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ILLINOIS POLLUTION CONTROL BOARD
August 9, 2004

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

IN THE MATTER OF:
PROPOSED AMENDMENTS TO:
REGULATIONS OF PETROLEUM
LEAKING UNDERGROUND STORAGE TANKS
(35 ILL. ADM. CODE 734) R04-23
(UST Rulemaking)

The following proceedings were held before the Illinois
Pollution Control Board, August 9, 2004, at the Department
of Natural Resources Building, One Natural Resources Way,
Springfield, Illinois, before Ann Marie Hollo, CSR, RMR.

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APPEARANCES:

OFFICE OF THE ILLINOIS POLLUTION CONTROL BOARD
James R. Thompson Center, 100 W.
Randolph Street, Suite 11-500
Chicago, Illinois 60601

By: Marie Tipsord, Esq.
Hearing Officer

ILLINOIS POLLUTION CONTROL BOARD MEMBERS:

G. Tanner Girard, Ph.D, Thomas E. Johnson, Esq.,

AND

Alisa Liu, P.E., Technical Staff Member

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
1021 North Grand Avenue East
Springfield, Illinois 62794

By: M. Kyle Rominger, Esq.

Posegate & Denes, P.C.
111 North Sixth Street, Suite 200
Springfield, Illinois 62701

By: Claire A. Manning, Esq.
On behalf of PIPE

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E X H I B I T S

NUMBER	MARKED FOR IDENTIFICATION	ADMITTED
Exhibit 77	11	15
Exhibit 78 - 80	12	15
Exhibit 81 - 86	14	15
Exhibits 87, 88	17	17
Exhibit 89	39	
Exhibit 90	117	
Exhibit 91	118	
Exhibit 92	179	196
Exhibit 93	196	196

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

9 To my immediate right is Dr. Tanner
10 Girard, presiding board member in this matter,
11 and to his right is Board Member Thomas
12 Johnson. And from our technical staff, we have
13 Alisa Liu today. If we have to continue until
14 tomorrow, I believe Anand Rao will be joining
15 us tomorrow. And we also have Erin Conley here
16 today.

17 This is the fifth set of hearings to be
18 held in this proceeding. The purpose of
19 today's hearing is to allow for additional
20 testimony from the Illinois Environmental
21 Protection Agency and the Professionals of
22 Illinois for Protection of the Environment,
23 known as PIPE.

24 We will begin with the Agency's testimony

1 and by Mr. Clay, and as usual, will be taken as
2 it is read; you can summarize it, and we will
3 mark it as an exhibit and go directly into
4 questioning. After that, after we finish with
5 the Agency -- excuse me -- we will ask PIPE to
6 present its testimony and be available for
7 questions.

8 Anyone may ask a question. However, I do
9 ask if you raise your hand, wait for me to
10 acknowledge you, and after I've acknowledged
11 you, please state your name and who you
12 represent before you begin your questions.

13 I must emphasize for the court reporter's
14 sake, you must identify yourself. Please do so
15 each time so that to be sure that she's getting
16 the right person.

17 I will only allow questions to be asked.
18 If you begin to testify, as usual, I will have
19 you sworn in. I'll politely ask you to state
20 your question and move on. We can allow for
21 testimony at the end of the day if there is
22 time. Please sign up in the back of the room
23 if you want to testify.

24 Speak one at a time. If you're speaking

1 over each other, the court reporter will not be
2 able to get your questions on the record. Note
3 that any question asked by a board member or
4 staff are intended to help get a complete
5 record for the Board's decision, and not to
6 express any preconceived notion or bias.

7 At the back of the room there are signup
8 sheets for both the notice and service list. I
9 do want to caution everyone that we're
10 still -- we're switching how we are doing
11 notice and service lists. The hearing officers
12 are no longer in charge of those lists. Those
13 lists are being done through the clerk's office
14 and on COOL. There are some kinks that need to
15 be worked out. If you have signed up on
16 R04-22, it doesn't necessarily mean you
17 automatically show on R04-23. So when you get
18 ready to serve documents on people, please
19 compare lists, compare contrasts, and if you
20 encounter any difficulties in signing up or any
21 inconsistencies between the two lists, please
22 notify Sandy Wiley in our Chicago office. She
23 is the one who is in charge of keeping track of
24 all that stuff. We're trying to get those

1 worked out, but please be patient and please
2 help us out. Thank you.

3 Before we begin with both PIPE and the
4 Agency, I want to note that on Thursday, August
5 5th, Mr. Bill Fleischli contacted me with some
6 concerns regarding the Agency's prefiled
7 testimony. So before we begin with either the
8 Agency or PIPE, we'll allow Mr. Fleischli a
9 couple minutes to speak briefly. Mr. Fleischli
10 has another meeting later today. So we're
11 going to start with him.

12 Before we do that, Dr. Girard?

13 BOARD MEMBER GIRARD: Good morning. On
14 behalf of the Board, I welcome everyone to the
15 fifth hearing on the proposal to amend the UST
16 rules. We look forward to the testimony and
17 questions today. And we hope to be closer to a
18 first notice draft here pretty soon. Thank
19 you.

20 HEARING OFFICER TIPSORD: Thank you.
21 Mr. Fleischli, we'll go ahead and have you
22 sworn in.

23 (Whereupon the witness was sworn.)

24 MR. FLEISCHLI: Thank you very much for

1 letting me testify first. I am Bill Fleischli,
2 the executive vice-president of the Illinois
3 Petroleum Marketers Association. I represent
4 the Illinois Petroleum distributors who pay the
5 \$75 million a year, the environmental fees to
6 fund the UST program.

7 As our members read the new proposal the
8 IEPA has submitted to the Board, our members
9 have some real concerns. The new proposal
10 would require the use of less stringent cleanup
11 objectives for my members' property, while
12 requiring that off-site impact be addressed
13 using the most stringent regulatory
14 requirements. The proposed rule change would
15 only allow for the reimbursement to the lower
16 standard on site, making the owner pay out of
17 pocket additional costs if they choose to
18 restore their property to the more stringent
19 standard.

20 Currently, the fund pays for reimbursement
21 costs to clean up the property to comply with
22 state statutes. The owner/operator, after
23 consulting with their engineers, chooses the
24 standard they want to clean -- they want to use

1 to clean their property based on land use and
2 land value.

3 Now the IEPA wants to mandate they use the
4 less stringent standard. And once a No Further
5 Action letter is issued to the property, this
6 instance will no longer be eligible for the
7 fund.

8 Should IDOT or future law changes require
9 a phase study of the property and contamination
10 be found and the property mandated to be
11 cleaned up, the property will not be eligible
12 for reimbursement for that instance from the
13 LUST fund, even though the owner is still
14 paying into the LUST fund and the owner would
15 be liable and the incident will not be covered.
16 This is not fair, nor right, in our estimation.

17 The Illinois Petroleum Marketers
18 Association is not against the tiered approach
19 for cleanups. In fact, we led the industry in
20 the state with this approach about 10 years
21 ago.

22 What is wrong is not allowing the owner of
23 the property and the owner of the tanks the
24 opportunity to make the right decision for

1 their particular piece of property, and in
2 shutting the owner out of the UST insurance
3 fund after a No Further Action letter is
4 issued, even though they still continue to pay
5 into the fund. The IPMA believes this was not
6 what the fund was originally set up to
7 accomplish. That is, cleaning up contaminated
8 property.

9 I believe these hearings should be left
10 open, and lender and real estate people should
11 be asked to testify to the effect this rule
12 will have on property values. If this supposed
13 shortage in the fund is the reasoning for this
14 proposal, then I ask the Agency to join the
15 industry to help pass legislation that would
16 prevent the Governor and General Assembly from
17 taking any more dollars from the fund, and help
18 the industry pass legislation that would direct
19 the Governor and the General Assembly to pay
20 the fund the \$35 million they have taken from
21 the fund over the last three to five years.

22 Thank you, and I'll answer any questions
23 you may have at this time.

24 HEARING OFFICER TIPSORD: Thank you,

1 Mr. Fleischli.

2 Is there any questions? Thank you very
3 much.

4 BOARD MEMBER GIRARD: Thank you.

5 HEARING OFFICER TIPSORD: Before we start
6 with the Agency's testimony, too, I do have a
7 couple of housekeeping things to take care of.
8 The Agency has provided us with a copy of the
9 annual report, the 2003 annual report, for the
10 leaking underground storage tank program.

11 MR. ROMINGER: There's several years in
12 there.

13 HEARING OFFICER TIPSORD: Oh, I'm sorry.
14 There are several years in there. 2003. 2003,
15 2001 and 2000, okay. If there's no objection,
16 I'm going to take these and mark each as an
17 exhibit. We'll start with 2000 and mark that
18 as Exhibit 77.

19 (Whereby, the Hearing Officer
20 marked Exhibit Number 77.)

21 HEARING OFFICER TIPSORD: 2001 will be
22 Exhibit 78. 2002 will be Exhibit 79. And 2003
23 will be Exhibit 80. Those are so marked.

24

1 (Whereby, the Hearing Officer marked
2 Exhibits 78 through 80.)

3 HEARING OFFICER TIPSORD: And also Carolyn
4 Hesse called me on behalf of CW3M. They're
5 going to submit some exhibits. Is there one
6 here representing CW3M with those exhibits?

7 MR. WEINHOFF: These exhibits are in
8 responses to questions by the Agency at the
9 June hearings.

10 HEARING OFFICER TIPSORD: You need to
11 identify yourself.

12 THE DEPONENT: Oh, Jeff Weinhoff, CW3M.
13 Sorry.

14 HEARING OFFICER TIPSORD: That's okay.

15 MR. WEINHOFF: I have copies on the back,
16 copies of the OSHA regulations that we referred
17 to, copies of fire marshal regulations, two
18 letters that we refer to that you asked copies
19 of, for, and a transcript hearing that we
20 referenced, and then calculations for our
21 numbers for the other states.

22 HEARING OFFICER TIPSORD: Do you have
23 another copy up here?

24 MR. FLEISCHLI: I've got extra copies.

1 MR. ROMINGER: Does that have the
2 reference to the specific regulation regarding
3 the --

4 MR. FLEISCHLI: It's a copy of which ones?

5 MR. ROMINGER: Well, we were wanting a
6 specific reference to the specific requirement
7 of the number of people on site that you were
8 referring to in OSHA.

9 MR. FLEISCHLI: I did not put it together.
10 Harold put it together. And it's got -- I
11 can --

12 HEARING OFFICER TIPSORD: You do have a
13 copy of them to look at, right? Why don't you
14 go ahead and let them take a look. And I'll
15 let you take a look at those. And for now,
16 I'll go ahead and mark it. And ask if you have
17 any objection.

18 All right. We'll mark as Exhibit 81 -- I
19 think I am up to -- it's a document, the OSHA
20 regulations, will be marked as Exhibit 81.

21 The office of state fire marshal
22 record -- I'm sorry -- regulation will be
23 marked as Exhibit 82.

24 We have a letter dated February 9, 2004,

1 from the Illinois Environmental Protection
2 Agency to Mathias Development Corp, which we
3 will mark as Exhibit 83.

4 The second letter from the Illinois
5 Environmental Profession Agency to LE Anderson
6 Brothers Company Oil Company, Inc., we'll mark
7 as Exhibit 84.

8 MS. MANNING: Excuse me, Ms. Hearing
9 Officer. This is Claire Manning with PIPE.
10 Are there public copies of those available?

11 HEARING OFFICER TIPSORD: He said he had
12 several.

13 MS. MANNING: Okay.

14 HEARING OFFICER TIPSORD: Exhibit 85 is a
15 transcript from PCB 97-226 River View FS versus
16 IEPA.

17 And Exhibit 86 is raw numbers from the
18 ETD of other states.

19 (Whereby, the Hearing Officer
20 marked Exhibits 81 - 86.)

21 HEARING OFFICER TIPSORD: Have you had a
22 chance to go over those?

23 MR. ROMINGER: Yes.

24 HEARING OFFICER TIPSORD: Is there any

1 objection?

2 MR. ROMINGER: Well, the part 1926, they
3 referenced that before, and we asked them to
4 provide us a specific citation of that specific
5 provision they were talking about. And it
6 appears what they have done is sent a whole
7 copy of the entire part 1926. So we still
8 don't know which part of 1926 they're talking
9 about. And we'd just ask that they identify
10 that at some point.

11 HEARING OFFICER TIPSORD: In their
12 comments?

13 MR. WEINHOFF: And I guess I misunderstood
14 the question, but I'll review it, and we'll
15 submit it as a public comment, I guess.

16 MR. ROMINGER: Okay.

17 HEARING OFFICER TIPSORD: Any other
18 objection? Seeing none, we will admit those
19 exhibits.
20 (Whereby the exhibits were admitted into
21 evidence.)

22 HEARING OFFICER TIPSORD: I think we're
23 ready for you, Mr. Rominger.

24 MR. ROMINGER: Since the last hearing, the

1 Agency went back, and we reviewed the
2 transcripts of all the previous hearings and
3 all of the testimony filed in this proceeding.
4 And we've gone through, and there were a lot of
5 good recommendations, suggestions and issues
6 that came forth as part of that process.

7 And Mr. King mentioned at the last
8 hearing, we were sort of missing a step in the
9 regulatory development that we usually have.
10 Once we put the numbers in these rules, they
11 were no longer circulated around for comment
12 from concern from both our side and people in
13 the regulative community.

14 So part of the reason these proceedings
15 have been so protracted is that that step was
16 not done. And that has been taking place
17 during these rule-making proceedings.

18 As we've done with our first and our
19 second errata sheet, we've continued to revise
20 our proposal when we saw the need of revision
21 or there could be improvements. And that's
22 what we've done in our third errata here.
23 There's quite a few issues that we thought we
24 could include and we've included.

1 So I'll turn it over to Doug. He's going
2 to go through the testimony and summarize some
3 of the issues that we've covered, and we'll
4 have some testimony also.

5 HEARING OFFICER TIPSORD: Do you want to
6 mark the errata as a separate exhibit of his
7 testimony, or do you want to attach it to
8 Doug's testimony?

9 MR. ROMINGER: I don't think there's a
10 preference. It may be easier if we have two
11 exhibits.

12 HEARING OFFICER TIPSORD: Should we go
13 ahead and admit those then? Do you have a
14 clean copy for me?

15 MR. ROMINGER: Yes. Of the errata?

16 HEARING OFFICER TIPSORD: Of both. I must
17 admit, I just noticed when I was reading it.

18 If there's no objection, we will mark the
19 errata sheet as Exhibit 87 and Mr. Clay's
20 testimony as Exhibit 88. And there are copies
21 available in the back of the room. Seeing
22 none, those are so entered.

23 (Whereupon the Hearing Officer marked Exhibits
24 87 and 88, and same were admitted into

1 evidence.)

2 HEARING OFFICER TIPSORD: And we'll have
3 you sworn.

4 (Whereupon the witness was sworn.)

5 MR. CLAY: Good morning. My name is Doug
6 Clay. Today I will be providing additional
7 testimony in support of the proposal.

8 The Agency would like to thank the Board
9 for the opportunity to submit these additional
10 changes. We would also like to thank all the
11 parties who provided comments and
12 recommendations during the proceeding.

13 Since the last hearing, the Agency has
14 reviewed the transcripts of all of the hearings
15 held in the rule making and all of the
16 testimony filed with the Board.

17 Our third errata contains the changes to
18 our proposal that we think are appropriate in
19 response to questions, comments and
20 recommendations that have risen in this rule
21 making. Although the Agency's third errata
22 sheet contains quite a few changes, we believe
23 these change will improve the LUST rules for
24 all parties involved in the LUST program.

1 We also have reviewed PIPE's counter
2 proposal filed last week. We oppose it to the
3 extent it is inconsistent with our proposal.
4 Their counter proposal indicates there are
5 many -- there may be some confusion in our
6 proposal. Gary will be discussing the few
7 changes that could be made to clear up this
8 confusion.

9 First, I would like to cover several
10 issues that were raised in the hearing in June
11 and July. I will then highlight some of the
12 changes proposed in our third errata sheet.

13 Issues raised on June 21, June 22 and
14 July 6th hearings: There were several claims
15 made regarding the time it takes the Agency to
16 respond to submittals and requests to reduce
17 the time allowed the Agency to review
18 submittals. First, the Act provides the Agency
19 with 120 days to respond to submittals. Any
20 changes to that time frame requires a statutory
21 change to the Act.

22 Furthermore, reduction of this time frame
23 would impact the Agency's administration of the
24 LUST program. The greatest factor in the

1 Agency's review time frames is the volume of
2 documentation it receives. On the average, the
3 Agency receives 30 linear feet of LUST plans
4 and reports each month or less -- or more than
5 7 feet each week. LUST documents currently
6 make up 50 percent of all the documents
7 received per month in the Bureau of Land's file
8 room. These figures do not include all the
9 reimbursement documentation received by the
10 LUST claims unit, such as applications for
11 payment. There must be an understanding of the
12 time and resources needed to review all
13 documents we receive. Shortening the Agency's
14 review deadline, even if done appropriately
15 through a statutory change, would hinder,
16 rather than help, the Agency's ability to
17 review more quickly.

18 Secondly, statements such as -- and quote,
19 "Project manager sends a letter at the end of
20 the 120 day review period and generally not a
21 day before," end quote, is inaccurate.

22 The Agency looked at the review times for
23 plans and reports from May 2003 to May 2004 and
24 review times are as follows: 26.3 percent of

1 all reviews were done in less than 30 days.
2 26.1 percent of reviews were done between 30
3 and 60 days, 19.7 percent were done between 60
4 and 90 days, and 27.9 percent were done between
5 90 and 120 days.

6 Furthermore, there have been many
7 complaints that sometimes it takes up to two
8 years to obtain Agency approval. The amount of
9 time it takes to approve a plan or report is
10 largely dependent upon the quality of the
11 submittal. If the initial submittal meets the
12 applicable regulations and therefore could be
13 approved, the time frames for approval will be
14 no more than 120 days. As shown in our numbers
15 I just mentioned, in most cases is much less.

16 The claim was made in prefiled testimony
17 of PIPE: Member firms conduct or provide
18 services at nearly all the underground storage
19 tank cleanups conducted in the State of
20 Illinois.

21 Later at the hearing, PIPE presented
22 Exhibit 58, which showed 10 unidentified
23 consultants working on 893 active LUST sites.
24 PIPE will not identify its members and could

1 not provide a breakdown of how many members
2 represented each of the different types of
3 businesses involved in the remediation of LUST
4 sites, but Cindy Davis did indicate that PIPE
5 had a total of 20 member firms that are either
6 consultants, laboratories, landfills or
7 contractors.

8 To put these numbers in perspective, the
9 Agency would like to offer the following:

10 There are over 23,000 LUST sites in the
11 LUST program. Over 10,000 of those sites still
12 have to be remediated. Of the unremediated
13 sites, over 2,300 have had some sort of
14 activity in the last two years, submitted a
15 plan or report to the Agency.

16 There are 375 different consultants that
17 have worked in LUST sites in the past five
18 years. There are 48 landfills in the state
19 permitted to accept LUST soils. There are 668
20 haulers permitted to transport LUST
21 contaminated soils. There are 89 laboratories
22 certified by the Agency to perform analyses
23 requiring the LUST program. There are 153 tank
24 removal contractors permitted by the Office of

1 the State Fire Marshal. There are numerous
2 drillers, excavators, drillers and excavators
3 that work in the LUST program. In addition,
4 there are thousands of owners and operators who
5 are the parties responsible for complying with
6 these rules and the parties to be reimbursed
7 under the rules for their corrective action
8 costs.

9 The Agency appreciates PIPE's involvement
10 in the rule making. It provides -- it has
11 provided many good comments and
12 recommendations, which are included in the
13 third errata sheet. And we look forward to
14 working with PIPE members in the future on
15 issues related to the LUST program. However,
16 while PIPE has been a very vocal -- has been
17 very vocal in these proceedings, the Agency
18 would like to point out that it represents only
19 a small fraction of the persons involved in the
20 LUST program. The Agency has heard, either
21 directly or indirectly, that many consultants
22 are happy with rules as proposed, and
23 specifically have no problems with Subpart H.

24 There have been comments about the scope

1 of work for professional consulting services
2 not being adequately defined in these rules.
3 The Agency does not believe that a detailed and
4 defined scope of work for each aspect of the
5 leaking underground storage tank cleanup is
6 necessary, nor does it -- should it be included
7 in these regulations. We agree that there are
8 some variabilities from site to site, but this
9 variability has been taken into account in the
10 Agency proposal. The scope of work is simply
11 the work required to perform the task being
12 reimbursed, such as preparing and submitting
13 the plan or report.

14 Several PIPE members commented on the
15 Agency's proposed soil conversion factor. We
16 believe that the conversion factors that have
17 been proposed are appropriate. And I would
18 like to emphasize that whatever conversion
19 factor the Board adopts, it should be
20 consistent throughout the rules.

