so -- and there's higher tipping costs downstate,
8 so -- and this person said, well, that's true, there
9 is more competition in Chicago, never mind.

10 I mean, there are variables, and
11 there's variables in backfill rates and there's
12 variables in tipping fees and there's variables in
13 transportation costs, and some people do their own
14 transportation and their trucks and their own
15 backhoes. There's a lot of variables, but we've
16 taken those things into account and that's how we
17 developed our numbers.

18 Harry, did you testify on that?

19 MR. CHAPPEL: In addition, we looked
20 at 25 different sites throughout the state randomly
21 and just looked at the specific costs provided in
22 those proposals, budgets, for excavation,
23 transportation and disposal. These are not amounts
24 that we approved in review of the budget. And

1 that's appendix -- or Attachment 9 to my testimony,
2 has those numbers, has those sites and has how those
3 numbers were arrived at. And, historically, the
4 Agency has allow between \$55 for excavation,
5 transportation, and disposal and \$20.00 for
6 backfill. Having done this sort here in this random
7 application of those numbers, we found that they
8 were coming up pretty close to what we've
9 historically used as a reasonable amount for those
10 types of activities.

11 BOARD MEMBER JOHNSON: What did you
12 do for the personnel title rates? It seems to me
13 like a guy with a bachelor in engineering is going
14 to make more money here in Chicago than he does in
15 Wauconda, so how do you reconcile the geographic
16 differences with respect to, in particular, the
17 personnel title compensation?

18 MR. BAUER: The personnel heights were
19 based on an average of all the stuff we get
20 throughout the state, and we did not take -- no one
21 has ever told us about the personnel difference in
22 the consulting thing, and it doesn't seem to
23 fluctuate in difference.

24 Our personnel rates are also --

1 the averages I think are a little bit less than what
2 we've actually proposed and we've adjusted those
3 based on experience an licensing.

4 BOARD MEMBER JOHNSON: I guess what
5 was troubling to me, everybody is giving analogies.
6 It's like baseball arbitration, the player says he's
7 worth X and management says he's worth, Y, whatever
8 the arbitrator comes up with, he never gets paid
9 what he's worth. He's either going to get more or
10 he's going to get less, and it seems like if it's a
11 fact then in Champaign County, I can get a pretty
12 darn good lawyer for a hundred bucks an hour, you
13 know, I can't get a clerk in Cook County to work for
14 me for that. So it's just -- it's something I had
15 noted.

16 BOARD MEMBER GIRARD: Could I go back
17 to Attachment 9 while we've got that opened up?

18 In terms of these 25 sites, are
19 these cleanups that have been done in the last five
20 years, or do they go all the way back to the
21 beginning of the program or just what time frame
22 were these cleanups completed?

23 MR. CHAPPEL: These are all within the
24 last four, five years. They were probably in the

1 last three years, actually, maybe even.

2 BOARD MEMBER GIRARD: Now, do you
3 have any sort of breakdown on where they were in the
4 state or --

5 MR. CHAPPEL: No.

6 HEARING OFFICER TIPSORD: You
7 indicated that there was a random sample. Can I ask
8 how you -- I mean, did you just go into a pile and
9 grab, how did you determine randomness?

10 MR. CHAPPEL: We can go back and find
11 out where those are located, those 25, right?

12 MR. BAUER: Yes.

13 You know, I would add too that
14 some of the -- I have a clerk's instruction
15 estimator manual and stuff like that, and they
16 indicate from upstate to downstate. It's usually
17 in -- my exhibit room is not that great. It is
18 pretty even across-the-state testing.

19 MR. TRUESDALE: But not professional
20 services typically?

21 HEARING OFFICER TIPSORD: All right,
22 Mr. Truesdale, we'll let you make your comments when
23 you testify -- yeah, in May.

24 I guess I'm a little confused, and

1 I'm an attorney not at a mathematician or a
2 scientist, but an average means that -- and I
3 believe Mr. Truesdale said this earlier, that
4 there's 49.5 percent above and 49.5 below, average
5 is the middle. That is correct, right, I'm not
6 mis-remembering what an average is, so by setting an
7 average as a maximum in some of these areas, you're
8 admitting that half of your reimbursement costs that
9 come in are going to be above that or should be
10 above that because they already are; is that not
11 correct?

12 MR. CHAPPEL: This is based on budgets
13 before any deductions by the agency. This is what
14 we proposed by the applicant in their budget.