21 At least one person representing -- or
22 presenting testimony raised the idea of
23 allowing owners and operators access to the
24 fund for costs incurred after the completion of

1 remediation and the issuance of a No Further
2 Remediation letter. The purpose of allowing
3 such access would be to make owners and
4 operators more comfortable with the TACO
5 regulations. PIPE's counter proposal takes
6 this idea farther and asked the Board to allow
7 owners and operators back into the LUST program
8 and the UST fund for almost any reason.

9 The Agency opposes allowing owners and
10 operators back into the LUST program and the
11 UST fund after the issuance of an NFR letter,
12 except as already allowed for sites with MTBE.

13 There are over 10,000 releases from USTs
14 that still need to be remediated. The Agency
15 should be allowed to focus its time and
16 resources on sites that have yet to be
17 remediated, and not on sites that have already
18 received NFR letters that were requested and
19 agreed to by the owner/operator.

20 According to Exhibit 69 submitted by PIPE,
21 most owners and operators already utilized
22 alternatives available under TACO as part of
23 the remediation. There is apparently already a
24 good comfort level with TACO.

1 Allowing owners and operators to come back
2 into the LUST program and accesses the LUST
3 fund would make it even harder to get a handle
4 on the fund's outstanding liability.

5 And, finally, the Board has already ruled
6 in the last LUST rulemaking, Docket R01-26,
7 proposed rule, second notice, that absent
8 special circumstances, such as MTBE
9 contamination, the UST fund should not be used
10 to pay remediation costs once the Agency has
11 issued an NFR letter. An NFR letter signifies
12 that no further corrective action is necessary,
13 thus making the use of the UST fund
14 unnecessary.

15 Issue has been taken with the Agency
16 reviewing plans, reports and applications for
17 payment that have been certified by a Licensed
18 Professional Engineer or Licensed Professional
19 Geologist. Some persons have asserted the
20 Agency should rely solely on the LPE and LPG
21 certification and should not question the LPE
22 or LPG's opinions or decisions. These
23 assertions assume the LPG and LPE
24 certifications have much more of a role in LUST

1 programming than they are given by the Act and
2 the rules. Under the Act and the rules, it is
3 the party responsible for protecting human
4 health and the environment and properly
5 administering the UST fund. The Agency's
6 review of work conducted at LUST sites is
7 necessary to ensure these obligations are met.

8 Furthermore, preventing the Agency from
9 reviewing documentation certified by an LPE or
10 LPG would result in unchecked access to the
11 fund. The Act gives the Agency, not the LPE or
12 LPG the responsibility to determine whether
13 costs submitted for reimbursement are
14 reasonable. The Agency has discovered numerous
15 examples where an LPE or LPG has certified
16 either technical or reimbursement submittals
17 that were obviously not in accordance with the
18 Act and the regulation.

19 And I'd like to just go through a brief
20 sampling, a few examples for multiple
21 consultants, the plans and reportings that have
22 been certified as reasonable by professional
23 engineers or professional geologists within the
24 last year or so that the Agency believes are

1 unreasonable. This is only a sampling and is
2 not included by any means in all instances.

3 One, a site investigation plan for minor
4 contamination at the site. Four soil borings
5 and monitoring wells were proposed to delineate
6 the extent of the contamination. A total of
7 257 hours were requested, a total budget of
8 over \$30,000, and personnel costs of over
9 \$19,000.

10 Second. Site investigation plan included
11 14 monitoring wells were proposed to delineate
12 the extent of the contamination, the submittal
13 of the site investigation completion report.
14 The total budget was \$140,000. 94,000 of that
15 was personnel costs. This was actually a
16 resubmittal. The initial submittal was for 25
17 groundwater monitoring wells to delineate
18 extent of contamination. The original budget
19 was for \$192,000, and it was over \$104,000 in
20 personnel costs.

21 Third example site investigation plan
22 consisted of 13 groundwater monitoring wells
23 were proposed to delineate the extent of
24 contamination. Total budget, \$101,000. 63,000

1 in personnel costs.

2 Fourth. Site investigation plan included
3 12 soil borings, five groundwater monitoring
4 wells, preparation of a dig and haul CAP and
5 corrective action plan and corrective action
6 completion report. A total of \$316,000 with
7 \$68,000 in personnel costs, which included over
8 \$800 -- 800 hours for project manager,
9 environmental protection II, a professional II
10 and environmental professional I.

11 Preparation of a corrective action plan,
12 installation of five borings and five
13 monitoring wells for a total of \$126,000, a
14 hundred thousand dollars in personnel costs.

15 A proposal for corrective action plan
16 consisting of injection of an oxygen generating
17 compound into the subsurface to remediate soil
18 and groundwater contamination in place. A
19 consultant certified \$32 a foot was reasonable
20 to inject the chemical. The Agency denied and
21 requested justification for the rate. Then the
22 plan amendment was submitted and certified that
23 included a rate of \$16 per foot for the same
24 work, which the Agency then approved. This

1 resulted in a cost savings or cost differential
2 of \$115,000.

3 Corrective action plan consisting of a dig
4 and haul, collection of samples, collection of
5 samples and replacement of five groundwater
6 monitoring wells and the performance of the
7 biofeasibility study. Total budget, \$552,000,
8 \$142,000 in personnel.

9 Corrective action plan, amendment,
10 consisting of the preparation of a plan and
11 budget for performance of the biofeasibility
12 study, which included 28 borings and 30
13 injections. Again, this was a pilot study.
14 \$443,000, and \$92,000 in personnel costs.

15 A corrective action plan, amendment, to
16 excavate 100 cubic yards of soil, collecting
17 confirmatory soil samples and install two
18 groundwater monitoring wells and prepare a
19 highway authority agreement, and record the NFR
20 letter. Total of \$58,000, \$49,000 in personnel
21 costs with 436 hours to perform these
22 activities.

23 In addition, over the years we have seen
24 numerous instances of double billing. That is,

1 duplicate submittals of costs that have already
2 been paid.

3 We've also seen numerous instances of
4 requests for payment for ineligible activities,
5 such as activities performed prior to the
6 existence of the LUST program, activities
7 performed prior to the release being reported,
8 landscaping activities, removal of animals from
9 remediation sheds. And we've even received one
10 where a consultant asked to be reimbursed for
11 staying at his parents' home.

12 Numerous instances where environmental
13 professionals have certified that the
14 requirements of the rules and Act were
15 satisfied and requested a No Further
16 Remediation letter. However, the report
17 clearly shows these requirements have not been
18 met.

19 Again, these are just a few examples and
20 are not isolated cases, to support the need for
21 the Agency to review plans and reports and not
22 rely solely on the professional engineer or
23 professional geologist's certificates for both
24 the technical adequacy and the reasonableness

1 of costs for corrective action as part of the
2 leaking underground storage tank program.

3 Members of PIPE have raised the idea of
4 creating a new database specifically for the
5 purposes of determining rates to adopt in the
6 rules. The Agency strongly opposes this idea.
7 A mandated burdensome and time-consuming data
8 collection effort sends the LUST program in the
9 wrong direction. First, it would greatly
10 complicate and lengthen the preparation of
11 budgets by consultants, thus increasing costs.
12 It would also complicate and lengthen the time
13 needed to review the budgets by the Agency.

14 BOARD MEMBER JOHNSON: Hey, Doug, I keep
15 looking through here. Those examples you just
16 gave, they're not in your prefiled testimony?
17 That was in addition to it?

18 MR. CLAY: That's correct.

19 BOARD MEMBER JOHNSON: Okay, thanks.

20 MR. CLAY: That's correct.

21 The UST fund and the Agency resources are
22 already taxed, and this proposal would only
23 worsen the situation.

24 Second, the data submitted would be skewed

1 from the beginning. There is nothing to ensure
2 the data submitted would reflect reasonable
3 costs.

4 And, finally, there is no need for such
5 data collection effort because the Agency has
6 added bidding provisions to its proposal as a
7 means of demonstrating on a site-specific basis
8 the costs higher than Subpart H are reasonable.
9 Bidding will more accurately reflect the daily
10 market prices and will be more responsive to
11 market changes.

12 Members of PIPE have raised the idea of
13 the Agency to provide owners and operates with
14 draft denial or modification letters prior to
15 decisions denying or modifying the plan of
16 report. Members of PIPE have likened this idea
17 to Agency review of permits.

18 The Agency is opposed to requiring a draft
19 denial or modification letter prior to the
20 Agency issuing a final decision. Such a
21 process would extend review times and is
22 counter productive to streamlining the LUST
23 program. Unlike permit reviews, the clock on
24 the Agency's 120-day review deadline would not

1 stop if the Agency were to issue a draft
2 letter.

3 Further, the analogy to permit reviews is
4 not appropriate. According to the permit
5 section; of the permits they issue, only the
6 RCRA part B permits, which are construction
7 operator permits for hazardous waste treatment,
8 storage or disposal facilities, require draft
9 permits prior to the final decision.

10 It is -- in its counter proposal, PIPE
11 requested the Agency be given 45 days to review
12 submittals. They also request that the
13 submittals be automatically approved if the
14 Agency does not respond within 45 days. Both
15 the shortened review time and the automatic
16 approval are contrary to the Act. As I have
17 stated, the Act specifically provides the
18 Agency with 120 days to respond to submittals.
19 Requiring the response PIPE wants within 45
20 days would shorten the statutory review period.
21 The Act also specifically provides that
22 submittals are denied by operation of law if
23 the Agency does not respond within 120 days.
24 Title 16 originally provided for approval by

1 operation of law if the Agency did not respond.
2 However in 1995, USEPA pulled its authorization
3 from the LUST program because in, part, the
4 automatic approval was inconsistent with the
5 federal program. In response, the legislature
6 amended the Act to provide denial by operation
7 of law. Allowing approval by operation of law
8 would once again threaten the USEPA's
9 authorization of the LUST program.

10 The idea of a peer review committee has
11 been raised by members of PIPE. The Agency is
12 opposed to creation of such a committee. The
13 Agency gives the Act -- the Act gives the
14 Agency the authority and responsibility to
15 oversee the LUST program and determine the
16 reasonableness of costs reimbursed from the UST
17 fund. The Act does not authorize persons
18 outside the Agency to review submittals, and
19 the decision of such a committee would not be
20 appealable to the Board. Only the Agency's
21 decision can be appealed to the Board.
22 Otherwise -- or outside influences or input on
23 Agency's final decision is simply
24 inappropriate. Furthermore, routing submittals

1 through such a committee prior to the Agency
2 issues a final decision will lengthen and
3 review -- lengthen the review process and is
4 counter to streamlining the LUST program.

5 To help foster and enable greater
6 communication between the Agency and other
7 parties involved in the LUST program, the
8 Agency is proposing a new provision that would
9 establish a LUST advisory committee. The
10 committee would be made up of representatives
11 of interested parties and will meet with the
12 Agency on a quarterly basis to discuss the LUST
13 program. This committee is modeled after the
14 Site Remediation Advisory Committee that was
15 established for the Agency's site remediation
16 program.

17 Another idea raised by PIPE members is to
18 allow another method besides Board appeal to
19 challenge Agency decisions. The persons
20 allowed to oversee the alternative proceedings
21 would be selected by committee -- by a
22 committee, and the costs of the proceedings
23 would be paid out of the UST fund. The Agency
24 opposes this idea and is not authorized by and

1 is not consistent with the Act.

2 A few issues have been raised regarding
3 the applications for payment. One is that the
4 requirement that applications for payment
5 include proof of payment to subcontractors.
6 There has been requests to strike this
7 requirement because of hardship of obtaining
8 canceled checks. Canceled checks are not the
9 only proof of payment that may be submitted.
10 Applications for payment may also contain lien
11 waivers or affidavits from subcontractors. One
12 of these methods of proof of payment should be
13 reasonably obtained.

14 Proof of payment of subcontractors' costs
15 is necessary to show the consultant is entitled
16 to handling charges. Handling charges, by
17 definition, means administrative insurance and
18 interest costs as -- and the reasonable profit
19 for procurement, oversight and payment of
20 subcontractors and field purchases. If the
21 consultant paid the subcontractor's bill, he or
22 she is entitled to handling charges. However,
23 many consultants have the owner/operator pay
24 the subcontractors directly, and therefore are

1 not entitled to handling charges. The Agency
2 needs the proof of payment to show the
3 contractor paid the subcontractor and is
4 therefore entitled to handling charges.

5 Testimony was provided by CW3M that the
6 average rate for excavation, transportation and
7 disposal of contaminated soils awarded by IDOT,
8 awarded for IDOT projects was \$99.75 cubic
9 yard. This comparison is inappropriate.
10 Following discussions with IDOT regarding the
11 bidding process, the Agency received a letter
12 from IDOT dated August 2, 2004 that explains
13 the process.

14 At the conclusion of the IDOT -- of this,
15 IDOT states, and I quote, "Based on the
16 information provided during the rule making,
17 IDOT's costs should not be used to compare or
18 justify costs proposed by the IEPA in this rule
19 making," end quote.

20 Steve Gobleman of IDOT, who has been
21 attending these hearings, has offered to answer
22 any questions regarding this letter and IDOT's
23 process. And he is here today.

24 MR. ROMINGER: We've got a copy to

1 provide for the record.

2 HEARING OFFICER TIPSORD: Yeah, let's go
3 ahead and mark that as an exhibit. We'll mark
4 the Illinois Department of Transportation
5 August 22, 2004 letter to Mr. Clay as Exhibit
6 89. If there's no objection, seeing none, it's
7 marked as Exhibit 89.

8 (Whereby, the Hearing Officer
9 marked Exhibit Number 89.)

10 MR. CLAY: Now I'd like to go through the
11 actual changes that we are proposing in the
12 Agency's third errata sheet.

13 The first change on the July 6, 2004
14 hearing, PIPE requested clarification on how
15 proposed Part 734 would be applied to releases
16 subject to Public Act 92-0554, but reported
17 prior to the effective date of Part 734. In
18 response, the Agency proposes to
19 change -- proposes a change that recognizes the
20 work already performed at a site, even though
21 the work may not exactly match the requirements
22 of 734.

23 In addition, the Section is changed to
24 provide the costs approved in a budget prior to

1 the effective date of Part 734 will be
2 reimbursed according to the amounts approved in
3 the budget.

4 The second change. In response to
5 comments, the Agency proposes to amend the
6 definition of half day, one half day equals
7 four hours. The Agency further proposes to
8 remove the two half days per calendar day
9 limitation so that more -- that two half days
10 can be reimbursed in a single calendar day.

11 Third change. Members of PIPE have
12 pointed out correctly that much of the Agency's
13 review of work performed at the site is based
14 solely on the report it receives and not on
15 direct observation of activities. However, the
16 Agency does not receive advanced notice of when
17 field activities are being -- will be taking
18 place. The Agency agrees that direct oversight
19 of field activities is very valuable in certain
20 circumstances. To help the Agency identify
21 sites for field activities should be directly
22 observed. And to help and plan for such
23 oversight, the Agency proposes to add wording
24 that would allow the Agency to require

1 notification of field activities.

2 Fourth change. To help foster and enable
3 greater communication between the Agency and
4 other parties involved in the LUST program.
5 The Agency proposes new sections that establish
6 a LUST advisory committee. The committee would
7 be made up of representatives of interested
8 parties and will meet with the Agency on a
9 quarterly basis to discuss the LUST program.
10 The committee is modeled after the Site
11 Remediation Advisory Committee that was
12 established through the Agency's Site
13 Remediation Program.

14 Fifth change. Members of PIPE have
15 expressed concern over the proposed language of
16 the LPE and LPG certification. In response,
17 the Agency proposes to amend certification so
18 that a professional who is certifying only to
19 the standards and practices of his or her
20 profession.

21 Sixth change. Members of PIPE requested
22 that allowances be made for situations where
23 early action soil samples cannot be collected
24 in the location specified in the rules. In

1 response, the Agency proposes to allow
2 alternate locations for samples and
3 circumstances required.

4 Seventh change. To address problems where
5 removal of free product that exceeds one-eighth
6 of an inch depth is impractical, the Agency
7 proposes to add language to the extent -- to
8 the maximum extent practicable back into
9 732.203(a) and 734.215(a). PIPE asked that
10 free product removal will be required only when
11 necessary to address health and safety issues.
12 Relaxing free product removal to such a
13 standard would make the Board's rules
14 inconsistent with federal rules and therefore
15 jeopardize USEPA authorization of the LUST
16 program.

17 PIPE also asks the Board to delete its
18 board notes from this section and throughout
19 these rules. The Agency believes that these
20 notes are helpful to owners and operators to
21 further clarify the Board's rules, and
22 disagrees with PIPE's proposal.

23 The eighth change. There was several
24 comments from members of PIPE and the American

1 Council of Engineering Companies, ACEC,
2 regarding the prescriptive nature of stage one
3 site investigations. In response to their
4 comments and recommendations, the Agency
5 proposes to amend Section 734.315(a) so that it
6 contains simplified samples requirements. The
7 amended stage one investigation is based on
8 ACEC's stage one site investigation submitted
9 in Dan Goodwin's testimony, which is Exhibit
10 74.

11 Ninth change. Members of PIPE have
12 expressed concerns over knowing how many
13 alternative technologies must be compared in a
14 budget when alternative technology is proposed.
15 The Agency believes that comparison of two
16 other alternative technologies is sufficient.
17 Therefore it proposes to require such a
18 comparison.

19 The tenth change. Members of PIPE
20 objected to requiring the submission of
21 laboratory certifications in applications for
22 payment. In response, the Illinois EPA
23 proposes to delete this requirement.

24 The eleventh change. In order to help

1 ensure UST fund money as used in a most
2 cost-effective manner, the Agency proposes
3 changes that will require owners and operators
4 to seek reimbursement to utilize certain
5 aspects of TACO.

6 First, the Agency proposes to limit
7 payment from the fund to costs that achieve
8 cleanup to Tier 2 objectives. TACO is designed
9 so that cleanup to the Tier 2 objective is
10 equally protected as cleanup to the Tier 1
11 objective, which is generally more expensive.

12 The second change is to the use of TACO,
13 is to require the use of a groundwater
14 ordinance as an institutional control if the
15 ordinance has already been approved by the
16 Agency and is available.

17 The twelfth change. CW3M raised concerns
18 about the consequences of a proposed provision
19 that could make consultant fees ineligible when
20 re-sampling is due to laboratory error. In
21 response to these concerns, the Agency proposes
22 to delete that provision.

23 Thirteenth change. CW3M raised concerns
24 about certain routine maintenance costs being

1 made ineligible by a proposed provision. In
2 response, the Agency changed those provisions
3 to make routine maintenance costs eligible for
4 reimbursement if they are approved in a budget.

5 Fourteenth change. Members of PIPE have
6 raised concerns over the addition of record
7 retention provisions. These concerns appear to
8 be centered around the audit language repeated
9 from the Act. The proposed section is intended
10 to be used for review of documents related to
11 the payments from the UST fund, such as time
12 sheets, subcontractors' invoices, chain of
13 custody documents, backup documentation for
14 costs submitted for payment. The Agency merely
15 needs to ensure that the records related to
16 reimbursement submittals are retained for
17 certain periods of time so they can be
18 reviewed, if necessary. With the new
19 streamlining process, many of these documents
20 will no longer be submitted to the Agency. Due
21 to the concerns raised by members of PIPE, the
22 Agency proposes to delete the statutory
23 auditing language and retain only the
24 provisions that are based on record retention

1 provisions in other Board and Agency
2 regulations. Copies of those provisions were
3 submitted to the Board in Exhibit 16.

4 Payment of corrective action costs from
5 the UST fund is the distribution of public
6 money, and the Agency must be able to properly
7 account for such public money. The proposed
8 record retention provisions will bring the LUST
9 program in line with other Board and Agency
10 regulations that deal with the distribution of
11 public money and will aid in the proper
12 accounting of public money in the UST fund.
13 Because hundreds of millions of dollars in
14 public monies are distributed through the UST
15 fund, far exceeding amounts governed by many
16 other Board and Agency regulations, there is an
17 even greater need for record retention
18 provisions in the LUST rules.

19 Sixteenth change. Several concerns were
20 raised over reimbursement amounts for personnel
21 costs. In response, the Agency proposes the
22 following changes to its proposal:

23 A. Allowing one half day of field work
24 and -- excuse me. Allowing one half day of

1 field work and field oversight for each leaking
2 underground storage tank that is removed, up to
3 10 half days.

4 B. Concerns were raised about the costs
5 of site investigation at high priority sites
6 under 732. In response, the Agency proposes to
7 add the same language and costs as provides for
8 site investigation under 734.

9 C. Concerns were raised over the costs
10 for additional well survey work required under
11 the new rules. In response, the Agency
12 proposes to add separate maximum payment amount
13 for this work.

14 D. Concerns were raised over
15 reimbursement of travel time. Members of PIPE
16 recommended the travel time be broken out and
17 reimbursed separately from the half day rate
18 due to its variability from site to site. In
19 response, the Agency proposes to remove travel
20 time from the half day rate and reimburse it
21 according to a sliding scale based upon the
22 distance from the consultant's office to the
23 site.

24 E. Concerns were raised about the costs

1 associated with plan revisions that are needed
2 as a result of unforeseen circumstances that
3 arise after a plan and budget have been
4 approved. In response, the Agency proposes to
5 allow \$640 for a plan and budget amendments
6 required because of unforeseen circumstances.
7 This amount is based on eight hours' personnel
8 time.

9 Seventeenth change. Concerns have been
10 raised about setting maximum reimbursement
11 amounts in the rules. In addition, the idea of
12 bidding, which is used in several other states,
13 has been raised as a possible method of
14 determining reasonable amounts for
15 reimbursement. In response, the Agency
16 proposes to add provisions that would allow
17 maximum amounts set forth in these rules to be
18 exceeded if a minimum of three bids are
19 obtained. If such -- in such cases, the amount
20 of the lowest bid would be an amount allowing
21 for reimbursement purposes, unless it is lower
22 than the maximum payment amount set forth in
23 these rules. The bidding provisions do not
24 specify who is to do the bidding. The Agency

1 anticipates that in most cases the bidding will
2 be done by the primary consultant.

3 The Agency believes that the bidding
4 process will generally improve the process of
5 proposed rules. First, it allows an exceedance
6 over the maximum rates if the lowest of the
7 bids exceed those rates. Bidding will allow
8 the rules to be responsive to site-specific
9 conditions and cause -- that cause an increase
10 in costs, such as greater hauling distances to
11 landfills and higher field cost.

12 Second, costs based on bids will
13 accurately reflect market price, making the
14 rules immediately responsive to price
15 fluctuation.

16 Third, there is less of a need for Agency
17 approval of unusual and extraordinary expenses
18 or the need to determine at what point the
19 costs substantially exceed the maximum payment
20 amounts. Instead, the costs can be bid out,
21 and the lowest bid will be considered
22 reasonable.

23 Fourth, there is no need to gather new
24 information to establish a new database

1 specifically for the purposes of determining
2 maximum reimbursement amounts, which could be
3 extremely burdensome to both consultants and
4 the Agency and result in great delays in
5 adopting these rules.

6 Finally, bidding will help the Agency
7 track market rates and adjust maximum payment
8 amounts in the rule when necessary. If we see
9 certain costs are continually bid out and
10 coming in higher than the maximum payment
11 amount allowed in the rules, we will know it's
12 time to review the rules and adjust those
13 amounts through a rule making. The proposed
14 bidding provisions do prohibit the bids from
15 certain parties. This is to ensure that
16 third -- that true third party bids are
17 obtained. However, the bidding provisions also
18 provide lowest bidder does not have to be used,
19 only the amount of the lowest bid. Another
20 person may be hired to perform the work, and
21 the rules specifically provide that parties
22 prohibited from bidding may perform that work.

23 The bidding provisions allow -- the bid
24 provisions also require that all bids received

1 must be submitted to the Agency. This is to
2 avoid situations, for example, where five bids
3 are obtained, and the three bids are submitted
4 to the Agency are the three highest. If more
5 than the minimum three bids are obtained, the
6 amount allowed for reimbursement is intended to
7 be the lowest of all bids, not just three.

8 Finally, the rules anticipate consultants
9 to obtain bids from persons who are properly
10 qualified to do the work. They are not
11 expected to obtain bids from unqualified
12 persons just because they are cheaper.

13 Eighteenth change. Even with the addition
14 of bidding, the Agency believes there will
15 still be situations where the reasonableness of
16 costs will need to be determined on a
17 site-specific basis due to extenuating
18 circumstances. For example, there may be
19 situations where three bids cannot be obtained
20 because there are only -- there are not three
21 persons who provide this service or perform the
22 work that is needed. Therefore, the Agency
23 proposes to change the unusual and
24 extraordinary expenses section to unusual or

1 extraordinary circumstances section. If
2 expense is the only issue, that can be handled
3 under the bidding provisions.

4 In Exhibit 7 of Dan Goodwin's testimony
5 from ACEC, he provides a list of several
6 situations that it proposes to list in the
7 rules as atypical situations. The Agency has
8 reviewed this list and believes that all of the
9 situations identified by ACEC are either
10 already reimbursed on a time and material
11 basis, can be addressed through the bidding
12 process, or have been addressed in the proposed
13 rules, including this errata. The Agency does
14 not see a need to designate certain situations
15 as atypical in the rules.

16 Nineteenth change. In its original
17 proposal, the Agency proposed a
18 review -- proposed a rule to review the rules
19 at least every two years to ensure the maximum
20 payment amounts remain current with the
21 prevailing market prices. In its first errata,
22 the Agency proposed a change to this
23 requirement to an automatic increase in the
24 maximum payment amount each year. The Agency

1 now proposes to add back in a mandatory review
2 of rates to ensure that they are keeping pace
3 with the prevailing market rates. The only
4 difference between the language as originally
5 proposed is that review must now be conducted
6 every three years instead of every two years.
7 The Agency believes that a three-year minimum
8 is sufficient because the maximum amount will
9 automatically be increased each year, and the
10 Agency will be able to track market
11 fluctuations through the bidding process.

12 Change 20. Jarrett Thomas, who submitted
13 testimony on behalf of PIPE and the Illinois
14 Association of Environmental Laboratories,
15 recommended that references to specific methods
16 for BTEX and PNA analyses be deleted from
17 Section 732, appendix D, and 734 appendix D.
18 In response, the Agency proposes to delete
19 those references.

20 Twenty-first change. Based on discussions
21 with interested parties, the Agency proposes
22 to increase the hourly rates for Engineer I,
23 Engineer II, Geologist I, Geologist II,
24 Geologist III and Professional Geologist. The

1 Agency believes that the amended rates are
2 reasonable amounts for purposes of
3 reimbursement for reimbursing costs from the
4 UST fund.

5 And, finally, the twenty-second change.
6 The Agency has proposed changes to the water
7 well survey requirements. So that water well
8 is -- so that water well survey is required
9 only when contamination exceeds the groundwater
10 and exposure route for remediation objectives.
11 Focussing on the remediation objectives -- on
12 these remediation objectives will protect
13 potable water supply wells while reducing the
14 number of sites where well surveys are
15 required. The reduction in number of well
16 surveys conducted will further reduce
17 corrective action costs.

18 That concludes my testimony.

19 HEARING OFFICER TIPSORD: Thank you.
20 Excuse me. I had my head down. You weren't
21 sworn in, right?

22 MR. KING: I was.

23 HEARING OFFICER TIPSORD: I thought you
24 were.

1 MR. KING: I just wanted to take a few
2 minutes and amplify a couple things that both
3 Kyle and Doug commented on.

4 As you can see from the nature of our
5 third errata sheet, we took very seriously the
6 commitment that we made at the last hearing,
7 that we were going to go back and look at
8 everything and figure out what we thought were
9 appropriate changes to make, and we have done
10 that. And we think that the hearing process
11 has allowed us to make a number of significant
12 improvements to our proposal. And we think
13 that the Board will see those improvements as
14 well. Because we did not get PIPE's proposal
15 until after we filed the third errata sheet,
16 our proposal is not reflective of anything in
17 the proposal.

18 Nonetheless, during the last week, we went
19 and reviewed that proposal. At least we
20 reviewed what we had, because we only had half
21 the proposal, since some of the numbers
22 are -- a lot of numbers -- and I suppose we can
23 see those today. I don't know if those have
24 been handed out yet or not.

1 Okay. Based on what -- on our review of
2 the proposal, we did not see any additional
3 modification that needed to be made, except for
4 one small area. It's apparent to us, based on
5 PIPE's proposal, that they are still confused
6 about what the Agency has proposed in Subpart
7 H. And as a result of that, we plan on
8 submitting, with our final comments, revisions
9 to the introductory provision of Subpart H that
10 will form kind of a road map description of how
11 Subpart H is intended to function. And I think
12 that change should help clarify things for
13 PIPE.

14 At this point, that's the only change we
15 think that's merited, based on our reading of
16 the PIPE proposal.

17 I was noticing one of the serious concerns
18 that we have with the PIPE proposal is that
19 there are many suggestions we think are
20 inconsistent with the terms of Title 16, and
21 some are inconsistent with federal law as well.
22 I don't think the Board has authority to adapt
23 rules in this proceeding that are inconsistent.

24 HEARING OFFICER TIPSORD: I'm sorry,

1 Mr. King. I apologize, but I lost your voice
2 completely.

3 MR. KING: I don't think the Board has
4 authority to adapt rules that are inconsistent
5 with Title 16. And I certainly don't think
6 it's advisable to adapt rules that are
7 inconsistent with federal law.

8 Doug has identified a number of those in
9 his testimony, and I wanted to go through one
10 additional one that Doug and I talked about.
11 It wasn't really something that Doug felt he
12 could go through because it concerned the
13 relationship between the site remediation
14 program and the LUST program.

15 In PIPE's proposal, they proposed that a
16 definition which would be added to an UST
17 remediation applicant, such that the UST RA
18 would have the same status as an owner or
19 operator of the UST system. They drew that
20 definition from Title 17 and site of
21 remediation program, but I don't think in
22 proposing that, they understand how that term
23 is used in that program or the implication of
24 its use relative to the federal rules and

1 regulations that govern the tank program.

2 As required by federal law and
3 regulations, Title 16 in the Board's LUST
4 regulations have always specified that the
5 legal responsibilities for operating
6 underground storage tank systems and responding
7 to releases from those systems belong to the
8 owners and operators of those systems.
9 Throughout numerous regulatory proceedings, the
10 Board has been very careful to keep its rules
11 in line with that principle to avoid conflict
12 with federal provisions. PIPE's proposal
13 represents the first time that I've seen anyone
14 suggest that a consultant should step into the
15 shoes of owners and operators with respect to
16 these legal responsibilities.

17 In the mid 1990s when we set about writing
18 Title 17 in terms of the statutory provisions,
19 we knew we were not bound by the same legal
20 constraints as was existing in the LUST
21 program. We knew that we needed to come up
22 with a broader term, because of the broader
23 scope of liability, that it tends to cite
24 under the liability provisions of state and

1 federal Super Fund liability provisions.
2 Unlike the LUST program where only the UST
3 owner/operator is liable, under Super Fund
4 provision, liability can also attach to prior
5 owners and operators and generators and
6 transporters.

7 Thus, when we were revising Title 17, we
8 came up with the terms of remediation applicant
9 as an approach that would allow anyone with
10 potential liability concerning the site to
11 enter the RSP and clean up that site with IEPA
12 oversight. That term went into the statute,
13 and then it was adopted in part 734 into the
14 Board rules, which became effective in 1997.

15 Although it is possible under the SRP
16 rules for a consultant to become an RA, a
17 remediation applicant, on an SRP site, the only
18 time I perceived that happening is when a
19 consulting firm intends to buy a site, clean it
20 up and then sell it for a profit. In those
21 instances, the consultant is acting more as an
22 owner of the site or maybe in a situation where
23 they're looking to become an owner and thus
24 develop the property. And that's kind of a

1 rare occurrence.

2 In the vast number of instances,
3 consultants are hired by RAs within the SRP
4 program, and they're hired to perform
5 consulting services and are paid by RAs for
6 those services. If consultants working under
7 the LUST program want to take on the rights and
8 responsibilities of owners and operators, they
9 can do that, and they can do that by purchasing
10 the UST system and registering with the OSFM as
11 the owners of the UST system. I don't see any
12 reason to add that concept of the UST RA to the
13 LUST rules.

14 The other thing; I heard Mr. Fleischli's
15 testimony this morning, and I'm kind of
16 surprised at the issue relative to our proposal
17 specifying that a cleanup going beyond Tier 2
18 would not be paid for by the UST fund.

19 We have talked to numerous consultants
20 over the last four to six weeks about the idea
21 of specifying that cleanup should not go past
22 Tier 2, and they've all seen -- they've all
23 told us that they don't see any real problem
24 relative to that. And the reason why they

1 don't see any problem -- I'll explain.

2 When Tier 1 was developed, it was based on
3 conditions at a site which would be the most
4 extreme in terms of potential risk.

5 Tier 2 provides that a person can go in
6 and look at what the conditions are at the site
7 and then develop remediation objectives based
8 on those conditions.

9 Virtually every -- for instance, the SP
10 program, virtually everybody who goes into that
11 program does an evaluation of the site that
12 allows the calculation of Tier 2 objectives.

13 And I'll give you one example that I think
14 is -- I think is fairly easy to understand.
15 Under Tier 1, there was a property assumption
16 of soil. It's called the FOC, the fraction of
17 organic carbon. When the Tier 1 table was
18 created, the assumption was that the fraction
19 of organic carbon would be .1 percent, which
20 would be the most extreme conditions we could
21 find under Illinois soil. What is typically
22 you would find in Illinois soil is that it is a
23 fraction of organic carbon more around the
24 percentage of 1 percent or 2 percent. Well,

1 what that does is you immediately have a
2 multiplication factor, common of the cleanup
3 objective, which allows it to be raised when
4 you do that site-specific investigation.

5 And all -- what we're saying is that if
6 that's what the soil -- if the soil at a site
7 is not going to allow contamination to move,
8 based on the Tier 2 calculations, then why
9 should we be funding cleanups through Tier 1
10 level, which are not needed to assure that same
11 level of public health protection?

12 So I'll finish my comments with that.

13 HEARING OFFICER TIPSORD: Are there any
14 questions for the Agency? I assume we're ready
15 for questions? Any questions?

16 MR. WALTON: Harry Walton, Illinois
17 Environmental Regulatory Group, and Chairman of
18 the Regulation and Site Remediation Advisory
19 Committee. And I have some questions with
20 regard to remedial objectives.

21 QUESTIONS BY MR. WALTON:

22 Q I'd like to take it pathway by pathway.

23 On the ingestion, are you proposing
24 any real changes to the risk posed in the ingestion

1 pathway when you go to Tier 2?

2 A (By Mr. Clay) No.

3 Q Thank you. For inhalation, when you
4 calculate a site-specific cleanup objective for
5 inhalation, would there be a change for the
6 inhalation pathway?

7 A No.

8 Q Please evaluate that. I think there would
9 be a bit of a change on that, on the FOC.

10 A Okay.

11 Q Now, under those scenarios when you do a
12 Tier 2, would there be any institutional controls
13 placed on the property that would go with the
14 property in the future?

15 A What we're proposing, there would be no
16 additional institutional controls put on the
17 property. You would be required to record the NFR
18 letter, but there would be no additional conditions
19 on that NFR letter.

20 Q With regard to the ingestion pathway and
21 statewide background number for PNAs, would those be
22 used as remedial objectives at LUST sites?

23 A Could you repeat that please?

24 Q With regards to the PNA statewide

1 background numbers, in the Metropolitan City of
2 Chicago, would those be used as objectives in the
3 Tier 1 numbers?

4 A Yes, they would be.

5 Q And, again, would those require any
6 institutional controls placed on the property?

7 A No, just the recording of the NFR letter.

8 Q In regards to the groundwater pathway,
9 where would the receptor exposure be in the
10 groundwater pathway? Is it at all points on the
11 property, property boundary?

12 A What we're -- I guess I don't understand
13 your question. You mean the Tier 2?

14 Q The Tier 2, where would the compliance
15 point be moved to under this scenario?

16 A The Tier 2 would apply on site. If it is
17 off site, it would still have to meet Tier 1.

18 Q So there would be no institutional control
19 with the exclusion of groundwater pathway under your
20 Tier 1 scenario?

21 A Correct.

22 Q Are you stating that you would use the SSL
23 equations, the vertical migration equations, in your
24 FOC to calculate the Tier 2?

1 A Yes.

2 Q You also stated that the remedial
3 objectives would be based upon use of the
4 groundwater ordinance. In this case, where would
5 the exposure point be measured?

6 A Yeah. It would be at the outside of the
7 ordinance, the model of extent of that
8 contamination.

9 Q Would that exclusion require an
10 institutional control placed on the property?

11 A There would be -- other than the ordinance
12 being mentioned, use of the ordinance being
13 mentioned in the NFR letter, there would be no other
14 institutional control.

15 Q So all receptors, on-site receptors, they
16 would be exposed in a direct context sense, to
17 Tier 1 ROs at point of exposure?

18 A Yes, you could say it that way.

19 Q How many LUST sites are there in Illinois
20 that are in communities that there's a current
21 groundwater use ordinance?

22 A As I stated, there had been 23,000
23 releases. Of those, over 10,000 are located in
24 ordinance communities. We've approved 111

1 ordinances in Illinois. And that's the total
2 issues. There's 10,000, approximately 10,000 open
3 releases that still need to be remediated, and about
4 4,000 of those are located in ordinance communities.

5 Q So I guess Gary said Tier 1 solution is as
6 protective to a Tier 2 solution, and that holds for
7 all pathways?

8 A Correct.

9 MR. WALTON: That's it.

10 MR. CLAY: I might add one more thing.
11 Treatment of groundwater is oftentimes the most
12 expensive part of a cleanup. And when you look
13 at the numbers, if there's 4,000 sites that are
14 in ordinated areas and could use an ordinance,
15 if those 4,000 sites, you know, chose to
16 remediate groundwater, even though it wasn't
17 necessary, and I think it's a conservative
18 number of a hundred thousand dollars to cleanup
19 that groundwater -- usually it's higher.
20 You're talking about \$400 million, to put this
21 in perspective in dollars, that we feel is
22 cleanup that's not necessary, because the
23 ordinance prohibits the use of that groundwater
24 as potable, for installing potable wells, so.

1 HEARING OFFICER TIPSORD: You have a
2 follow-up on that?

3 BOARD MEMBER JOHNSON: No.

4 HEARING OFFICER TIPSORD: Go ahead.

5 BOARD MEMBER JOHNSON: I was looking over
6 this, Doug, the new Section 855, which bothers
7 me. I was used to calling it ordinary,
8 extraordinary, an unusual expenses 855.

9 But I assume that that was going to be the
10 addition that was going to engender the most
11 interest or most questions.

12 QUESTIONS BY BOARD MEMBER JOHNSON:

13 Q The biggest question I had was in Section
14 C, in part, in 855, your proposed language is the
15 maximum payment amount for the work bid shall be the
16 amount of the lowest bid, unless the lowest bid is
17 less than the maximum payment amount set forth in
18 Subpart H, in which case the maximum payment amount
19 set forth in Subpart H shall be allowed.

20 And this goes back, I guess, to
21 essentially our first hearing when we talked about
22 your Subpart H maximum payments is -- to me this
23 implies that no longer is going to be -- I mean,
24 it's implying that regardless of what the bids are,

1 you get three of them, they're all under the amount
2 that you've defined as the maximum number, payment
3 allowed. We're going to get the maximum payment
4 allowed. Am I reading that right?

5 A (By Mr. Clay) Yes.

6 Q Do you recall the question somebody asked
7 in the first hearing that these are maximum amounts,
8 and if in fact the amount comes in underneath that,
9 that's what's going to be reimbursed, rather than
10 the amount delineated in Subpart H?

11 A Because someone could, without bidding, go
12 in and do the work for the amounts in Subpart H, we
13 put it in C that way to allow them to go ahead and
14 use Subpart H.

15 And I would have to agree with you;
16 that would be reasonable to take the lowest bid,
17 since we've also stated in testimony that someone
18 who's conducting this bidding has already
19 predetermined or prequalified these bidders as
20 someone that would be acceptable to them.

21 Q And you're going to require not only if I
22 get five bids, I'm going to want all five of them so
23 I can't pick and choose which ones I submit to you,
24 then this seems to imply as well that if I go out

1 and get any bids, three or more, I'm going to have
2 to submit them to you, whether or not I intend
3 to -- I guess what I'm saying is, if I'm an
4 owner/operator, and I go out and get three bids and
5 they all are underneath the maximum allowable
6 amount, unless I'm required by the rules to do so,
7 I'm not going to submit them to you guys. Does this
8 require the submission of any bid for any work?

9 A We didn't want to penalize the consultant
10 from bidding if they did all come in below the
11 maximum payment amount. So in those cases, they
12 wouldn't have to submit those bids. They could just
13 use the maximum amount.

14 Q Okay. I think it would probably be easier
15 to reconcile with the statutory language that rather
16 than have you guys looking at a bid, that
17 identifies, you know, an amount less than what the
18 maximum allowable amount is, I think it seems to me
19 like it's better for your reviewers to say this is a
20 reasonable expense when they don't have to -- when
21 or for any amount less.