15 HEARING OFFICER TIPSORD: I understand
16 that, but that doesn't answer my question.

17 If this is the average that half
18 of the people are already charging more than what
19 your maximum is, correct? Whether or not it's,
20 approved they're already charging more than what
21 your maximum is; is that correct?

22 MR. CLAY: I would say that's true,
23 but that doesn't mean that what they're charging is
24 reasonable.

1 HEARING OFFICER TIPSORD: Right, I
2 understand that.

3 (Laughter.)

4 HEARING OFFICER TIPSORD: Let's keep
5 the personal comments down, please, please, please.
6 Mr. Truesdale we'll start with. And could we please
7 keep it to questions?

8 MR. TRUESDALE: I'm going to try and
9 be very, very brief.

10 In terms of random sample
11 collections, there are multiple statistical methods
12 to ensure --

13 MR. CHAPPEL: Stop right there. This
14 was not --

15 MR. TRUESDALE: In all the testimony,
16 there's reference to samples randomly collected?

17 MR. CHAPPEL: Correct.

18 MR. TRUESDALE: In order to ensure
19 statistical validity and scientific defensibility,
20 there are specific methods that must be used in
21 order to maintain the randomness of the sample, and
22 what that entails is that the probable distribution
23 of each sample must be equivalent. That means
24 there's the exact same chance of pulling something

1 that you may consider to be unreasonable as they're
2 pulling something that you may consider to be
3 significantly less than reasonable. That's the
4 reason for doing statistics, to normalize highs and
5 lows. By doing that and only using an average, you
6 ignore that spread in the data set and the
7 confidence interval is reduced substantially.

8 There are a number of methods,
9 SW 846, a USEPA document that has basic statistical
10 principals for the number of random samples that
11 should be collected to represent a population and
12 how those samples should be collected. Was any
13 guidance such as SW 846 considered in collection of
14 the random samples used?

15 MR. CHAPPEL: No.

16 MR. TRUESDALE: Next question.

17 Once again, I'm going to go back
18 to the same thing, statistical differences in
19 geographic locations across the state, there's no
20 information provided in either testimony or in the
21 regulations as to how any of these data sets we
22 derived, including reference to geographic location,
23 time frame, if they were normalized, if they were
24 four years old, were they normalized for inflation

1 as proposed in the regulations prior to inclusion in
2 the averages that meant to be representative of
3 today.

4 I guess my concern is there's
5 nothing in here that allows me as a scientist to
6 evaluate the statistical validity or a scientific
7 defensibility of any other of these numbers that are
8 proposed including unclarities or inconsistencies of
9 scope of work provided in the one sentence
10 description of \$800 for calculation of cleanup
11 objectives other than Tier 1? Those are my
12 concerns. And I want to know if there's something
13 that the Agency can provide that would allow that
14 type of clarification, and when would they be
15 willing to do.

16 MR. CHAPPEL: No.

17 MR. TRUESDALE: No --

18 MR. CHAPPEL: I don't have that
19 information. I don't have the statistical
20 information you're looking for.

21 HEARING OFFICER TIPSORD: Can I ask a
22 question?

23 How many reimbursement
24 applications do you get a year?

1 MR. OAKLEY: Well, we process
2 approximately 2400 every year. We receive more than
3 that.

4 HEARING OFFICER TIPSORD: 2400 and you
5 have 25 that you -- over a four-year period, that's
6 correct, right, 25 is the number you?

7 MR. OAKLEY: Yes.

8 HEARING OFFICER TIPSORD: And you get
9 2400 a year.

10 MR. CLAY: I'd like to add that like
11 we're also not relying solely on the sampling. I
12 mean, we're relying on 15 years of experience
13 relying on, you know, what -- you know, we see from
14 consultants throughout the state and, you know,
15 so it's not just -- you know, we didn't do a
16 statistical analysis of this, and it's not just
17 based on these 25 sites or, you know, a different
18 number of sites throughout the testimony, but it's,
19 you know, based on a lot of experience in review of
20 these. So it's not just basically --

21 MR. KING: So, in summary, what you're
22 saying is the figures in Subpart H, in your
23 professional opinion, are reasonable figures for
24 reimbursement of those costs?

1 MR. CLAY: I'm sorry. Would you say
2 that again?

3 MR. CHAPPEL: Yes.

4 (Brief pause.)