22 A Okay.

23 Q I guess I had a question with respect to
24 the now 860, which is the old 855.

1 Is that intended to kick in only in
2 instances where bids have been sought previously?
3 Or only instances -- your example was if there
4 aren't three people, which is the question I was
5 going to ask.

6 What if you can't find three
7 subcontractors that are going to be able to bid on
8 this, because there aren't three of them in the
9 State of Illinois? When does that kick in? When
10 does that 60 kick in? Whenever it fits this
11 definition that it looks like a three part task, to
12 determine maximum payment amount, amounts -- let's
13 see. They demonstrate to the Agency the costs are
14 eligible for payment, they exceed the maximum
15 payment and the result of unusual or extraordinary
16 circumstances. You're not going to have the
17 requirement that owner/operator first exhaust the
18 bidding process?

19 A I think the intent was that they don't
20 necessarily have to bid, but this is an
21 extraordinary circumstance that they've identified
22 up front, you know. We would expect they would
23 probably bid that to show that it's going to be over
24 the maximum payment amounts.

1 There could be situations that
2 they've got an approved plan and budget. They go
3 in, they're doing the work, and then they come
4 across some extraordinary, unusual or extraordinary
5 circumstance. Well, at that point, you obviously
6 can't bid it. You're implementing the corrective
7 action plan at that point. Then they can come to
8 the Agency and justify those higher costs.

9 BOARD MEMBER JOHNSON: Thank you.

10 HEARING OFFICER TIPSORD: Go ahead.

11 MR. WEINHOFF: Jeff Weinhoff, CW3M. I
12 just had a couple questions on the mechanics of
13 the bidding process.

14 QUESTIONS BY MR. WEINHOFF:

15 Q For example, during stage one, you bid
16 drilling, and it came out two dollars a foot higher.
17 And that was, you know, for three bids. The low was
18 two dollars a foot higher. Would you need to rebid
19 stage two and stage three? Or would that bid be
20 good for that site forever, or each time you're
21 going to propose it, would you need to rebid it?

22 A (By Mr. Clay) I think you need to rebid
23 each time, because I think your bid that you're
24 requesting or your proposal you're requesting bids

1 for would be different.

2 Q So with each submittal you need to rebid
3 that work?

4 A Correct.

5 Q Okay. And the second question I had was
6 like for excavation, transportation, backfill, are
7 you requiring like three bids for excavation and
8 three bids for transportation and three bids for
9 disposal, or three bids for the whole job together?

10 A We would anticipate it would be for each
11 stage of that. Three bids for transportation, three
12 bids for excavation and three bids for disposal,
13 since you're dealing with different companies for
14 disposal, different companies for trucking,
15 different companies for excavation.

16 Q I see. So you wouldn't get one contractor
17 do it all for you? You'd get a separate amount?

18 A Correct.

19 Q Okay. And then with disposal, how would
20 distance with the landfill be affected? Because
21 you've got three bids for transportation, those bids
22 are going to be affected by which landfill you're
23 going to use, for example. So would you need nine
24 then to go with your three landfill bids, or the

1 three different landfills that you do bid?

2 A Well, I guess the bid from three trucking
3 companies, for example, or three different
4 landfills.

5 Q So you'd get different costs for each
6 trucking company and landfill and excavator?

7 A Yes. Well, I don't know why the excavator
8 makes any difference. Trucking would be the only
9 difference because of the distance of the landfill.

10 MR. WEINHOFF: That's all I have.

11 HEARING OFFICER TIPSORD: Mr. --

12 MR. TRUESDALE: A couple of questions.

13 HEARING OFFICER TIPSORD: You need to
14 note -- you need to identify yourself for the
15 court reporter.

16 MR. TRUESDALE: Joe Truesdale with CST
17 Environmental Services.

18 QUESTIONS BY MR. TRUESDALE:

19 Q One question, just to clarify Jeff's
20 statement about the drilling costs.

21 You mentioned that the drilling costs
22 for each activity in the stage, one stage, two
23 stage, three site investigation would be bid
24 separately. So essentially what you're saying then

1 is the costs associated with those bids would be
2 entirely dependent on the scope of work being
3 performed, correct?

4 A (By Mr. Clay) Yes.

5 Q The second question. In the proposal to
6 limit remediation on sites and use the groundwater
7 ordinance to address the ingestion of groundwater
8 objective, and the original ASTM corrective based
9 action document that TACO is based on, there are
10 other pathways essentially that are addressed,
11 inhalation of dissolved hydrocarbon in the
12 groundwater that's virtually ignored in TACO. So
13 under the existing frame work of TACO, since the
14 owner/operator always has the ability to clean up to
15 groundwater ingestion objectives, it's never been a
16 technical issue. However, if you run through those
17 numbers in ASTM and put in some general values, you
18 usually come up with something that says benzene
19 concentration somewhere less than one part per
20 million would pose an excessive risk for inhalation.
21 This is all hydrocarbons in groundwater.

22 Now, in the context of using the
23 groundwater ordinance, the soilability limits, you
24 can have up to 20 parts per million benzene in the

1 groundwater.

2 Has there been any consideration
3 given to evaluating those potential inhalation risks
4 associated with leaving those contaminants in place?

5 A Well, I mean the three pathway, the three
6 exposure pathways --

7 HEARING OFFICER TIPSORD: Speak up.

8 MR. CLAY: There are three exposure
9 pathways to TACO. Ingestion, soil inhalation
10 and then ingestion of groundwater. And those I
11 don't know we're anticipating any new exposure
12 methods.

13 MR. KING: If I just could make a comment
14 on that.

15 Where I think Mr. Truesdale has suggested
16 that there may be some additional changes that
17 may be warranted to TACO, I don't think it's
18 appropriate to try to change TACO in the
19 context of the LUST rules. The Agency's
20 planning on opening a -- proposing additional
21 changes to TACO hopefully within the next
22 several months. And I think if there's an
23 issue about whether there needs to be an
24 additional pathway included within TACO, I

1 think that would be an appropriate time to
2 discuss that issue.

3 Q (By Mr. Truesdale) I think what I'm
4 stating actually is that in your testimony and
5 errata sheet, you suggest that this proposal is
6 adequately protective of human health and the
7 environment. However, if you read through the ASTM
8 corrective based action --

9 HEARING OFFICER TIPSORD: Mr. Truesdale,
10 do you have another question?

11 MR. TRUESDALE: Sorry. I apologize.

12 HEARING OFFICER TIPSORD: Ms. Manning?

13 MS. MANNING: I just have one question for
14 Mr. King.

15 QUESTIONS BY MS. MANNING:

16 Q Gary, you testified very generally and
17 very broadly that PIPE's proposed language is
18 inconsistent with federal law and state law. Yet
19 the only example you gave was the suggestion that
20 the Board define a UST RA. Certainly the suggestion
21 was not that Title 17 become Title 16? Title 16 is
22 Title 16.

23 Nonetheless, could you indicate what
24 other provisions of PIPE's proposed language you're

1 speaking of that you consider inconsistent with
2 either federal or state law?

3 A (By Mr. King) I thought Doug went into
4 several of those within his testimony. At least
5 that's what I heard him saying.

6 MR. CLAY: The approval by operation of
7 law, rather than denial, was a big issue with
8 the USEPA. It's also contrary to the statute.
9 The 45 days for review time proposed by PIPE is
10 inconsistent with the state statute, which
11 allowed 120 days. Those are two.

12 Free product. The wording in the federal
13 rules is the maximum practicable -- I believe
14 something to that effect, as opposed to whether
15 or not it's a threat to human health, which is
16 what PIPE is proposing. Those are the ones I
17 can name off the top of my head.

18 MS. MANNING: We're going to address all
19 those. Thank you.

20 HEARING OFFICER TIPSORD: Any other
21 questions? Start with Mr. --

22 MR. COOK: Jay Cook, United Science
23 Industries.

24 QUESTIONS BY MR. COOK:

1 Q With regard to the competitive bidding
2 process, is it anticipated that the consultant, the
3 primary consultant, would solicit bids on behalf of
4 the owner/operator?

5 A (By Mr. Clay) Yes.

6 Q And the time required to prepare the bid
7 specifications to solicit those bids, is that
8 considered to be a reimbursable corrective action
9 cost?

10 A It's reimbursable as a handling charge.
11 Under the definition it's partially for procurement.

12 Q Can you clarify that? The time it's
13 actually necessary for the engineer to prepare the
14 bid specifications and the bidding documents, is
15 that professional services time reimbursable?

16 A It is reimbursable as a handling charge.
17 As a current handling charge, we believe that's what
18 that was intended for.

19 Q I'm not sure I understand that. As an
20 example, just to have -- if I had an engineer, let's
21 say who was working, and he had 10 hours of service
22 time in preparing the bid specification documents,
23 and his billing rate was a hundred dollars an hour,
24 so you've got a thousand dollars charge, is that

1 what would be reimbursed, or is it a percentage of
2 the contract that's awarded? Like, the drilling
3 contract that's awarded, or a percentage of
4 the -- or the excavation, transportation, disposal
5 contract that's awarded?

6 A It's a percentage -- if you had a \$10,000
7 subcontractor doing drilling, it's a percentage of
8 that as your handling charge. And the time to
9 prepare and put together those bids and to collect
10 those bids, evaluate those bids would be in that
11 handling charge.

12 Q And so that's different than the rest of
13 the way that the professional services are handled
14 within the regulations or reimbursement for
15 professional service on an hourly basis? This would
16 be on a percentage base?

17 A It is different. It's just the putting
18 together the bid proposal and evaluating those bids
19 would be under the handling charge.

20 Q And so the consultant would receive more
21 compensation the higher the bids were; is that
22 correct?

23 A That's the way the handling charges work,
24 that's correct.

1 I might add, though, if there's a
2 situation where the owner and operator is going to
3 reimburse or pay for the subcontractor directly, in
4 that case, the consultant would not be entitled to
5 handling charge. There is a provision in -- well,
6 in Subpart H and then in 734.855, that sets forth an
7 amount for the consultant for their time for putting
8 up those bids together.

9 Q Separately if the contractor is paid?

10 A Yes. Because we recognize there there's
11 no handling charge for the consultant, but they
12 would be compensated from them.

13 Q They would be paid for their hourly rate
14 as long as it was reasonable for the services
15 performed?

16 A No. It's not time and material. It's a
17 specific amount.

18 MR. ROMINGER: Clarification. That's an
19 845 G. I believe Doug said 855.

20 HEARING OFFICER TIPSORD: Thank you.

21 Q (By Mr. Cook) And Dwayne just said that's
22 \$160 per event?

23 A Yes.

24 Q So that's roughly a couple of hours, hour

1 and a half?

2 A Right. We figured two hours.

3 Q To compare each set of specifications?

4 A Yes.

5 Q Okay. And had the Agency evaluated the
6 costs of soliciting bids, and in the process of Jeff
7 just described, it seemed like a fairly elaborate
8 process to me. There are potentially multiple
9 rounds of bid solicitation that took place. What
10 added costs would there be to the program and
11 estimated added cost to the program to solicit these
12 bids across the remaining LUST sites? Do you have
13 an estimate, the increase in cost?

14 A I don't have a specific estimate, but
15 we've always paid handling charges. And, you know,
16 I assume that they're part of the handling charge is
17 to, you know, seek a competitive price. And so I
18 mean, I guess we anticipate that that was being done
19 to some degree already because that's what handling
20 charge is for in part.

21 Second, I don't think we -- I mean,
22 in a lot of cases, there's not going to be bids
23 sought. They're going to use the maximum payment
24 amounts as -- Member Johnson said, I mean, you don't

1 have to bid it. I mean, from what we've heard from
2 the number of consultants, the amounts in the rules,
3 they don't have a problem with it. So I don't see
4 everything going to bidding. But if they do, it's
5 covered by the handling charges.

6 MR. COOK: I don't have any other
7 questions.

8 MR. GOODWIN: Mr. Dan Goodwin with Secor
9 International.

10 QUESTIONS BY MR. GOODWIN:

11 Q Doug and Gary and Kyle, any of the three
12 of you that you feel like you can respond to this
13 question, I'd like to hear from you.

14 You have introduced three, I think,
15 pretty significant concepts into this latest set of
16 changes to the proposal. One being the concept of
17 competitive bidding and particularly as an
18 alternative to the dollar limits on reimbursement
19 that would apply.

20 Secondly, the requirement for
21 obtaining cost estimates, provided cost estimates,
22 on at least two alternative technologies in addition
23 to standard technology cost estimate in order to
24 establish a reimbursement limit for that.

1 And the third item -- my mind has
2 gone blank.

3 A (By Mr. Clay) TACO.

4 Q TACO. The introduction of the TACO Tier 2
5 concept was discussed earlier.

6 My question is, for any or all three
7 of those concepts, have you done a analysis of the
8 statutory authority and satisfied yourselves that
9 the statutory authority is already there, and if so,
10 would you be willing to provide that analysis?

11 A (By Mr. King) Are you asking whether we've
12 done a legal analysis?

13 Q Yes.

14 A I don't -- we haven't seen a formal legal
15 analysis on those things, no.

16 Q Okay. Do you intend to do one if it
17 appears there's an issue?

18 A I'm sure we would if there was an issue.
19 But as we've always seen the Board's authority in a
20 rule making, you know, there are specific things
21 that the Board -- you know, the Board can't be
22 inconsistent with its statutory authority. And
23 we've identified some areas where there are certain
24 things, you know, in the PIPE proposal that we

1 thought are inconsistent with that authority. We
2 did not identify any inconsistency issues as we were
3 evaluating what we were suggesting here.

4 Q Wouldn't you agree that to incorporate any
5 of those three proposals into the regulations, the
6 Board has to make a finding that there is an
7 underlying statutory authority for the Board to do
8 such a thing?

9 A Oh, I would agree, yes, absolutely.

10 Q But you, the Agency, has not really done
11 any kind of a formal evaluation to make a finding to
12 present to the Board that that already does in fact
13 exist?

14 A We have not done any kind of formal
15 internal document. I assume that we certainly could
16 look at that issue in terms of our comments and
17 provide input to the Board on that legal question.

18 MR. GOODWIN: Thank you.

19 HEARING OFFICER TIPSORD: Ms. Davis?

20 MS. DAVIS: I am Cindy Davis, CDS.

21 QUESTIONS BY MS. DAVIS:

22 Q I have a question on the proof of payment
23 and the handling charge.

24 Doug, you just described a situation

1 where, let's say, you need to go out, and you need
2 to haul to a landfill, but couldn't, due to the
3 price the Agency has established. We would go out
4 and get three bids. What happens in the case,
5 though, where the owner/operator wants the
6 contractor to wait for payment, and let's say the
7 subcontractors have waited for payment? So I won't
8 have proof of payment to put in the reimbursement
9 request. So in that case, what I'm understanding
10 the rules say, that there is no handling charge if
11 you can't provide proof of payment. So how does the
12 consultant get paid to go for the three bids?

13 A (By Mr. Clay) Well, it's just not the
14 canceled check. There could be a lien waiver, and
15 there was another affidavit -- yeah, an affidavit or
16 lien waiver or a canceled check. So I mean, you
17 could provide a lien waiver.

18 Q Okay.

19 MR. SCHUMACHER: You're not --

20 HEARING OFFICER TIPSORD: Excuse me. You
21 need to identify yourself.

22 MR. SCHUMACHER: Brad Schumacher.

23

24 QUESTIONS BY MR. SCHUMACHER:

1 Q You do a cleanup for 200,000. You get
2 done Monday. You went to submit the reimbursement
3 on a Friday for your reimbursement. Obviously you
4 haven't paid the trucker, you haven't paid the
5 landfill, you haven't paid anybody yet. So you're
6 not going to have the waiver or anything.

7 MS. DAVIS: That is a problem.

8 HEARING OFFICER TIPSORD: Excuse me,
9 excuse me. We're drifting into testimony.

10 MS. DAVIS: Okay.

11 HEARING OFFICER TIPSORD: Please stick to
12 questions. If you want to comment on this at
13 the end of the day, I'll be more than happy to
14 let you testify.

15 MS. DAVIS: That was my -- that was the
16 end of the question.

17 QUESTIONS BY MS. DAVIS:

18 Q And the next question I have is, in the
19 case of a drilling aspect where I own my own
20 drilling company, and let's say a particular site I
21 can't do a drilling for the set price. So I go out
22 and I get three bids as the Agency has allowed me.
23 And it also allows me that if I wanted to, I could
24 do the work for the lowest bid. How do I get paid

1 for my handling for my time to go get those bids for
2 the scope of work? Because I'm a person who is
3 using a subcontractor with the indirect financial
4 interest. I mean, how do I get paid?

5 A (By Mr. Clay) In that case, I think you
6 would be entitled to that lump sum as if the owner
7 and operator were paying for the subcontractor. And
8 then, you know, that's sort of a business decision.
9 That's a decision you're making, that you want, in
10 your case, your company to do the work as opposed to
11 the low bidder.

12 MS. DAVIS: Okay.

13 HEARING OFFICER TIPSORD: Go ahead.

14 MR. SCHUMACHER: Brad Schumacher.

15 QUESTIONS BY MR. SCHUMACHER:

16 Q I didn't get an answer. If I sent in my
17 reimbursement claim, I am not going to have any
18 waivers, cancelled checks, affidavit, because I
19 haven't paid my contractor yet. So are you going to
20 deny my claim? Or how does that work? Obviously,
21 we're going to pay our subcontractor, but what if my
22 terms are 90 days, I submit a claim, and you're
23 going to not process the claim because I don't have
24 the waivers? Or backups that I'm paying the

1 subcontractor?

2 MR. CLAY: Can I respond to that this
3 afternoon?

4 HEARING OFFICER TIPSORD: Sure.

5 MR. CLAY: Let us discuss it.

6 MR. SCHUMACHER: Thanks.

7 HEARING OFFICER TIPSORD: Mr. Truesdale?

8 QUESTIONS BY MR. TRUESDALE:

9 Q One more question. It's related to what
10 Mr. Goodwin talked about earlier and about the TACO.

11 You mentioned before, Doug, that you
12 don't expect that there will be deed restrictions or
13 other environmental land use controls required for
14 sites that use the Tier 2 objectives. And
15 Mr. Walton referred to the PNA background analysis
16 for metropolitan areas, for instance.

17 What if an owner/operator did soil
18 removal at a site after issuance of an SRN based on
19 background PNA data, and that soil was subsequently
20 moved to a site outside of the metropolitan area, or
21 in a case where a Tier 2 inhalation objective was
22 calculated based on site-specific moisture content
23 and that soil was subsequently excavated and spreads
24 to the soil where the physical characteristics

1 forced the moisture content to change and
2 volatilization occur. How would the Agency address
3 those situations?

4 A (By Mr. Clay) Well, on every one of our
5 NFR letters, there should be a condition that says
6 to the effect any soil removed from the site needs
7 to be handled in a proper manner. Whether it's
8 Tier 1 or Tier 2, the Agency -- or the LUST section
9 is not making a determination whether that soil is
10 moved to a different location as a waste. They're
11 saying that that soil in place is safe, is
12 protective to human health and environment.

13 So what I said was there would
14 be -- you would see no difference in the NFR letter
15 if it was a Tier 1, based on the Tier 1 numbers. Or
16 if you collected site-specific soil property
17 information calculated Tier 2, you wouldn't be able
18 to tell that in your NFR letter. There would be no
19 additional conditions. We'd still have the
20 condition on both, that, you know, if soil is
21 removed, it needs to be handled in accordance with
22 the appropriate regulation.

23 Q But under the current frame work, the
24 owner/operator always had the ability to clean up to

1 the most stringent Tier 1 objectives. So there are
2 no expressed costs associated with managing that
3 waste. If it was excavated and disposed of, the
4 cost would still fall on the owner/operators under
5 the new scenario; is that correct?

6 A I don't understand the question.

7 Q If the owner/operator made the decision to
8 clean up to the most stringent Tier 1 subsequently
9 excavated soil and moved it to another property, it
10 already met the most stringent Tier 1 objectives
11 applicable to any property in Illinois. So there
12 would be no expressed risk with managing that
13 material in accordance with state regulations.
14 However, under the new frame work, there could be
15 costs associated with that, for the owner/operators,
16 correct?

17 A You're assuming that with that statement,
18 you're assuming that Tier 1 residential can be put
19 in any location anywhere and has no waste
20 designation. We don't make that decision in the
21 LUST program.

22 Q Right.

23 A And so, you know, there may be soil that
24 meets the Tier 1 residential that wouldn't be

1 appropriate for certain areas or conditions to put
2 into. So we're not making that designation that
3 it's clean soil, if you will. We don't have that
4 authority in the LUST program.

5 MR. COOK: Jay Cook with USI.

6 QUESTIONS BY MR. COOK:

7 Q Under the federal financial responsibility
8 requirements, the definition of financial
9 responsibility, is there a specific definition of
10 what an owner/operator must demonstrate in the
11 financial, in terms of financial responsibility? We
12 know there are monetary amounts. But that financial
13 responsibility originally was intended to do several
14 things. One of them, I believe, was to show that
15 the owner/operator is capable of undertaking a
16 corrective action; is that correct?

17 A That's correct.

18 Q Financially capable of undertaking a
19 corrective action?

20 A Right.

21 Q And corrective action then in Illinois
22 could include remediation to either Tier 1 or Tier 2
23 requirements; is that correct?

24 A Tier 1, Tier 2, Tier 3.

1 Q Are there instances where the Agency could
2 require an owner/operator to utilize a more
3 stringent cleanup criteria than what's being
4 proposed in this Tier 2 type of situation?

5 A It would be based on what's outlined in
6 the regulations. That Tier 1, Tier 2 or Tier 3, if
7 they met that, then we would issue the remediation
8 letter.

9 Q In instances where the Agency is proposing
10 that reimbursement only be allowed to the use of
11 these Tier 2 objectives, is it possible that the
12 Agency could require what I'll call a more
13 conservative cleanup approach? In other words,
14 meeting more stringent cleanup objectives?

15 A (By Mr. King) I don't see how that's
16 legally possible, because, I mean, TACO provides
17 different methodologies for a person to establish
18 remediation objectives relative to a site. And the
19 way the Board rule is set up under 742, that's an
20 owner/operator's decision to make.

21 Q So if they elect, they could utilize
22 Tier 2 and still meet the requirements legally that
23 are imposed by the Agency, and the Agency could not
24 require them to perform the work?

1 A Yes, that's correct.

2 Q Okay. With that being the case, as a
3 practical matter, do you have an estimate of the
4 number of owners and operators in the State of
5 Illinois that are financially able to undertake a
6 cleanup that would exceed these Tier 2, those -- how
7 much, as a practical matter, how much of the
8 owner/operators will utilize Tier 1 or something
9 more stringent than what you're proposing is the
10 maximum amount that would be reimbursed under this
11 Tier 2 approach?

12 A I think it would be very few.

13 Q Very few? So as a practical matter, sort
14 of the default cleanup objective becomes this Tier 2
15 approach conditioning?

16 A I'm trying to think. I guess I'm, in
17 responding to that, I'm just trying to figure out
18 what -- I guess I wouldn't quite use the term
19 "default cleanup objective."

20 Q It would be the method of choice by the
21 vast majority owners and operators in your
22 estimation?

23 A I think that's probably true. I mean, I
24 think you're correct in your statement that far

1 fewer number of owners and operators will go to
2 Tier 1. They would stay with Tier 2 because that's
3 what we would be paying for. And it would be in our
4 view, it would certainly be equally protective with
5 Tier 1. There may be some owners -- I mean, there
6 are owners and operators now that utilize Tier 3
7 provisions, and that certainly would be the case
8 still.

9 Q Is it a fair characterization to say then
10 that because of the owners and operators, the
11 majorities of them probably don't have the money to
12 take the more stringent approach to clean up, that
13 they take this approach, is it a fair
14 characterization by saying by shifting that, the
15 eligibility of those sites, so that the maximum
16 amount of reimbursement that's available at these
17 sites is based on Tier 2 objectives? That it really
18 is a practical matter, for all intents and purposes,
19 you've practically cleaned -- or changed the
20 remediation objectives, as a practical matter? Not
21 as a technical matter, not as a legal matter, but
22 just as a practical matter, you've changed the
23 remediation objectives statewide?

24 A No, I wouldn't say it that way at all. I

1 mean, the remediation objectives are still
2 within -- established under 742. And there's Tier
3 1, Tier 2, Tier 3. We haven't changed those
4 remediation objectives. We've changed that, what
5 would be reimbursed.

6 MR. CLAY: And to add to that, I mean, as
7 Gary testified earlier, in the site remediation
8 program when those people that are in the
9 program are footing the bill, they almost in
10 all cases go to Tier 2.

11 Q For what reason in your estimation?

12 A Because of footing the bill and being
13 cheaper cleanup, and it's equally protective of
14 human health and the environment.

15 Q Because, in your opinion, does -- Gary,
16 you're an attorney, I believe; is that correct?

17 A (By Mr. King) Yes.

18 Q In your opinion, would an owner/operator
19 incur more liability to a third party if they only
20 clean up the Tier 2? Let's say that I'm a tank
21 owner, but I don't own the site; I don't own the
22 real estate; I own the tanks. And as a result of
23 that, I'm responsible for cleaning this site up.
24 Now, if I only remediate to Tier 2, that's all I

1 have to do as it pertains to my relationship with
2 the Agency. But as my relationship is established
3 with this property owner, they may not be very happy
4 about that.

5 So in your opinion, do I have greater
6 liability to this third party property owner because
7 I haven't cleaned up to Tier 1?

8 A I would say the answer is no.

9 When we established TACO in 1997, we
10 were very careful, and we went through a large
11 number of debates, a large number of testimony
12 around the whole concept that in terms of public
13 health protection and protection of the environment,
14 a Tier 1 was equal to a Tier 2, was equal to a Tier
15 3.

16 Now, there may be -- and we see this
17 particularly in the site remediation program. If
18 you've got an out-of-state developer who wants to
19 buy a piece of property, he will demand that that
20 property be cleaned up to -- sometimes will demand
21 that that property be cleaned up to at least Tier 1
22 because he may not be familiar with the Illinois
23 system.

24 And when those questions come up, we

1 have to -- you know, we go through and discuss with
2 people what Tier 2 and Tier 3 are and that kind of
3 thing. And usually people, once they understand
4 what we're doing in Illinois, are willing to accept
5 something other than Tier 1 as a methodology.

6 Q I see. The answer to that then is, no,
7 that wouldn't, in your opinion, change the liability
8 between the property owners. I would assume that it
9 would not decrease the potential for lawsuits
10 between the parties.

11 Is the fund, can the indemnification
12 within the fund for third party indemnifications be
13 tapped in this instance where the owner of the tanks
14 has elected not to clean up to Tier 1, elected to
15 cleanup to Tier 2, and the property owner is a
16 separate party and is unhappy about that decision on
17 the part of the tank owner/operator, can the
18 property owner make a claim against the fund for
19 indemnification, third party indemnification?

20 A Well, anybody can make a claim relative to
21 for indemnification, and that has to go through the
22 process, through the Attorney General's office and
23 that.

24 But we could take the position that

1 indemnification would not be proper, because if
2 they've done a Tier 2 cleanup, it was the same issue
3 of potential risk to human health or environment as
4 a Tier 1 claim.

5 MR. COOK: Okay. I just had a question
6 that I wanted clarification.

7 BOARD MEMBER GIRARD: Can I just follow up
8 on that?

9 QUESTIONS BY BOARD MEMBER GIRARD:

10 Q In terms of, you know, protection of human
11 health and the environment, you feel that an NFR
12 letter provides that; is that correct?

13 A (By Mr. King) Yes.

14 Q So it means you met all the obligations
15 under the Act?

16 But the questions about liability
17 still, I'm not sure, has been clearly answered. If
18 a property owner has an NFR letter, does that
19 property owner then have any future liability for
20 the contamination that may still be in the ground
21 from the LUST site?

22 A There's certainly a large body of cases
23 that involve tort law where individual citizens sue
24 companies with claims that their health has been

1 impacted through the contamination of the site. You
2 could have an NFR letter on a site, the site has
3 been cleaned up, to protect human health and the
4 environment, and somebody could still file a claim
5 saying that there had been a human health impact
6 that was tortuous in nature, in that there was
7 liability related to that.

8 Now, that claim would exist -- it
9 could exist if I've cleaned up -- it wouldn't matter
10 what you cleaned it up to. You could still have
11 somebody making that kind of claim, whether it was
12 Tier 1, Tier 2. Somebody could still claim that the
13 owner and operator was liable for impact to their
14 human health based on a tort law offense.

15 MR. CLAY: And keep in mind, the Tier 1
16 versus Tier 2 that we're talking about is
17 simply applying site-specific soil
18 characteristics to the cleanup objectives as
19 opposed to very conservative.

20 MR. KING: As opposed to the default
21 number which Tier 1 is based on.

22 MR. CLAY: Right. So it's not increasing
23 the -- you know, in most cases, one in a
24 million risk that, you know, TACO was based on.

1 Q (By Board Member Girard) But you feel that
2 legally cleaning up the Tier 2 standards provides as
3 much protection from liability as cleaning up to
4 Tier 1?

5 A (By Mr. King) Well, you're talking about
6 potential risk to human health or the environment,
7 yes.

8 BOARD MEMBER GIRARD: Thank you.

9 HEARING OFFICER TIPSORD: Okay?

10 MR. GOODEIL: Russ Goodeil, Applied
11 Environmental.

12 QUESTIONS BY MR. GOODEIL:

13 Q Doug, I've got a question, I guess, on the
14 simplest terms.

15 You had indicated that there are a
16 hundred and eleven communities that have groundwater
17 use ordinance.

18 A (By Mr. Clay) Yes.

19 Q And the Agency is basically encouraging,
20 and even through this proposed legislation, forcing
21 owners/operators or consultants to go out and get
22 more groundwater. Then I guess my question --

23 A That's not true. That's not true.

24 Q Then, like I say, I'm not a hydrogeologist

1 or engineer or anything. But I guess, you know, as
2 more of a citizen, my concern comes in if we're
3 implementing these groundwater use ordinances and
4 not cleaning up the groundwater, granted it is
5 expensive, where do we as citizens and Environmental
6 Protection Agency draw the line as to how many
7 communities or how much groundwater contamination is
8 acceptable? And that's, I guess, you know, in the
9 simplest terms.

10 A Well, the community makes that
11 determination whether or not they want to adapt that
12 ordinance. And what we're posing is the utilization
13 of that ordinance, only if one has been approved and
14 adopted and is acceptable to that site.

15 I mean, you may have a site that's on
16 the edge of the ordinance. Even though the
17 community has an ordinance, you wouldn't be required
18 to use that, because the model and the extent of the
19 contamination goes beyond that.

20 So the idea is not that anyone has to
21 go in and adopt an ordinance or go to a municipality
22 and request the adoption of the ordinance. If one
23 is already there and is approved and can be used,
24 that's the one that has to be utilized.

1 Q As a follow-up to that, what level of
2 groundwater contamination as citizens of Illinois is
3 acceptable? I mean, where do we draw the line? I
4 mean, I know expenses are a major concern. But how
5 much contamination in Illinois groundwater is
6 acceptable?

7 A (By Mr. King) Well, I mean, that to me, it
8 seems like that's an appropriate debate to consider
9 when we're talking about what is within the TACO
10 regulations. And I think that is an issue that we
11 certainly debated at the time those regulations were
12 adopted.

13 You know, to give you an example of
14 kind of the thought process that we've been going
15 through with this. There is an ordinance within the
16 City of Chicago that's in effect that prohibits the
17 installation of potable water wells within the City
18 of Chicago. There have been hundreds of sites that
19 have relied on that groundwater ordinance and have
20 not remediated groundwater, you know, to meet
21 potable supplied uses.

22 What sense does it make to clean up
23 the hole in the donut? I mean, one of the reasons
24 why TACO was created was to provide a mechanism so

1 that you don't have to clean up the hole in the
2 donut. Why do it if it's -- why spend the resources
3 to clean up that hole in the donut if it doesn't
4 make sense to do that?

5 Q I understand that, but the Agency is now
6 encouraging the rest of the donut basically, using
7 your terms -- I mean implementing more groundwater
8 use ordinances within communities throughout
9 Illinois.

10 And it's my understanding -- I may be
11 misunderstanding. But through passage of the
12 additional groundwater use ordinances, we're making
13 that hole in the donut much bigger, is my
14 understanding.

15 HEARING OFFICER TIPSORD: Mr. Goodeil, I
16 was going to say, you need to keep it in the
17 form of questions.

18 MR. KING: Yeah. I just want to make it
19 clear. We do not -- and we have made -- we
20 have made it very clear in numerous instances
21 that the decision to adopt a groundwater use
22 ordinance belongs to that municipality.
23 They're making the decision relative to the
24 groundwater use within their community and how

1 much they're going to force sites within that
2 community to clean up relative to groundwater.
3 If a community does not want to have that
4 ordinance, and that is certainly our -- that is
5 certainly their option. Many communities have
6 seen that there was a benefit to having
7 projects move forward, be cleaned up, you know,
8 when they have that groundwater ordinance in
9 place.

10 HEARING OFFICER TIPSORD: I don't think
11 we're going to get done with the Agency. I
12 would hope we'd get done before lunch, but it's
13 now 12:15. We have been at it for about 2
14 hours and 15 minutes. So I think we need to go
15 ahead and take a lunch break. We'll break one
16 hour. We'll come back promptly in one hour and
17 continue with the Agency at that time. Thanks.

18 (Lunch break.)

19 HEARING OFFICER TIPSORD: Let's go ahead
20 and go back on the record.

21 Mr. Clay has indicated that they have a
22 response to, I think, Mr. Schumacher's
23 question. Go ahead, Mr. Clay.

24 MR. CLAY: Yeah. As we stated, there's

1 canceled checks, a waiver or affidavit would be
2 acceptable to payment, but I mean, it's part of
3 the handling charge. In reading the definition
4 of handling charge, it's for interest. And so
5 it's presumed or expected that the prime would
6 pay their subcontractors, and reimbursement and
7 then get reimbursed from the Agency.

8 So I mean, that's, you know, like I said,
9 part of the -- in the definition of handling
10 charges interest.

11 MR. SCHUMACHER: Can I?

12 HEARING OFFICER TIPSORD: Sure. Do you
13 have a follow-up? Sure.

14 QUESTIONS BY MR. SCHUMACHER:

15 Q Even, say, we paid our subcontractors
16 within 30 days. When I do the cleanup, I want to
17 immediately submit the remediation and all the
18 reimbursement. I don't want to wait 30 days to get
19 a waiver of lien, you know, if I'm paying on that.
20 Is there any way that I can go ahead and submit the
21 claim, and is there any way that I -- say the
22 comptroller is going to give us a check within, you
23 know, we get the letter in a month and a half or two
24 months, and then I have that time frame that before

1 I get paid, before the comptroller actually issues a
2 check. Could I submit the waiver of liens?
3 Because, say, you know, if it takes a hundred days
4 to get paid, and I pay my subcontractor in 30 days
5 or 60 days, and I can get the waiver of liens, I
6 have that time frame to get that waiver of liens to
7 the EPA or to somebody before the check is actually
8 cut. That will at least show that, hey, I did pay
9 all my subcontractor. Here's a waiver of lien.
10 Because what I don't want to -- 30 days, I don't
11 want to wait 30 more days to get in the line for
12 reimbursement just for a waiver of lien.

13 Is there any way that we can submit
14 them prior to getting a check? Like, would you
15 normally do for a normal contract -- you submit your
16 waiver of lien before the company pays you?

17 A Right. And I mean, basically you need to
18 wait until you get a waiver of lien before you
19 submit the bills. And I understand what you're
20 saying.

21 But you've got to remember from the
22 Agency's standpoint, we're dealing with thousands of
23 these things. So you're talking another review now
24 or at least a portion of a review to now you

1 submitted your waiver of liens, which you already
2 reviewed the package and said, you know, you haven't
3 paid your subcontractors, at least you haven't shown
4 us that you paid your subcontractors.

5 And I mean, to be honest, one of the
6 reasons this provision is in there is because we
7 received complaints from subcontractors that said
8 I'm not getting paid. And we said, well, let me
9 look that up. And we looked it up and said, well,
10 we paid the owner/operators three months ago. They
11 are not paying the subcontractor.

12 Q That's not really the Agency's
13 responsibility? It should be the contractors, it
14 should be the consultant, it should be a contractor
15 thing. You know, the subcontractor is not getting
16 paid, the general, and you know, take legal action
17 against that person. It's not --

18 A No, I disagree. I mean, we are to
19 reimburse corrective action costs. If you haven't
20 paid your sub, then you haven't incurred that cost.
21 I mean, that's the way I look at it.

22 HEARING OFFICER TIPSORD: Okay.

23

24 QUESTIONS BY MR. COOK:

1 Q You said you haven't incurred that cost.
2 If I was audited, our books were audited, on an
3 accrual basis, my auditors would say based on
4 generally accepted accounting principles, that I
5 hadn't incurred that cost. So when you make that
6 statement or you just -- I just want a
7 clarification. What's that based on? Is it based
8 on GAP?

9 A Based on what?

10 Q GAP.

11 A I'm not familiar with that term.

12 Q Generally accepted accounting principles.

13 A Okay. It is based on the fact that you
14 don't have anything that showed proof of payment
15 that you're proposing, which is a canceled check, a
16 waiver or an affidavit from your sub.

17 MR. COOK: All right.

18 HEARING OFFICER TIPSORD: Any other
19 questions? Ms. Manning?

20 MS. MANNING: I have a question for
21 Mr. King.

22 QUESTIONS BY MS. MANNING:

23 Q Gary, you indicated in your testimony that
24 evidence of a continued confusion over Subpart H,

1 which you promised to set straight after these
2 hearings. Could you just enlighten us now in terms
3 of what area of confusion you think there still
4 remains with your proposed Subpart H, and how it's
5 going to work employed by the Agency?

6 A (By Mr. Clay) Yeah. I mean, one of the
7 real confusions was that we identified -- and I
8 think this was in talking with PIPE members and in
9 talking with Dan Goodwin -- was there was some
10 confusion on how long summons would work and how we
11 would determine a maximum amount for that task
12 actually works.

13 And if it's a lump sum of \$2,000, for
14 example, for consulting services, and the consultant
15 submits an invoice that says \$2,000 for a
16 corrective -- well, let's use the real world
17 example. Okay. 51 20 for a corrective action plan,
18 which allows in Subpart H, the consultant submits an
19 invoice that says 5120 preparation for corrective
20 action plan. That's all we're looking for as far as
21 the consultant services and showing that that cost
22 was incurred. We would pay 5120. There would be no
23 other documentation required. I mean, we want to
24 know the dates when the work was done, and that's

1 probably it on that invoice. So there wouldn't be
2 time sheets or anything like that required.

3 If the consultant would submit an
4 invoice for \$4,000, for preparation of corrective
5 action plan, we would not reimburse them 5120. So
6 the 5120 is a maximum. But if they ask for 5120 for
7 that task, then we would reimburse that. We're not
8 going to reimburse you for more than you ask for.

9 And I think that's what we want to
10 clarify is how those lump sums and unit rates
11 would -- what we would expect and how that would be
12 paid.

13 Q So that's true of all the lump sum and
14 unit rates from your perspective, that you don't go
15 behind those once an invoice is submitted, saying
16 that I've done that work?

17 A For subcontractors, you know, we have to
18 have backup invoices for the subs.

19 For example, if we've got a drilling
20 subcontractor, you know, we'd want to have \$19 a
21 foot, which is how many feet that were drilled, the
22 dates. But that's what we would expect from the
23 subcontractor. It would be from the consultant. We
24 have to have that invoice from the sub. But, yeah,

1 for the lump sums and the unit rate, that's what we
2 would expect.

3 MS. MANNING: Okay, thank you.

4 HEARING OFFICER TIPSORD: Anything else?

5 Okay. I have a few questions.

6 BY HEARING OFFICER TIPSORD:

7 Q First of all, Mr. Clay, in your testimony
8 on page 4 from this hearing, one of the comments
9 that's made here is that the Agency believes there
10 will be a significant savings in cleanup costs with
11 the establishment of, quote, "reasonable costs,"
12 unquote and regulations. And we've heard a lot of
13 testimony about what's reasonable and all of that.

14 I guess my to-the-point question is,
15 do you believe that's because you're reducing what's
16 currently considered reasonable?

17 A (By Mr. Clay) I don't think it's reducing
18 what's considered reasonable. I think it's a matter
19 of what everybody considers reasonable as part of
20 the rules.

21 I mean, for example, some of the
22 examples I gave as far as what's being billed as
23 reasonable and certified as reasonable, we felt were
24 far from reasonable. And so I don't know that we're

1 reducing what's reasonable. I think it's just a
2 matter of making sure that everybody knows up front
3 what is reasonable.

4 And then as a result of that, I think
5 there will be savings in report preparation, you
6 know, re work. We said in past hearings that most
7 of the denials are the result of budget issues as
8 opposed to technical issues. So hopefully we'll
9 avoid those having to be resubmitted.

10 Q That's actually my next question then. A
11 list of unreasonable costs of the Agency deemed to
12 be unreasonable, I am assuming that none of those
13 costs were appealed to the Board? Or were those
14 costs appealed to the Board?

15 A The examples?

16 Q Yes.

17 A I don't know. I think those were all
18 within the last year, and some of them may have
19 been -- we didn't look at whether or not they were
20 appealed or not.