5 HEARING OFFICER TIPSORD: Mr.
6 Truesdale, did you have any follow-up?

7 MR. TRUESDALE: I guess just to go
8 back and --

9 HEARING OFFICER TIPSORD: And, please,
10 questions.

11 MR. TRUESDALE: Once again, SW 46
12 specifies that the reason for statistics is to allow
13 the uncertainty of inductive inferences to be
14 evaluated, and, once again, these are standards that
15 being proposed, just like the cleanup objective,
16 essentially, yet there's no mechanism for us to
17 evaluate the uncertainty associated with these
18 inductive inferences based on Agency experience,
19 and, as a scientist, I would like to see some method
20 to do that. And, once again, I just want to
21 reenforce that I think it's necessary for something
22 to be provided, and I'd like to know how that issue
23 is going to be resolved in this rulemaking?

24 MR. BAUER: I guess one of the big

1 issues is that the data itself does not lend itself
2 to be able to do an analysis such as you designed.
3 The way that consultants bill is not consistent. We
4 have an extreme array of how things come in, and it
5 is -- it would be extremely complicated to do the
6 type of analysis that you are asking for.

7 MR. TRUESDALE: Then I guess the
8 follow-up question was, don't we have the cart
9 before the horse here a little bit, shouldn't we
10 define the scope of work, collect the data set that
11 can be evaluated logistically and then --

12 MR. CHAPPEL: And nobody gets paid
13 till then?

14 MR. TRUESDALE: Well, there has to be
15 something that's done in the interim. We have a
16 mediation. I would propose a mediation process
17 where it's not solely based on Agency decision, but
18 individuals with financial responsibilities, i.e.,
19 throwing marketers, individuals from the consulting
20 industry and the regulatory body itself to come to a
21 mediation.

22 HEARING OFFICER TIPSORD: I'm going to
23 ask -- I assume you're going to testify on May 25th?

24 MR. TRUESDALE: Yes.

1 HEARING OFFICER TIPSORD: I'm going to
2 ask that you include the method, the SW 8 method
3 that you're referring to as a part of your testimony
4 as an exhibit because I'm assuming you probably
5 don't have extra copies of it with you today, and it
6 needs to be entered into the record, so please bring
7 that --

8 MR. TRUESDALE: It's a USEPA document.

9 HEARING OFFICER TIPSORD: We may -- I
10 have a copy, but please bring it to the May 25th
11 hearing.

12 Mr. Cook?

13 MR. COOK: I have a follow-up
14 question. Mr. Chappel said that no one would be
15 paid until then, why would that be the case?

16 MR. CHAPPEL: Well, until we have the
17 database and the statistical analysis that Mr.
18 Truesdale has referred to, how do we know, what's
19 reasonable?

20 (Simultaneous colloquy.)

21 HEARING OFFICER TIPSORD: One at a
22 time. Don't talk over one another, please.

23 MR. COOK: It took 15 years and over a
24 half a billion dollars in claims payments.

1 MR. CHAPPEL: That's exactly what my
2 testimony is. This table represents a random
3 sampling to determine whether those costs are
4 reasonable.

5 The numbers we've been using over
6 the last 15 years, do those fall within a random set
7 as being reasonable, and these are the ones I looked
8 at, this is the number that we came up, and this and
9 it looks like that random set falls within those
10 reasonable numbers.

11 MR. COOK: Do you agree or disagree
12 that the methods that you apply provide a
13 statistically reliable means of evaluating those
14 costs?

15 MR. CHAPPEL: No.

16 MR. COOK: Then I have a question.

17 Mr. Bauer said that the data set
18 in and of itself does not lend itself to the proper
19 statistical evaluation. I would tend to agree with
20 that. I've spoken with a number of different
21 consultants, we all bill differently.

22 Our organization presented last
23 year to the EPA with the thought of developing a
24 unified work breakdown structure in phasing in cost

1 containment over a period of time with the first
2 phase of that approach being to collect a
3 significant -- a set of data that could be analyzed.
4 And that's not what's presented here.

5 I know that other consultants have
6 proposed a similar approach, and that's not what
7 shows up in these proposed regulations. Can I ask,
8 based upon the recommendations of the consulting
9 industry, how come that approach was not presented
10 to the Board?