21 Q Could you check on that? I'd be
22 interested to see if they were appealed and whether
23 or not were affirmed. Or, you know, I think that's
24 a significant issue. If you were not affirmed,

1 obviously the Board didn't agree with your summation
2 that those were reasonable?

3 BOARD MEMBER JOHNSON: Those were all
4 denied, your list of unreasonable --

5 MR. CLAY: I think they were all denied,
6 yes.

7 The example that I gave where it was \$32 a
8 foot for injection of the oxygenated compound,
9 they just resubmitted that at \$16 a foot, and
10 we approved that. So that was one that was
11 resubmitted as opposed to, you know, gone to
12 something going to appeal, but we'll get back
13 on that.

14 Q (By Hearing Officer Tipsord) Okay. Then
15 on -- I think it was page 7 -- no, 14. In
16 discussion about PIPE's comments regarding sort of a
17 draft denial or a draft decision by the Agency, you
18 noted that -- and they analogized with the pertinent
19 section, you say that the analogy to the permit
20 review is not an appropriate unit. You talked to
21 the permit section, and that a permit issue RCRA
22 part B permits require draft to a final decision.

23 Again, I'm making -- I'm sure you'll
24 correct me if I'm wrong. You talked to the land --

1 A That's correct.

2 Q Are you aware of whether or not water and
3 air permits --

4 A I believe they do. For example, their
5 NPDS permits, they do draft permits.

6 HEARING OFFICER TIPSORD: Thank you. And
7 then in the rules, first of all, in this errata
8 sheet, given the size of the errata sheet, I'm
9 going to ask the same request of PIPE later on.
10 Could you provide that to us on disk?

11 MR. ROMINGER: Sure.

12 HEARING OFFICER TIPSORD: And particularly
13 on page 5 -- and this is also an issue that I
14 noticed that PIPE raised in their discussion.
15 But in the new language on page 5, the Agency
16 states, the Agency "may" allow. As you
17 probably are aware, JCAR is not fond of the use
18 of the word "may." So could we have some
19 further clarification? And I'm not even sure
20 that "may" is correct based on the testimony.
21 I think you're using it, as we may do this if
22 nothing else works, but you will do it in the
23 first sentence, doesn't happen.

24 BOARD MEMBER JOHNSON: 202?

1 HEARING OFFICER TIPSORD: Yeah, page 5.
2 Could you just check on that? And we may need
3 some further clarification.

4 MR. CLAY: I think that's fine. We'll
5 allow alternative clarification.

6 MR. ROMINGER: Yeah. It intends them to
7 allow to use those provisions.

8 HEARING OFFICER TIPSORD: Yeah. Then on
9 page 38, and you talk about this again in your
10 testimony, about reviewing payment amounts and
11 that you'll periodically review and maybe
12 commit to changes. Would the Agency be willing
13 to commit to when they'll bring those -- you
14 know, if you decide changes are necessary for
15 Subpart H, how much time it will be before you
16 bring those to the Board?

17 I mean, like, if you do it every three
18 years, are you going to wait another three
19 years before you bring it to the Board? Would
20 you be willing to make a commitment to bring
21 those to the Board within a certain time frame
22 after that?

23 MR. CLAY: Can we look at that? And part
24 of it will be dependent upon how extensive they

1 are. I mean, if it's one number. We wouldn't
2 want it to input from the community. So we'd
3 have to have time for that. But I mean, if
4 it's a couple numbers, it would obviously be
5 much easier to do very quickly as opposed to if
6 all the numbers are changing. But we'll
7 respond to that.

8 MR. ROMINGER: Yeah.

9 Q (By Hearing Officer Tipsord) Then sort of
10 a general question -- and this is again going to the
11 economics of the rule, we heard -- you gave us a lot
12 of numbers today about the number of consultants,
13 laboratories, etcetera, that are out there that are
14 probably not members of PIPE.

15 My question sort of is, do you
16 anticipate that these rules, as adopted, as you have
17 proposed them in this errata sheet, will result in
18 any potential businesses going out of business? Or
19 I mean, do you have a feel for that?

20 MR. CLAY: We don't anticipate that.

21 HEARING OFFICER TIPSORD: Thank you. Are
22 there any other questions for Mr. Clay or the
23 Agency? Thank you very much.

24 We'll move on to PIPE then. Let's go off

1 the record for just a second.

2 (Whereupon there was a short
3 discussion off the record.)

4 MS. MANNING: This is PIPE's response to
5 the testimony of Doug Clay that was prefiled,
6 and I'll be reading that today.

7 HEARING OFFICER TIPSORD: We're back on
8 the record.

9 MS. MANNING: Madam Hearing Officer,
10 should we mark both of these exhibits? Have
11 you done that already as exhibit --

12 HEARING OFFICER TIPSORD: Yeah. We'll
13 mark the filing from August 3rd, PIPE's
14 proposed alternative language as Exhibit 90 if
15 there's no objection.

16 MS. MANNING: And I would state that I
17 regret that I don't have copies of this
18 document today that we filed. So Exhibit 90?

19 HEARING OFFICER TIPSORD: Yes.

20 (Whereby, the Hearing Officer
21 marked Exhibit 90.)

22 MS. MANNING: And then I would offer then
23 as Exhibit 91 a document entitled PIPE
24 Testimony in Response to IEPA Testimony of

1 August 9, 2004, and Third Errata Sheet PIPE
2 Testimony in Support of Alternate Language.

3 HEARING OFFICER TIPSORD: Any objection?
4 Seeing none, we'll mark that as Exhibit 91.

5 (Whereby, the Hearing Officer
6 marked Exhibit 91.)

7 (Witness was sworn.)

8 MS. MANNING: Madam Hearing Officer,
9 before I begin, too, I would like to suggest
10 that the legislative community of PIPE as well,
11 they may testify from time to time after I
12 respond to the Agency's comments. So perhaps
13 they ought to be sworn in as well.

14 HEARING OFFICER TIPSORD: Okay. Let's
15 swear you in.

16 MR. TRUESDALE: Joe Truesdale, CSD
17 Environmental.

18 MR. WEINHOFF: Jeff Weinhoff, CW3M.

19 MR. DOTY: Dwayne Doty, United Science
20 Industries.

21 (All were sworn.)

22 MS. MANNING: Thank you.

23 HEARING OFFICER TIPSORD: Go ahead.

24 MS. MANNING: First as a general matter,

1 PIPE again very much appreciates and respects
2 this opportunity to address the Pollution
3 Control Board on this rule making with great
4 importance regarding the underground storage
5 tank rules.

6 Second, PIPE appreciates the changes to
7 the rule proposal that the Agency has submitted
8 in its third errata, and further thanks the
9 Agency for the many meetings we have had over
10 the course of this proceeding.

11 In large part, PIPE supports the offered
12 changes that are in the third errata sheet and
13 agrees that they are responsive to some of the
14 concerns raised by PIPE and other interested
15 groups that have met with the Agency over the
16 course of the last several months. Further,
17 the changes make the Agency's proposal more
18 palatable. Specifically, PIPE, although we had
19 questions about the proposed draft provisions
20 regarding bidding, generally the concept as
21 drafted by the Agency is something that PIPE
22 can rally around, and to a certain degree,
23 support. Also we support definitely the
24 concept of the UST advisory committee, and I'll

1 talk about that in a little later fashion.

2 However, there are still some very
3 important issues that need yet to be addressed
4 by this Board. Those issues involve process
5 and procedure as well as cost designated for
6 reimbursement.

7 Regarding process, we do not share the
8 Agency's position that their proposal will
9 result in any efficiencies. That's "in any
10 efficiencies," not "inefficiencies."

11 Regarding costs, PIPE continues to believe
12 that the Agency's costs as set forth in Subpart
13 H are neither well defined nor well justified.
14 They are not well defined because they do not
15 define the work necessary for certain lump
16 sums. They are not justified because they are
17 not -- they are based on historical data as
18 determined appropriate by the Agency, and not
19 on any real or market based data criteria or
20 statistics.

21 Today 's PIPE testimony is broken into two
22 phases. First a response to the Agency's
23 prefiled testimony and third errata sheet.
24 And, second, our testimony in support of PIPE's

1 alternate approach on the areas of substitute
2 disagreement that remain.

3 The following clarifications are required
4 and result directly from the prefiled testimony
5 filed by Doug Clay on behalf of the Agency.

6 First -- and this is a small matter,
7 meeting agendas. On page 3, Mr. Clay states
8 that PIPE prepared the agenda for the meetings,
9 and although the agenda reflected what we
10 intend to discuss, they do not necessarily
11 reflect what was actually discussed in our
12 meetings. A quick review of those agendas will
13 suggest that all of the issues set forth in
14 them are issues that PIPE has been concerned
15 about from the outset of these proceedings, as
16 the Board will recognize from the testimony of
17 past hearings. It is true the PIPE prepared
18 these agendas. It's also true that they
19 reflect PIPE's concerns. Some of those
20 concerns, admittedly, were discussed in more
21 detail than others.

22 For example, where the Agency made clear
23 its position at the outset in opposition to
24 certain items, such as procedural alternatives,

1 database for collection of market data and cost
2 issues, there was very little discussion.

3 It was not PIPE's intention submitting
4 these agendas to show areas of disagreement, to
5 show areas of agreement -- excuse me. Just
6 areas of concern and discussion. Those areas
7 of concern and discussion are consistent with
8 our testimony throughout this Board proceeding.

9 Impetus for the rule making. In response
10 to Mr. Clay's assertion, which is found on page
11 3 of his prefiled testimony, item 2, he states
12 that, quote, "This rule making was initiated in
13 2002 in response to statutory changes passed
14 that year."

15 And, presumably, I guess, not because the
16 Agency saw the fund began to fail, PIPE asserts
17 the following: First, this rule making was not
18 filed with the Board for public hearing until
19 January 13, 2004, a full year and a half after
20 PA 92-0554 became law on June 24, 2002. While
21 the Agency did in fact at some point during
22 this period of time have meetings with the Ad
23 Hoc committee, which consists largely of those
24 individuals who appeared and offer testimony in

1 this proceeding, namely Dan Goodwin and Cindy
2 Davis, the heart of the concerns raised by the
3 Ad Hoc committee at that time were not
4 addressed by the Agency before it filed this
5 rule and in large part remain unaddressed. And
6 for that, you can see the testimony in both Dan
7 Goodwin and Cindy Davis in this proceeding.

8 The entire testimony at hearing, as well
9 as Mr. Clay's very next point, item 3 on page
10 4, contradicts the idea that this rule is not
11 about controlling costs.

12 Mr. Clay is correct in asserting that the
13 transcript incorrectly captured Cindy Davis's
14 testimony when it reflected that she stated
15 that the Agency, during our meetings, told us
16 for the first time that they needed to save
17 \$125 million from the fund. Cindy didn't say
18 125 million. She did say 25 million. And we
19 were told 25 million by the Agency during one
20 of our meetings. 25 million is the figure that
21 correctly references Ms. Davis's testimony.

22 Mr. Clay states that the \$25 million
23 reduction figure is justified because, quote,
24 "Approximately 25 million more is being paid

1 out of the fund each year than is coming in."
2 PIPE would like to point out that, first and
3 foremost, it supports the idea of ensuring that
4 the UST fund is used wisely -- excuse me -- for
5 its intended purpose. That intended purpose is
6 reimbursement for the remediation of
7 underground storage tank sites. However, with
8 the exception of FY 03, at least in the data
9 presented to us by the Agency, the cost of
10 reimbursement has not historically exceeded the
11 revenues the fund generates.

12 If the state's goal is cost control, which
13 the Agency at this stage is hard pressed to
14 deny, the Board and the Agency should look at
15 the costs of the state's implementation of the
16 program, rather than direct all of the focus of
17 this rule making to the unspoken and unproven
18 assertion that current costs of reimbursement
19 are unreasonable. Over the last three fiscal
20 years, the Agency's share of operational costs
21 from the fund has risen \$200,000 to \$400,000
22 per year, such that the 04 cost of
23 administering the Agency's LUST fund was almost
24 \$4 million, which doesn't include the money

1 that the Agency utilized from the USEPA for the
2 administration of the program. As the Board
3 well knows, \$4 million exceeds the entire
4 annual appropriation for the Board's own
5 operations.

6 Various other states, like Wisconsin,
7 administer their entire UST program with
8 federal USEPA dollars alone and do not even tap
9 into the state's own UST fund for the
10 administration of the program.

11 And on that note, I would suggest that the
12 Agency put a lot of the states other laws in
13 and talk directly just about the costs of those
14 other laws. But I would direct the Board's
15 attention to look carefully at those laws,
16 because a lot of things that PIPE is talking
17 about in this proceeding are in fact covered in
18 those laws.

19 Things like escape clauses, the 800 -- the
20 855 rule now, 860, 732.855, 732.860, those are
21 included in most of the state's provisions,
22 escape clauses like that, as well as most of
23 those other states have some sort of scope of
24 work provisions, so that when there is a lump

1 sum attached to a specific job, the job is more
2 clearly delineated than in this proposal, and
3 I'll get to that later.

4 The Agency has not suggested what its
5 proposal will actually say or how much it will
6 cost. Mr. Clay's testimony admits that the
7 Agency has not performed the formal economic
8 analysis to determine, in specific dollars, the
9 savings that will be generated by its proposal.
10 The Agency's expectation of savings is
11 bolstered only by its presumption that it is
12 establishing, quote, "reasonable costs." Yet
13 those costs have not been derived from any
14 scientifically sound method or from any
15 reliable market place data. The Agency's
16 presumptions need to be closely examined by the
17 Board.

18 Further, the Agency's focus in this rule
19 making was not in the least focused on the
20 great number of sites that have yet to be
21 remediated in Illinois. Indeed, it was PIPE
22 who put forth data concerning the great number
23 of sites that remain inactive. There was no
24 great concern expressed as to why 5,000 sites

1 still await remediation. Indeed, if the UST
2 remediation business were as lucrative as the
3 Agency would like to have the Board believe,
4 one might wonder why this great number of sites
5 remains inactive. Based upon these statistics,
6 one might wonder why the EPA is not actively
7 encouraging businesses like those in PIPE who
8 are engaged in remediation to double their
9 efforts, instead of discouraging them from
10 doing so by squeezing them out of their
11 remediation business by setting the costs based
12 on the Agency's selective and dated historical
13 data.

14 Time to review claims. On page 5, item 5,
15 the Agency declares the testimony of interim
16 PIPE president, Cindy Davis, inaccurate. This
17 Agency testimony has caused PIPE to reevaluate
18 our testimony on time frames. And,
19 accordingly, we have researched all of the data
20 available on the Agency's Web site regarding
21 this, and indeed, Mr. Clay is correct. That
22 the Agency's time frame for issuing each of its
23 various decisions averages much less than a
24 hundred and twenty days.

1 Further, the Agency has averaged much less
2 time for decision making FY 04 than it did in
3 FY 03. The Agency is indeed making substantial
4 improvements in these time frames. And clearly
5 the data suggests, however, that a hundred and
6 twenty day wait for a decision is now out of
7 the norm.

8 However, and importantly, Cindy Davis was
9 also correct, at least in terms of her
10 experience with her company. The data
11 regarding her company, CSD Environmental, bears
12 out her testimony. The average time it takes
13 for the Agency to issue a decision on a project
14 involving her company is 119.86 days, which
15 Ms. Davis now recognizes is well outside the
16 norm. Indeed, the next closest average,
17 considering only those companies whose
18 remediation decisions constitute more than
19 1 percent of the overall Agency decisions, is
20 94.26 days. Indeed, out of 3,353 decisions
21 reviewed, the average Agency time to respond
22 has been 67.84 days. Also, the data easily
23 demonstrates that the time frame began to
24 shorten considerably after the Board's decision

1 in Ayers.

2 Ms. Davis is correct on another point as
3 well. And from the start of the UST project to
4 final reimbursement, regardless of the time
5 frame it takes to issue individual decisions of
6 the Agency, it takes a very long time to get
7 that. The statistics above -- excuse me,
8 include each and every decision the Agency
9 makes in the UST program. The Board must bear
10 in mind that there are so many of these
11 decisional steps that the actual time frame
12 from start to finish; that is, from budget to
13 final reimbursement, must consider a number of
14 them added together. For that time frame,
15 there are no statistics.

16 The Agency further states that since the
17 Act provides it with 120 days to respond to
18 submittals, any change to that time frame would
19 need to be a statutory change, and reduction in
20 this time frame would impact the Agency's
21 administration of the LUST program.

22 And indeed, this morning Gary King
23 indicated that our proposal is inconsistent
24 with state law, and we'll get into that later,

1 because I disagree with him in terms of any
2 PIPE's proposals being challenged under state
3 law. That the statute allows for a 120-day
4 response period does not require the Agency to
5 take a 120-day response period for each and
6 every decision.

7 Further, since the Agency does indeed
8 issue most of its decisions in a time frame
9 that's actually closer to 60 days, the Agency's
10 continued reluctance to at least consider some
11 of its decisional -- to at least consider the
12 reduction of some of these time frames is
13 perplexing, particularly when it asserts that
14 this rule is going to allow for more efficient
15 administration and processing.

16 On page 6, item 5, regarding extension of
17 the 120-day time frame if more information is
18 sought, Mr. Clay asserts, quote, "In some
19 cases, additional information that is needed
20 can be submitted within the 120-day time frame,
21 and the submittal can be approved."

22 First, the Board needs to ask the
23 questions Hearing Officer Tipsord was asking
24 earlier in terms of tying the language down in

1 this rule making. The Board needs to ask what
2 cases and under what circumstances, ie who gets
3 to ask -- who gets asked to provide additional
4 information and who doesn't.

5 It has not generally been the experience
6 of the members of PIPE that the Agency calls
7 and asks for more information. The opposite in
8 fact has been the practice. The Agency does
9 not generally solicit information, and
10 generally it provides no information regarding
11 the reasons for rejection or modification
12 beyond the standard and vague phraseology
13 "exceeds the minimum requirements of the Act."

14 Given the Agency's assertion, one must
15 question why would they continue to have such a
16 problem with tying these principles down, in
17 the manner provided in PIPE's alternative
18 language. Similarly, the Board should ask the
19 Agency questions like the amount of time it
20 takes the Agency to approve a plan or report is
21 largely dependent upon the quality of the
22 submittal, and that has not been in all of
23 PIPE's members' perspective as well.

24 The next item that Doug talked about is

1 PIPE itself being a vocal minority. And it
2 challenges -- he challenged in his testimony
3 again that PIPE would not identify its members
4 and could not provide a breakdown of how many
5 members represented each of the different types
6 of businesses involved in the remediation of
7 LUST sites.

8 He then gave various statistics -- the
9 Agency did -- in terms of putting everything
10 into perspective, and offered without
11 suggesting names, that there were numerous
12 silent consultants out there who were perfectly
13 happy with Subpart H. Hopefully, PIPE expects
14 that the Board is not going to be swayed by any
15 assertions by the silent people out there who
16 are not speaking to the Board in this
17 proceeding. If other companies or associations
18 have something to say in this rule making, they
19 can and should do it.

20 Rather, given the context of Ayers and
21 other litigation concerning the rate sheet, the
22 Agency's continued focus on who the members of
23 PIPE are breeds suspicion, if you would, within
24 the members of PIPE. And as everyone knows

1 here, PIPE was born out of this rule making.
2 While PIPE very respectfully recognizes the
3 Board's admonition at hearing -- Member
4 Girard's -- that failure to disclose its
5 membership may weaken its credibility, and
6 we've discussed your concern.

7 It's evident from this proceeding that
8 this whole side of the room are members of PIPE
9 for the most part. We can identify everybody.
10 And there's a board staffer. And Dan is not.
11 But PIPE is well represented. It's a new
12 association that has worked quite positively
13 with the Agency.

14 I don't mean my comments here today to be
15 disingenuous. I do want the Board to know how
16 serious the members of PIPE are, however.

17 The following rather prominent and engaged
18 Illinois associations have happily worked side
19 by side with PIPE. In addition to the Agency,
20 the ACEC, the ISPE and the IPMA. Indeed,
21 PIPE's birth was envisioned and inspired by
22 IPMA.

23 And to the extent of the question of whose
24 interests PIPE represents continues to be

1 relevant to the Board, I'm going to offer you
2 the following:

3 There are 10,000 UST sites in Illinois
4 that have yet to be remediated. And PIPE is an
5 association of various established and viable
6 companies. Oftentimes we're direct competitors
7 in this business. They're in a position to and
8 are very competent to, as you can tell from
9 their testimony and their questions, to
10 remediate those 5,000 sites that remain to be
11 remediated in the State of Illinois. PIPE has
12 members, companies who are more tangentially
13 involved in the UST remediation, such as
14 laboratories, landfills and drillers.

15 I think in Doug's testimony, he said there
16 were 48 landfills. We don't have 48 landfills
17 as our members, but as you all know, one
18 landfill company, you know, might have several
19 landfills. So numbers aren't necessarily
20 driving the concerns of this rule making.

21 While the Agency alerts that there are a
22 number of companies who perform LUST
23 remediation in Illinois -- and they are
24 correct -- the Agency very much realizes that

1 the companies who have been active in PIPE at
2 these hearings have the greatest market share
3 of that business, especially when you're
4 considering how it relates to the gas station
5 owner and operator with the retail gas station
6 owner and operators, and those that are not
7 owned by the large oil companies. Given that
8 these smaller owners and operators are the
9 ones, especially in downstate Illinois, who
10 risk the most harm from this rule making, it
11 should be no surprise that the consults and
12 businesses who are in a position to
13 successfully remediate these properties are the
14 ones that are the most active in this hearing.

15 PIPE suggests, again, that the Agency
16 ought to be encouraging businesses like those
17 in PIPE who can remediate these remaining
18 properties. The rule making ought to consider
19 the importance to Illinois of the viability of
20 these companies.

21 Thankfully, Doug's testimony finally
22 speaks of market factors, as PIPE has
23 encouraged all along. However, he does not do
24 so as support for the numbers that have been

1 presented in rule making, the rates proposed,
2 because they're not based on real market data,
3 but instead in support of the competitive
4 bidding proposal, which as stated earlier, PIPE
5 supports as it's written.

6 Scope of work. The Agency's description
7 of scope of work speaks volumes about the
8 differences of opinion that remain between the
9 Agency and the participants in this making.
10 Quote, "The scope of work is the work required
11 to perform the task being reimbursed; preparing
12 and submitting a plan, preparing or submitting
13 a report." State job descriptions are
14 generally more comprehensive than the Agency's
15 description of what they consider to be the
16 scope of work on a UST project.

17 Payment for environmental services
18 requires a flexible reimbursement procedure
19 that varies according to the degree of
20 difficulty in the project. The Agency has
21 proposed to divide the payment of services for
22 the consultants into two types of
23 payments -- time and material, and lump sum or
24 fixed fee. PIPE agrees that dividing payments

1 into these two types is appropriate, depending
2 on the specifics of the tasks and the magnitude
3 of the unknowns. Time and material pricing
4 works best when the technical and financial
5 risks and unknowns are large.

6 As many authorities recognize -- and I'm
7 not going to read all of that, but the bottom
8 line is, is it's a quote from the Environmental
9 Business Committee White Paper Performance
10 Based Contracting. And it basically -- the key
11 phrase here is that unfortunately many key
12 government decision makers seem to share belief
13 that a fixed price guarantees delivery of a
14 product -- or a project for a fixed price.
15 This is not a valid notion, because change
16 orders and large contingency fees are then
17 needed to protect against unanticipated site
18 conditions or technology performance. By
19 utilizing time, material contract when the
20 risks or unknowns are great, and then applying
21 lump sum or fixed fee price contracts to
22 discrete, well defined tasks with small
23 unknowns, efficiency gains and cost savings can
24 be realized.

1 The Agency does not believe that a
2 detailed, defined scope of work for every
3 aspect of the leaking underground storage tank
4 is necessary. PIPE is not requesting a defined
5 scope of work be prepared for every aspect of
6 the leaking underground storage tank site.
7 However, PIPE requests a defined scope of work
8 be prepared for those services that will be
9 paid for on a lump sum or a fixed fee basis.
10 In the next part, we explain the concept behind
11 a proposed sub appendix G, which we'll pass
12 around in a while.

13 We've drafted Appendix G. And it says,
14 "which provides a scope of work for the
15 services for which PIPE has identified as a
16 commodity type where the tasks are well defined
17 with relatively small risks and unknowns." The
18 intent of the scope of work is to identify all
19 of those tasks that are needed to prepare these
20 reports or services and to establish a standard
21 of review. It is our hope that the scope of
22 work will eliminate arguments of what items and
23 services are to be provided for the lump sum or
24 fixed fee. Without a clear defined scope of

1 work, the Agency and the consulting engineer
2 may have differing opinions of what work is
3 required to be performed, ultimately increasing
4 the need for appeals. In the event the Agency
5 reviewer decides the site warrants additional
6 information beyond the scope, the consulting
7 engineer should be paid on a time and material
8 basis to provide the site-specific information.

9 Mr. Clay has voiced concerns to PIPE that
10 if the rules were to list the services to be
11 provided, and it was not an inclusive list, the
12 consulting engineer would be requesting
13 additional pay. However, it is unfair to the
14 consulting engineer when the profitability of
15 their firm is to provide these services is at
16 risk.

17 The best option would be to work together
18 and develop an all-inclusive list to be
19 included in the Board's regulations, which
20 allows all the players to know the rules of the
21 game. PIPE also agrees that a method needs to
22 be established to allow additional services to
23 be included on the scope of work if it's
24 determined the service was left off in error.

1 Swell Factor and Conversion Factors. I'm
2 going to allow for testimony in terms of the
3 technical to you guys. I'm going to let you
4 handle that.

5 TACO tools and entry back into the fund
6 after an NFR letter. Regarding this issue,
7 PIPE responds that forcing a TACO based cleanup
8 affects the freedom of choices available to the
9 owners and operators who hire PIPE members, and
10 accordingly, we defer to IPMA and the position
11 of owners and operators of this issue.

12 However, PIPE does have some serious
13 concerns with the Agency's objection to allow
14 owners and operators back into the fund when an
15 unforeseen problem has been discovered after an
16 NFR letter is issued following a TACO based
17 cleanup.

18 The Agency used PIPE's own data, which
19 demonstrates that some owners and operators
20 already used TACO, to suggest that since there
21 was already a comfort level, there should
22 therefore be a mandate. Yet the Agency has
23 known from our discussions that owners and
24 operators will not accept a TACO mandate until

1 they are guaranteed to get back into the fund,
2 if need be, after an NFR letter is issued.

3 Thus, the idea of allowing these items to
4 be reimbursed following an NFR is not to make
5 owners and operators more comfortable with TACO
6 regulations, but to increase their willingness
7 to utilize the tools that TACO provides. The
8 Agency's position on this issue, that being not
9 being able to get into the NFR again if there's
10 a problem of award, is shortsighted. If the
11 Agency wants to realize the cost savings that
12 TACO will provide, it ought to seriously
13 consider a vehicle for allowing an NFR to be
14 reopened under certain special circumstances,
15 as already is the case with MTBE contamination.
16 The UST fund is, after all, a fund that is
17 designed to fully insure against contamination
18 from leaking underground storage tanks.

19 On a final note regarding this issue, the
20 Agency suggests that allowing for a reopening
21 of an NFR letter, even under special
22 circumstances, would make it even harder to get
23 a handle on the fund's outstanding liability.
24 And on this note, we would suggest that we

1 appreciate whatever desire the Agency has to
2 get a handle on the fund's outstanding
3 liability. The TACO issue shouldn't hold
4 anybody up, on the TACO issue as well.

5 And the next issue that I'm going to talk
6 about is the professional technical
7 certification and Title 16.

8 In Item 12, the Agency's proposal, the
9 Agency presents testimony for the first time
10 that suggests putting the LPE or LPG
11 certification in the Act. The legislature only
12 intended for oversight of site investigation
13 and corrective action by that professional.
14 The testimony misses the mark and shouldn't
15 really sway the Board. PIPE has never
16 suggested that the Agency should rely solely on
17 an LPE or LPG certification. We've never
18 suggested that. As the Board knows, when the
19 legislature required an LPE, later an LPG,
20 certification, the theory was that the licensed
21 professional would certify to the propriety,
22 from a technical perspective, of the decisions
23 that were made at the site concerning cleanup.
24 In large part, this is to justify that the work

1 that was done was necessary for the site
2 remediation. That is, in fact, the issue here,
3 by the way.

4 The question is, how many soil borings
5 were necessary. The provision also was
6 necessary because the Agency itself does not
7 oversee UST remediation from a technical
8 perspective, as it does in other programs, but,
9 rather, its oversight is limited to an on-paper
10 fiscal review.

11 The point PIPE makes is an absolutely
12 valid one, which should be folded into these
13 rules by the Board. That point is that where
14 there is room, and need, for technical judgment
15 regarding how a UST site is cleaned up, the
16 Agency ought to defer to the judgment of the
17 professional who has signed the certification,
18 as opposed to Agency reviewer who oftentimes
19 lacks technical training and is only trained
20 really in the Agency's standards of fiscal
21 review. The UST program needs to quit mixing
22 apples and oranges, apples being technical
23 questions, and oranges being fiscal questions.

24 Further, the Agency's citation to 57.7(f),

1 as being the alleged sole provision regarding
2 LPE and LPG certification, brings up a very
3 interesting statutory question, which I
4 understand the Board already knows anyway in
5 terms of the various conflicting statutes which
6 make up Section 57.7 and are contained in Title
7 16.

8 As you know, in 2002, Title 16 was the
9 subject of conflicting amendments in four
10 different bills, each of which became public
11 law. I am not going to read them all, but the
12 Board should know that they're very
13 conflicting. And the problem is that the
14 latter two Acts, which were the LPE and LPG
15 certification and their revision act actually
16 were passed before the site classification
17 bill, but did not become law until after such
18 bill. Thus, the amendments that were
19 contemplated and made law in the newer law in
20 reality amended the old new law.

21 Even in reviewing the Illinois Compiled
22 Statutes of 2002, they present four different
23 versions of Section 57.7. They also point the
24 reader to Section to 5 ILCS 70/6, which

1 indicates how conflicting statutes are to be
2 interpreted.

3 Basically, the provision requires that,
4 where possible, the laws, quote, "shall be
5 construed together in such a manner as to give
6 full effect to each act, except in the case of
7 irreconcilable conflict." The provision
8 further states that an irreconcilable conflict
9 between two or more acts which amend the same
10 section of an act exists only if the amendatory
11 acts make inconsistent changes in the section
12 as it therefore existed.

13 Certainly, regarding the professional
14 certification clauses, there is no obvious
15 intention by virtue of the passage of what is
16 now 57.7(f) to limit the provisions that the
17 legislature passed regarding LPEs and LPGs in
18 the context of 92-735. The Agency's original
19 filing in this matter merely cites 92-554 and
20 92-735 as the rule's impetus, but does not
21 necessary either shed further light on the
22 statutory quagmire.

23 The Board simply -- the only reason I'm
24 saying this is, the Board really needs to be

1 careful in dealing with these provisions in
2 terms of how it interprets the Act when they're
3 conflicting.

4 On a final note on this particular issue,
5 the Agency continues to obfuscate the point
6 PIPE attempts to make regarding professional
7 certification. Instead, it talks about its
8 greater authority to ensure reimbursement costs
9 are reasonable and promises to provide the
10 Board with examples of how it has received
11 professional certifications that have
12 constituted inaccurate or improper
13 certifications.

14 Doug went through a list of them this
15 morning. As PIPE has told the Agency a number
16 of different times, we hope that they denied
17 all of those claims. That's their job. We
18 would hope they do it. In fact, PIPE pointed
19 out to the Agency that it has the authority
20 under the statute already to go after any
21 fraudulent contractors. This rule making is
22 not about fraudulent contractors.

23 Database and electronic improvements for
24 the LUST program. The Agency's response to the

1 participants' suggestion of a database for the
2 collection of market data is, while not
3 unexpected, is perplexing. Certainly, with all
4 the resources of the fund that are available to
5 the Agency, it is in a position to consider the
6 benefits that electronic efficiencies will
7 offer them -- electronic filing, electronic
8 data collection. Instead, the Agency continues
9 to deem the very suggestion of electronic
10 efficiencies as a, quote -- and this is the
11 quote from the testimony -- "a mandated
12 burdensome and time-consuming data collection
13 effort which sends the LUST program in the
14 wrong direction."

15 We couldn't disagree more. Time and
16 again, government and businesses have
17 benefitted from electronic efficiencies and
18 data collection. It is fairly well-established
19 business fact that, generally, electronic
20 efficiencies reduce work; they do not create
21 more of it.

22 Indeed, the Agency's position on this
23 issue is in direct conflict with its position
24 that its rule proposal is intended to create

1 efficiencies. If this rule proposal is going
2 to work as well as the Agency expects,
3 basically if the costs are within Subpart H are
4 good to go, there is absolutely no reason why
5 not to design an electronic filing form and
6 database which processes claims in record time.

7 UST Advisory Committee and proposed
8 process changes. The Agency's comments
9 regarding PIPE's proposal, items 14, 15 and
10 17 -- actually, I'm here to answer any
11 questions about them when we get into the
12 testimony about our proposal.

13 We appreciate and support the Agency's
14 proposal of the UST Advisory Committee, which
15 is in item 14. And certainly that committee
16 will identify problems. But unfortunately,
17 simply a UST advisory committee is not going to
18 solve any problems, and they're certainly not
19 going to solve problems immediately. The time
20 for some of these solutions and some of these
21 issues to be addressed and raised and finally
22 disposed of is now, while the Agency is before
23 the Pollution Control Board.

24 Average costs of remediation per site. In

1 response to item 17, which delineates the
2 average cost of remediating sites from 1997 to
3 2001, PIPE fails to understand the Agency's
4 following point: And this is the point they
5 make. The Agency did not include incidents
6 closed in later years because it assumes that
7 many claims related to those sites have yet to
8 be submitted. Actually, as PIPE has indicated
9 in testimony exhibits, many of those sites,
10 even the 1997 to 2001 data, are actually sites
11 that were opened in the years delineated in the
12 Agency's chart, but haven't been closed yet
13 either.

14 PIPE asserts that the more logical reason
15 for the omission of the 2002, 2003 and 2004
16 data is that it is not supportive of the
17 Agency's position. Certainly, over the course
18 of the years, one would expect that average
19 costs would rise. If they have not, it's
20 likely due to the fact that in some years,
21 there may have been more complicated cleanups
22 than in other years.

23 As various members of PIPE have testified
24 in this proceeding, there are currently some

1 very complicated cleanups underway. The Board
2 should not be swayed by the Agency's continued
3 use of old data to support real time figures.

4 The rate sheet. In item 18, the Agency
5 asserts that, quote, "There appears to be some
6 confusion regarding the Agency's use of the
7 rate sheet." We're no longer confused. The
8 Agency utilized rate sheets, for various
9 purposes, at various times, based upon rates
10 deemed appropriate by select Agency employees
11 looking at select files of select costs. In
12 large part, the numbers brought to the Board in
13 this rule making are based upon those select
14 costs.

15 Proof of payment for subcontractors. In
16 item 19, the Agency is requesting the proof of
17 payment to subcontractors be included in the
18 application for payment. Mr. Clay states the
19 proof of payment to the subcontractor is
20 necessary to show that the subcontractor was
21 paid, and therefore the owner or operator is
22 entitled to reimbursement of handling charges.
23 The definition of handling charges is defined
24 in the proposed amendments to 35 Illinois

1 Administrative Code, Part 734, Section 735.115.
2 And that definition is administrative,
3 insurance and interest costs and a reasonable
4 profit for procurement, oversight and payment
5 of subcontractors -- subcontracts and field
6 purchases.

7 According to the definition, handling
8 charges are due to the owner and operator
9 regardless of whether he paid the subcontractor
10 at the time of services or if the subcontractor
11 agreed to wait until the owner and operator
12 received payment from the LUST fund.

13 Obviously, from question and answers
14 earlier today, it's not the Agency's intention
15 to indicate whether the contractor paid the
16 subcontractor. And to wait for that payment,
17 they expect that there has to be proof of
18 payment before they will pay the contractor for
19 any of the subcontractor costs. Even if the
20 subcontractor agreed to wait for payment, the
21 prime contractor bore the cost of insurance,
22 administration, and is entitled to a reasonable
23 profit for the procurement and oversight of
24 subcontracts. It is unfair to the prime

1 contractor to deny a handling charge if the
2 subcontractor agreed to wait for payment.

3 For essentially the same reasons, PIPE
4 proposes that Section 734.630, double zero, be
5 removed. Even if the prime contractor has a
6 financial interest in the subcontractor, the
7 prime still bears a cost of insurance,
8 administration, etcetera. There's nothing
9 untoward in this relationship. It's a typical
10 business relationship.

11 Drilling beyond stage three. In item 20,
12 the Agency squarely presents the dilemma a
13 consultant faces when he has to perform work
14 not necessarily contemplated in the four
15 corners of the rules.

16 Mr. Clay explains that, if someone has to
17 drill beyond stage three, he could do so
18 without approval, because he now will know,
19 with certainty, what he will be paid for the
20 drilling.

21 What we've all come to realize that
22 there's this disconnect in this proceeding.
23 However, is that the concern is not with what
24 the cost of drilling will be, but whether the

1 Agency is going to approve the drilling at all.
2 The Agency has shown no propensity to defer to
3 the judgment of a licensed professional as to
4 whether any work will be necessary or whether
5 that particular work was necessary, and the
6 Agency has shown every propensity to deny costs
7 if the work performed, that contractor
8 performed, was what the Agency deems, without a
9 technical review, excessive. The mantra being,
10 "exceeds the minimum requirements of the Act."

11 If the Agency intends to streamline, they
12 should allow an expedited method of getting
13 approval in this situation, or other "out of
14 the box" atypical situations. They should also
15 exhibit a willingness to define a particular
16 scope of work.

17 IDOT excavation, transportation, disposal
18 costs. In item 22, the Agency claims it has
19 been in contact with IDOT. And, in fact,
20 putting the letter into evidence today -- and I
21 have had an opportunity to read it. And it
22 doesn't deny that PIPE's testimony that the
23 average cost that IDOT pays contractors
24 for -- the particular cost is 99.75. The

1 Agency proposes 57. But they claim a
2 distinction because of the way IDOT reviews
3 bids and awards contracts. And I continue and
4 I think PIPE continues to fail to understand
5 the distinction.

6 The fact of the matter is, when reviewing
7 the IDOT contracts, that is the average cost of
8 that particular piece of work.

9 At this time, Madam Hearing Officer, I'm
10 concluding my remarks, at least that are
11 directly in response to the Agency's remarks
12 and the errata sheet.

13 In large part, as I indicated, we're
14 supportive of all of the Agency's comments in
15 the errata sheet and the movement they've made
16 in the errata sheet, but we believe that
17 there's a lot of substantive issues that
18 remain. And I'm willing to go on and talk
19 about what it is that PIPE is proposing, unless
20 anybody wants to ask any questions at this
21 point.

22 HEARING OFFICER TIPSORD: Let's go ahead
23 and proceed with your testimony, and we'll take
24 questions.

1 MS. MANNING: Okay. If I might just add,
2 that our proposals really are, from our
3 perspective, while some of the issues are in
4 direct conflict with the Agency's issues in
5 terms of scope of work, in terms of potential
6 cost and in terms of procedures, by and large,
7 we've been able to work out a lot of the other
8 issues.

9 One of the issues we would suggest the
10 Board look at -- and we didn't -- and I know
11 other people have testified. I think David
12 Reeser (sp) maybe at the first hearing that the
13 Board had in this matter, is to look at the
14 idea of merging Part 732 and Part 734. Having
15 both parts is going to be very complicated for
16 the regulating community, in that every time
17 somebody is operating under one or the other,
18 every time, you know, it's changed, you'll have
19 to change both parts. We just raised this as
20 an idea because we believe that it's
21 complicated to have both 732 and 734, but we
22 offer no suggestions to the Board in terms of
23 whether to do it.

24 Subpart A. In terms of the general

1 provisions, the Agency's applicability
2 clause -- and we've talked to them about the
3 applicability clause. And I think we're pretty
4 much on the same page with that, except that I
5 think that the language we proposed -- and I
6 would welcome any words that the Board finds
7 appropriate in terms of the applicability on
8 this.

9 The key, I think, is that there can't be
10 retroactive application of the rules. Whatever
11 amendments the Board makes and whatever -- once
12 they're promulgated and they go through the
13 joint committee, that's when they're effective.
14 So any work performed, any budgets approved
15 prior to the effective date of these rules,
16 these rules wouldn't apply to. I don't think
17 that the Agency's provisions are written that
18 tightly, and I think they should be.

19 We put in both for 732 and 734 -- and,
20 again, we would welcome any wordsmithing on the
21 part of the Board in terms of tightening the
22 applicability.

23 Definitions. Gary King spoke about this,
24 this morning. And I find it interesting that

1 PIPE's only perspective in putting the
2 definition of UST-RA is to simplify things.
3 There was no intention to develop any sort of
4 liability that's under Title 17 into Title 16.
5 It's especially interesting, in that the
6 Agency's proposing TACO. TACO comes out of
7 Title 17. And if there's legal issue in terms
8 of the applicability of the site remediation
9 program to an underground storage tank cleanup,
10 one would think that would be a legal issue,
11 not simply a suggestion that a definition be
12 considered that makes this process work better.