11 MR. CLAY: First of all, I'm not sure
12 how long that would take; secondly, it's a resource
13 issue. If you want us to do that, we're not going
14 to be doing reviews.

15 You know, we did look at the data
16 set. Like I said, we looked at the -- and with the
17 numbers that came out, we looked at how they fit in
18 with what we've seen over the years with all the
19 experience, and we feel like they're in line with
20 it.

21 If they're not, I would welcome
22 you guys to tell us why they're not and provide the
23 documentation to support your numbers. But we need
24 to do something now, and in the next hearing, we're

1 going to have some examples of why it's critical to
2 do something now. There are just -- you know, this
3 fund right now is at a, you know, critical point,
4 we're looking at cash flow issue in the near future.
5 We want to maintain the solvency of that fund and we
6 can't continue spending the resources the way we
7 have without having the tools and the rules to
8 support that. And we spend way too much time -- we
9 spend an inordinate amount of time bargaining over
10 these budgets, and, Jay, you know that. And we
11 don't argue over technical issues anymore, it's all
12 about the budgets. And that's why we want to get
13 something in the rules and we need it now.

14 MR. COOK: I do not disagree. Cost
15 containment is a good thing if it based on
16 statistically reliable information, and it's fairly
17 and uniformly administered across the regulated
18 community. That's one of the things all the
19 consultants agree with.

20 The thought of utilizing rates
21 that are based on averages is something that I think
22 warrants a lot of further discussion. And you asked
23 whether we would be -- the consulting community
24 would be willing to provide alternatives, and I'm

1 confident that the answer to that is yes.

2 Let me ask the Agency. Is the
3 Agency willing to sit down and evaluate what those
4 alternatives are and enter into good faith
5 discussions with the regulated community to
6 determine that?

7 MR. CLAY: We have been doing that to
8 some degree for a year. I think it's been about a
9 year, Consulting Engineers Council of Illinois.

10 Now, what they've told us is we
11 can't talk numbers, other than hours. I mean, we
12 can't talk dollars because it would be an antitrust
13 issue.

14 And so I assume any group of
15 you -- through that organization, they can't. Now,
16 it doesn't mean that individually you guys can't
17 submit --

18 But look at it. I mean, the rate
19 is not the issue. It doesn't matter if we come up
20 with a rate for different personnel functions that
21 is twice what we're proposing. The hours is what it
22 comes down to. And, you know, if you don't have
23 both, if you don't -- and that's why we went for
24 these lump sums, you need a race. If you don't have

1 both -- you know, we've been going by standard rates
2 for a long time. You guys know that. But if you
3 don't put the hours with you, it didn't mean
4 anything.

5 MR. COOK: Are you able to identify
6 the number of hours spent specifically by the
7 different labor classifications in development as an
8 example of a corrective action plan?

9 MR. CLAY: That's what we did. We
10 took the numbers for a 45-day report, for corrective
11 action plan, for -- some of those documents and from
12 CECI that listed the functions that went into those
13 plans and reports and we looked at that list and
14 said, okay, one says photocopy. Well, we're not
15 going to pay \$130 for the PE to be photocopied.
16 That's an administrative support function.

17 So we looked at that from a couple
18 different areas just averaging different functions
19 and in Harry's testimony. We also looked at that,
20 compared how many hours that go into that. If you
21 guys disagree, then tell us what the weighted
22 average should be. You know, we've got too
23 many hours -- or we don't have them by hours, but we
24 just did an average it would give -- it's if loaded

1 to high toward administrative support, then tell us.

2 But, you know, based on, you
3 know -- that's how we came up with the -- Harry got
4 his testimony is an average of \$80, for example, for
5 a corrective. That includes administrative support,
6 that includes project manager, that but PE.

7 So, I mean, if that average should
8 be different, then, you know -- I would welcome to
9 seeing that and the support for it.

10 MR. COOK: Section 855 deals with the
11 unusual or extraordinary expenses. You mentioned
12 early that you felt a substantial percentage of your
13 charges would be covered by the general proposals as
14 presented here. Can you quantify what that -- what
15 substantial means?

16 MR. CLAY: Well, I mean, I've just
17 thrown out I in the past. I would open that over 90
18 percent of the sites that fall under these -- I
19 mean, all the charges fall under here. I mean,
20 that's what we set out to make a large majority.
21 Now, excluded alternative technologies and, you
22 know, stuff that we that built in to not go under
23 the lump sum.

24 MR. COOK: If that doesn't hold to

1 be the case, do you have an idea of how many appeals
2 might be presented for the Board? And I guess the
3 question I have is how rigid are these figures and
4 how many sides would be allowed to be reviewed
5 pursuant to 732-855, which provides some relief to
6 the owners and operators for site specific
7 conditions, and how many instances will these rules
8 be rigidly applied and the answer will be if you
9 don't like it, take it to the Board.

10 MR. CLAY: Well, I mean, we will
11 look -- I mean, I don't know how many, what number.
12 We didn't set a number. We're only going to
13 consider a percentage. But, you know, we would
14 consider the argument for anyone that wants to make
15 that argument.

16 Now, you know, if someone comes in
17 and says, well, I pay my people more, that's not
18 going to fly with me, you know, but if -- you know,
19 you tell me anything you say, I had to excavate
20 Chicago and here was the reasons why and this is the
21 site conditions and this is what happened, then --
22 and this is the increased cost for those reasons,
23 and that's something that I would consider, but what
24 I'm afraid of, and I don't want to give anyone the

1 wrong impression that, you know, what I'm afraid of
2 is that everything is going to be an exception, and
3 that's not going to fly.

4 I mean, if we adopt these rules,
5 we're going to expect that they apply to a large
6 majority of the sites.

7 MR. COOK: With the individual
8 differences that we saw with regarding to these
9 sites, I anticipate that this particular provision
10 will be brought up quite frequently, whether it's
11 acceptable to the Agency or not, in those cases
12 where it's brought up, will these sorts of issues be
13 brought to the attention of the IEPA project manager
14 or will there be an internal review board at the
15 Agency that would review these sort are pre-appeals?

16 MR. CLAY: There would be a work group
17 comprised of LUST managers and project managers that
18 would review everyone of these claims.

19 MR. COOK: The unit managers?

20 MR. CLAY: And I would sit on that as
21 well. And the reason to do that is to ensure a
22 consistent -- make sure we're consistent in our unit
23 approvals and denials of, you know, the
24 extraordinary, you know, situations.

1 MR. COOK: You mentioned earlier the
2 fund being in danger of a negative cash flow in the
3 near future, that's based upon what?

4 MR. CLAY: It's a potential based upon
5 revenues and expenses.

6 MR. COOK: Is there a projection
7 that's been done that would indicate that's going to
8 be the case.

9 MR. CLAY: Possibly this summer.

10 MR. COOK: Is there a projection?

11 MR. KING: The projection is this
12 summer. Yeah, this summer sometime.

13 MR. COOK: And the projection is based
14 on historical claims against the fund or --

15 MR. KING: It's based what's in the
16 fund now, what comes in each month and what is going
17 out each month.

18 MR. CLAY: Yeah, historical claims
19 have been going out, so --

20 MR. COOK: The average dollar amount
21 claimed per reimbursement applications submitted, do
22 you have the trend line on that over the course of
23 the last several years?

24 MR. CLAY: Well, I think the average

1 per site is around a 100,000.

2 MR. OAKLEY: 90,000.

3 MR. CLAY: And per claim --

4 MR. OAKLEY: Per claim I think it's
5 around 30.

6 MR. COOK: Is that going down or going
7 up?

8 MR. OAKLEY: The per claim is going
9 down because we're receiving more claims.

10 MR. CLAY: But I think the average
11 site per cost has probably gone down over the years
12 too.

13 MR. COOK: Has the Agency consulted
14 with USEPA to determine if these cost reductions are
15 imposed upon the owners and operators whether USEPA
16 would consider the LUST fund even though it may have
17 adequate funding in the program whether it will
18 still be considered to be an acceptable means of
19 financial responsibility because it does not cover a
20 large percentage of the cost incurred by the
21 owner/operator, has that sort of an inquiry been
22 made of the USEPA?

23 MR. CLAY: We've discussed this with
24 the USEPA, the fund, solvency, but also these rules,

1 and they would say that these rules are -- they're
2 very interested in these rules going through because
3 they do see this as a very good cost control
4 measure.

5 But, again, it's not -- I don't
6 think these are going to -- these aren't much lower
7 for a lot of people who are seeing this, it's,
8 again, streamlining, which in and of itself will
9 save the cause. But USEPA was very supportive of
10 these rules. We met with them it was probably three
11 months ago. We go twice a year. They were very
12 concerned about the solvency of the fund. Do you
13 remember in '95 they pulled an approval of the fund
14 and a lot of owners and operators got letters saying
15 they're going to have to provide a million dollars
16 of insurance on their own, and, luckily, the
17 legislature passed. And I remember the impact fee,
18 which, again, we think is enough money, but it
19 doesn't mean that we shouldn't, you know, be very
20 efficient with our resources. So, I mean, the USEPA
21 is keeping track of this very closely. There is a
22 number of funds that appear to be moving themselves.

23 MR. COOK: From the standpoint of the
24 reduction of cost and charges against the LUST fund,

1 do we all understand the importance of maintaining
2 the financials liability fund and the positive fund
3 balances, has the Agency looked at its internal
4 practices, administrative policies, procedures, to
5 determine ways that the Agency can expedite this
6 whole process to serve to reduce costs assessed
7 against the fund, it occurs to me that they were in
8 the regulatory program and so that 100 percent of
9 the cost incurred by the owner/operator is a cost to
10 comply with regulations. The EPA, Illinois EPA,
11 drives and sets the bar as to the scope of work
12 that's required for a particular owner/operator to
13 apply.

14 So has the Agency looked at means
15 that can be utilized to reduce -- looked
16 internally -- at means that can be used to reduce
17 the reporting requirements, time delays, that sort
18 of thing?

19 MR. CLAY: We have -- you know, I
20 think one of the big things we see is, you know,
21 this is a resource issue. But I think if we can
22 streamline the process more, you're going to see
23 quicker turnaround on reviews, so, you know,
24 cleanups are going to get done quicker, and, like I

1 said before, we spend all of our time on denials
2 and, you know, arguing with consultants on budget
3 issues. If we can address those issues through
4 these rules, you know, I think if we streamline the
5 process, and that's, you know -- that's the best
6 thing we can -- that's what we thought was the best
7 approach to take.

8 Yes, we have over the years looked
9 at a number of ways to streamline the process. You
10 know, there are -- and there's no plans or reports
11 that are getting cut out. And some are federal
12 requirements, the 20- and 45-day reports, and, you
13 know, then we're down to site investigation and
14 corrective action claims, so...

15 MR. KING: I mean, we have done that
16 all the time. We're always looking to try to
17 streamline things. One of the big issues for us
18 that existed during the 1990s was an effort that
19 culminated in the passage of -- I forget the public
20 act number that became effective in June of '02, we
21 wanted to get rid of the site classification system
22 that dated from the early '90s because people were
23 using that system instead of TACO, and that system
24 was increasing cost. It took us years to be in a

1 position to get that out of the statute, but we
2 finally were successful at doing that.

3 We have continued to look at ways
4 to streamline costs. The reason why we have this
5 regular proceeding is we think this is a way to
6 streamline costs to make our operations more
7 effective and more effective for consultants.

8 One of the complaints that we have
9 received over the years is that people don't like
10 the time frames it takes for them to get reviews
11 done and get payments processed. We think this will
12 speed that up, you know, and money paid out more
13 quickly should be an advantage for everybody.

14 HEARING OFFICER TIPSORD: Could we go
15 off the record for just a second?

16 (Whereupon, a discussion was had
17 off the record.)

18 HEARING OFFICER TIPSORD: We had a
19 discussion off the record. We are going to go with
20 the prefiling of the remaining questions for the
21 Agency at this time. That prefiling deadline having
22 been previously established, I thank you all for
23 your attention, your promptness in getting back on
24 breaks, we got a lot of work done today, and thank

1 you very much. We're adjourned.

2 (Which were all the proceedings
3 had in the above-entitled cause
4 on this date.)

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1 STATE OF ILLINOIS)

2) SS.

3 COUNTY OF DUPAGE)

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5 I, STACY L. LULIAS, CSR, do
6 hereby state that I am a court reporter doing
7 business in the City of Chicago, County of DuPage,
8 and State of Illinois; that I reported by means of
9 machine shorthand the proceedings held in the
10 foregoing cause, and that the foregoing is a true
11 and correct transcript of my shorthand notes so
12 taken as aforesaid.

13

14

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Stacy L. Lulias, CSR
Notary Public,
DuPage County, Illinois

17

18 SUBSCRIBED AND SWORN TO
19 before me this ___ day
of _____, A.D., 2004.

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21 _____
Notary Public

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