13 We didn't even think of the UST-RA issue
14 until, quite honestly, there was an Agency
15 surreplying the Ayers case, where there was an
16 argument raised that there was something
17 untoward, if you will, because one of the
18 members of PIPE was the decision maker in terms
19 of appealing something on behalf of an owner.

20 And the point I think we're trying to make
21 is there's nothing untoward in that at all.
22 Owners and operators have contracts with
23 consultants continually in this program, and
24 that ought to be recognized by the Board, and

1 that there's no problem with that.

2 And the definition that's contained in
3 Title 17, speaks perfectly to various issues.
4 It basically just says, "a Underground Storage
5 Tank remediation applicant means any person
6 seeking to perform or performing investigation
7 or remedial activities under Title 16 of the
8 Act, including the owner/operator of the site
9 or persons authorized by law or consent to act
10 on behalf or in lieu of the owner/operator of
11 the site."

12 This simply recognizes the contract, if
13 you will. That is a matter of general business
14 course between consultants and owners and
15 operators of the underground storage tank fund.
16 That's it.

17 And there are other states, if you look at
18 them. I think Indiana is one of them where
19 they actually have a form that an owner or an
20 operator can file, indicating that a consultant
21 can deal on his behalf with the Agency. The
22 idea is just to make this easier.

23 And, again, even the language here doesn't
24 suggest that we're assuming liability on the

1 part of the consultant. It says responsibility
2 for interfacing with the Agency on questions
3 concerning the propriety of the remediation
4 almost always rests with the consultant the
5 owner has hired to remediate the property.

6 The next item I think that I just wanted
7 to talk about is the data collection, plans and
8 budgets and reports. We had suggested language
9 in the Section 734.135. And, again, the Agency
10 has been opposed to the whole concept of a
11 database. The benefits of the database, I
12 think, we talked about earlier.

13 The language just says the Agency shall
14 create an electronic database that will allow
15 for electronic plans, budgets and reports;
16 collect and maintain data relevant to costs and
17 remediation of sites, including costs that are
18 usual and customary in the cleanup of such
19 sites, as well as data related to the number
20 and severity of sites yet to be remediated; and
21 provide for expeditious review and payment of
22 claims that meet the requirements of the Act.

23 Early action. We proposed changes in the
24 early action, free product removal section.

1 Again, this was for purposes of making these
2 rules easier to deal with. It wasn't intended,
3 and I don't believe that it causes any major
4 legal issues. In fact, I don't consider that
5 it has any legal issues in terms of 734.215.

6 On Page 15 of our proposal, we talk about
7 the Board notes as well. And the suggestion is
8 to look at the Board notes because they may be
9 obsolete. Our idea is to tie this all up so
10 that we all know whatever language the Board is
11 using, whether it's maximum rates or lump sums
12 or reimbursable costs. As we've suggested, it
13 needs to be tied up.

14 And there's -- really the Board notes are
15 simply confusing to the regulating community.
16 So the Board might want to consider whether it
17 just wants to do away with those Board notes
18 and make the rules, say what they need to say.

19 Subpart E, review of plans, budgets or
20 reports. Gary testified to this -- well, he
21 didn't testify to it, but he did say that this
22 would be, I guess, Doug, if that there was a
23 problem with the procedure and if it conflicted
24 with state law, but it's my impression that

1 they do not.

2 First of all, the time frames in here are
3 not doing anything that's inconsistent with the
4 Act. It's just setting forward a specific
5 process. 734.505(a) is exactly the language of
6 the Agency. 734.505(b) talks about the
7 authority to approve, reject or require
8 modification.

9 What it really does -- actually, in the
10 middle of that is the Agency fails to make such
11 decision within 120 days, the applicant can
12 consider the Agency to have denied the
13 submittal and can proceed to invoke the
14 processes set forth in this.

15 That is the law. That is the law. PIPE
16 would like it differently. It would be great
17 that if it was actually a grant as opposed to a
18 denial in most cases, but it's a denial. So
19 that is the law.

20 The part the Agency may find objectionable
21 also isn't -- there's nothing wrong with the
22 law, and that is to turn the burden of proof.
23 The Agency will have the burden as to why the
24 applicant's submittal violated the Act or these

1 regulations or was not otherwise approvable.
2 If the applicant prevails before the Board, the
3 Board may authorize the payment of the
4 applicant's costs from the UST fund. That's
5 the law as well.

6 C is the Agency shall process claims as
7 expeditiously as possible. Where the submittal
8 and attendant costs are consistent with this
9 part, the Agency shall approve such a submittal
10 within 45 days of its receipt. Just because
11 the law says they get 120 days doesn't mean you
12 can't, in your regulations, allow for a shorter
13 time frame, especially if the Agency is used to
14 processing it in that amount of time frame, a
15 shorter time frame anyway, number one.

16 And, number two, if the theory of these
17 rules is that everything is going to be easy,
18 and it's an easy review, and the costs are
19 contained, when everyone follows Subpart H, the
20 Agency shouldn't have any trouble just
21 approving the plan then within that period of
22 time.

23 Subpart D then says if the Agency intends
24 to reject the submitted plan, budget or report,

1 or requires modification thereto, or requests
2 more information, it shall within 45 days of
3 the receipt of such submittal, provide written
4 notification of such intention. Such written
5 notification -- and those four provisions are
6 taken right out of the statute. Granted those
7 provisions are taken out of the statute after
8 the 120-day time frame in terms of rejection,
9 and in the middle part of it in terms of a
10 modification, but there's nothing wrong with
11 doing it this way from an administrative law
12 perspective. It does not violate the
13 Environmental Protection Act. It does not
14 violate the Administrative Procedures Act. It
15 certainly is a streamline procedural approach
16 to getting decisions made easier, quicker and
17 more efficiently.

18 It says it if chooses to modify the
19 submittal in response to the Agency's written
20 notification, the applicant shall provide such
21 notification of modification to the Agency
22 within 35 days of receipt of the Agency's
23 letter of intention. The applicant's notice of
24 modification shall not extend the applicable

1 120-day review period.

2 In fact, I think Doug, in his testimony,
3 talked about how, you know, when they get
4 information, it doesn't extend the 120-day
5 period. So they shouldn't have any problem
6 with that either, because you shouldn't ever
7 extend the 120-day period in underground
8 storage tank.

9 F is then if, at the end of the period,
10 the Agency deems that the submittal should be
11 rejected, it shall provide written notification
12 for the reason of such rejection, which shall
13 include one more of those reasons delineated in
14 734.505(d).

15 And I'd like to point those out, if for no
16 other reason, are statutory. You know, that's
17 why they're italicized, except they're not
18 currently the Agency's proposal. And generally
19 when they get a rejection letter, there's not
20 this specification. When UST remediation
21 applicants, or whatever you want to call them,
22 the consultants apply and get a denial letter
23 from the Agency, oftentimes that denial letter
24 simply says exceeds the minimum requirements of

1 the Act, and doesn't allow for any more
2 specificity on that.

3 And it talks about if the applicant has
4 modified its plan, based on the Agency's
5 request; that's not good enough, and there's
6 still a problem. The Agency ought to explain
7 to them why that's a problem as well.

8 G says an owner and operator may waive the
9 right to a final decision within 120 days.
10 That's basically already in the Agency
11 proposal. That language isn't any different
12 than the Agency's letter.

13 H, I think is the same as the current
14 Agency language as well. The Agency shall mail
15 notice of its intended action, pursuant to
16 Section 734.505(d).

17 I. Any final action by the Agency to
18 reject or require modifications or rejection by
19 failure to act, of a plan, budget, or report,
20 in accordance with Section 735.505(f), again,
21 which cite the statutory language, shall be
22 subject to appeal to the Board within 35 days
23 after the Agency's final action in the manner
24 provided for in review of permit decisions in

1 section.

2 Nothing new either.

3 Where an applicant has filed an appeal
4 with the Board, the Agency shall at the
5 applicant's request, agree to a 90-day
6 extension provided in Section 40 of the Act.

7 Generally, they do that anyway. I mean,
8 there is a distinction there in terms of saying
9 that the Agency shall agree to a 90-day
10 extension. Perhaps there is an issue there,
11 but if so, it's not a big one, and it's not
12 something that is a deal breaker in terms of
13 PIPE anyway. It's not really the focus of this
14 procedure.

15 My testimony here is that the focus of
16 this procedure is absolutely within the
17 confines of both the Environmental Protection
18 Act and the Administrative Procedure Law.

19 During this period at the applicant's
20 request, the Agency will meet with the
21 applicant in an effort to resolve any dispute
22 about costs or narrow any issue that may be
23 appealed to the Board.

24 2. Where the applicant prevails before

1 the Board, the Board will authorize payment of
2 the applicant's reasonable attorney's fees from
3 the fund, in accordance with Section 57.7 of
4 the Act, unless the Board finds that the appeal
5 was not taken in good faith.

6 Admittedly, that particular provision
7 further details the discretion already allowed
8 the Board in the Act. So if the Board
9 obviously prefers the discretion as it is
10 written in the Act, that's not a deal breaker
11 in terms of PIPE either.

12 3. As an alternative to a Board appeal,
13 the parties may mutually agree, in writing, to
14 the services of a mediator or arbitrator who
15 shall be paid a reasonable fee from the UST
16 fund. And then it talks about specific
17 requirements that the UST Advisory Committee
18 will establish, a list of acceptable neutrals
19 who need not be lawyers and who shall not be
20 state employees, but demonstrate an
21 understanding of issues related to the
22 contracts. The UST advisory committee will set
23 a limitation as on the rate to be paid any such
24 neutral.

1 PIPE's intention here is not to avoid a
2 Board appeal. And PIPE drafted this, in large
3 part, not knowing what the balance of powers
4 are and still not knowing what the balance of
5 powers are in terms of pursuing appeals to the
6 Board. It's very costly, as you know now, as I
7 certainly know, to proceed through the Board
8 through an appeal process. Statutes require
9 that you have to have a lawyer to argue before
10 the Board. This particular process would give
11 the parties an "out" if they chose. Obviously,
12 if would be a contract between the EPA and a
13 particular consultant, instead of going the
14 route of the Board, which would have an appeal
15 to the courts. They decide just to resolve it
16 more informally. It's an alternative dispute
17 resolution procedure that allows for that to
18 happen.

19 The Board might, I think, already has a
20 rule that allows the Agency and members of the
21 regulating committee to have an alternative
22 dispute resolution procedure, which takes a
23 decision outside of the confines of the Board.
24 I think it's in the MSHA program, but I am not

1 sure. I will provide the Board with that
2 particular provision, but I'm sure that there's
3 at least one area on board regulation where the
4 Agency's proposed itself an alternative dispute
5 resolution mechanism.

6 The reason PIPE is proposing this is that
7 the balance and the equation of power in the
8 underground storage tank program is no
9 different than it is in other programs that the
10 Agency administers. In large part, that's
11 because of the numbers of cases that the Agency
12 deals with. It's also because that the money
13 in dispute is not as large as it is elsewhere
14 when you're talking about permits and those
15 kinds of things.

16 The other issue I think the Board needs to
17 look at is, this really isn't a permit appeal.
18 While the law has drawn the underground storage
19 tank process into Section 40 of the Act, it
20 really isn't a permit appeal. So there are
21 various kinds of things which I've suggested in
22 my filing to the Board in terms of differences
23 and similarities between this and the permit
24 process.

1 Certainly I would suggest, though, the
2 Wells case that we talked about in here that
3 found that the failure of a company to receive
4 information before a denial may very well
5 violate due process. It's something the Board
6 at least should look at in terms of evaluating
7 the propriety of a process like this. PIPE is
8 very serious about the idea of process and in
9 making sure that things work more
10 expeditiously.

11 More so than any other program or many
12 programs, PIPE members feel they're in a black
13 box when we're dealing with the Agency, and
14 it's a black box that's really hard to get out
15 of. And it's really costing them a lot of
16 money in terms of doing their business, and
17 many of them are even considering getting out
18 of the business as a result of that particular
19 black box. That is not good for the State of
20 Illinois. It's not good for the remediation of
21 these 5,000 sites that are inactive and sitting
22 out there. So this is a real serious proposal
23 on the part of PIPE that we would like the
24 Board to listen to in terms of making this

1 process more workable and in terms of balancing
2 the equations of the parties out a little
3 easier, and a little more as the Act intends,
4 that the regulated community and the EPA have
5 equal authority when they get before the Board.

6 Obviously, this was written as well before
7 the Board's case in Ayers recently that you
8 issued on Thursday. We just found out about
9 that case, that the attorneys' fees issue. And
10 I'm sure the --

11 MR. KING: Excuse me.

12 MS. MANNING: Okay.

13 MR. KING: I don't think we should be
14 talking about cases that are pending before the
15 Board.

16 MS. MANNING: I thought that case was
17 closed. I'm sorry.

18 BOARD MEMBER JOHNSON: It's well within
19 the appeal period.

20 MS. MANNING: Okay, thank you.

21 That's all I had on procedure, procedure.

22 The payment from the fund. We indicated
23 in our Subpart H filing, as the Board has known
24 for some time, that we have two real issues.

1 The first issue is the lack of a definitive
2 scope of work for any of the things for which
3 lump sum is due and owing.

4 We have worked very hard, and we've given
5 various drafts to the Agency a long time ago,
6 and we're still working on all of us agreeing
7 what it is that's the scope of work for a
8 particular process where a particular lump sum
9 that's applicable in this particular
10 proceeding.

11 And I believe we do have a draft of
12 Appendix G, of proposed Appendix G that we're
13 going to circulate, and then I'll put into
14 evidence.

15 In terms of rates and dollars and PIPE
16 offering any numbers to replace our Xs that
17 have been presented to the Board in the filing,
18 at this point, we have decided -- let me just
19 explain what we've done thus far and where
20 we're working on the numbers.

21 PIPE has agreed, through me basically, to
22 exchange numbers and has attempted to come up
23 with specific numbers that fit the categories.
24 However, we have discovered, just like we

1 thought perhaps we would, until we get a
2 delineated scope of work so that everybody
3 understands what's called for in every lump sum
4 payment or maximum amount, or whatever the
5 Board intends to call it in its rule, until
6 that happens, until everybody agrees what it is
7 that's required for that particular piece, it's
8 very difficult, if not impossible, for us to
9 come up with an alternative set of numbers for
10 that particular piece. We're still working on
11 it, as we do intend, at some point to present
12 those numbers to the Board.

13 And the way we're going to do that is
14 basically through me. Everybody will, once
15 their work, scope of work is delineated, based
16 on the Agency's sections, we're going to take
17 each of those sections, say this is what the
18 work is for this particular dollar amount, we
19 all agree that's what we'll do for it. That's
20 what's included in it. Let's get that language
21 in the rule, let's put a specific dollar amount
22 on it, and we'll present that to -- each member
23 of PIPE will send me their own indications of
24 what that number will be, should be, and then

1 I'll send those to the Board. But that is a
2 process that will have to take place after
3 we've all come to an agreement on what the
4 scope of work is. And I think that is a
5 process that everyone in this rule making ought
6 to consider that needs to be done before we
7 actually come up with numbers that work.

8 The other alternative that PIPE considered
9 and would like the Board perhaps to consider,
10 and we've asked the Agency to consider, and
11 they've not, is the idea of using a
12 professional market based consultant, like RS
13 Means to come in and look at this particular
14 situation, this particular market, this
15 particular state and indicate what those
16 numbers ought to be.

17 My understanding is the State of Wisconsin
18 is going through rule making at this point in
19 time, and they're going effective with their
20 new rule in September. And my understanding is
21 they're basing some of theirs on drawing from
22 RS Means. We've actually talked to the people
23 from RS Means. PIPE's not in a position
24 obviously to hire them and to say come and look

1 at market data. PIPE is convinced and
2 committed to develop accurate market based fees
3 and structures. We're not just looking here to
4 up the costs and have a high cost of
5 remediation. As I said, there's
6 5,000 -- there's a lot of work yet to do in
7 Illinois. What we're very concerned about,
8 however, to make those costs relevant to
9 reliable and market based, and there needs to
10 be a appreciation for the businesses that are
11 already established that are capable of doing
12 this work and in prices that reflect their
13 costs of doing business. So at this point in
14 time, that's where we are. Go ahead.

15 BOARD MEMBER JOHNSON: Have you come to a
16 consensus? Have your group members come to a
17 consensus on how you intend to do that?

18 MS. MANNING: Yes. And we had the scope
19 of work that we'll pass out today. I think Joe
20 has it. Do you just have one copy, Joe?

21 MR. TRUESDALE: I have three versions.

22 HEARING OFFICER TIPSORD: You know what?
23 I'm going to need to have more than one copy.

24 MS. MANNING: How about we put it in

1 public comment after the Board hearing?

2 MR. TRUESDALE: I have two different
3 versions that I'm aware of yet.

4 MS. MANNING: That's what we're doing. I
5 mean, we've have a scope of work that all of
6 the consultants that at least are members of
7 PIPE have agreed to. And what they're going to
8 do is give me numbers.

9 HEARING OFFICER TIPSORD: From a practical
10 standpoint, we've already had five sets of
11 hearings here. It would seem to me that this
12 would be a fairly substantial piece of
13 information you're wanting to put in. When
14 does PIPE anticipate having this scope of work
15 done so that you can move on to the next point?

16 MS. MANNING: Probably two weeks, a week.

17 MR. TRUESDALE: If I might just add
18 something. A lot of it -- a lot of problems
19 have come from just trying to figure out what
20 will be required in the regulations and the
21 changes that have come about through this
22 hearing process, what was required for site
23 investigation in the initial proposal versus
24 what site investigation requirements are.

1 Fourth, first, second and third errata sheets.
2 The scope continues to change for us. So it's
3 hard to put our finger on what we have to do as
4 a result of that.

5 MS. MANNING: Well, you saw some of that
6 in the testimony this morning about the
7 questions about the bids. I mean, there's a
8 moving target here, which makes it more
9 difficult, because every time any part of the
10 questions our people had this morning, well, if
11 you have more than one bid, you know, do you
12 have more than one bid for each thing? And if
13 the bid -- you know, if you do a second
14 drilling, do you have to go and get the bids
15 again the second time? And so all of those
16 things need to be considered in terms of what
17 the scope of work is.

18 BOARD MEMBER JOHNSON: Well, we
19 appreciate -- it's like trying to put a thumb
20 tack on jello. You know, we have a time line,
21 and I think that that's what Marie was getting
22 to is that we can't wait forever.

23 MS. MANNING: I understand that. And we,
24 honestly, the last time we met with the Agency

1 and Dan Goodwin, there was -- and I think he's
2 going to testify today, we asked for more time
3 because we thought we had another couple of
4 weeks to work with the Agency. So I would
5 think it might behoove the Board to have
6 another set of hearings or just one in the next
7 week or two. But Dan is going to testify today
8 as well.

9 HEARING OFFICER TIPSORD: Before we move
10 on to that, did you have additional testimony,
11 or are you ready for questions?

12 MS. MANNING: Did you guys want to say
13 anything? Can we have just a few minutes?

14 HEARING OFFICER TIPSORD: Yeah. Let's
15 take a few-minute break, yeah.

16 (Brief break.)

17 HEARING OFFICER TIPSORD: Let's go back on
18 the record.

19 MS. MANNING: In response to the Board's
20 question, Madam Hearing Officer, I am prepared
21 to put two pieces into evidence, which might
22 indicate that at least on some costs were
23 closer to the Agency than it appears. And
24 those are the construction costs, those costs

1 that are very well defined, and they're not the
2 professional services costs. They don't
3 necessarily require the same scope of work.

4 I have a document. Which exhibit are we
5 at now? And I'll go ahead and mark it.

6 HEARING OFFICER TIPSORD: Exhibit 92 for
7 construction costs. And I'll explain it.

8 (Whereby, the Hearing Officer
9 marked Exhibit Number 92.)

10 MS. MANNING: These are costs that
11 directly are taken out of the Agency's
12 proposal, Subpart H. One we did is put the
13 word out to various members of PIPE. Six
14 companies responded. Some companies didn't put
15 numbers as to anything and others put numbers
16 down. And this fills in at least the Xs from
17 PIPE's perspective on those unit costs. As you
18 can see, we're really not far from the Agency
19 on some of these costs, like ET & D.

20 BOARD MEMBER JOHNSON: What, Claire?

21 MS. MANNING: E T & D, excavation,
22 transportation, disposal. The famous \$58, in
23 other words. We're not seeking the \$97 that
24 IDOT pays their contractors for ET & D. You

1 know, that big issue about IDOT.

2 MR. ROMINGER: Is that a third column
3 down?

4 BOARD MEMBER JOHNSON: I was just trying
5 to find that.

6 MS. MANNING: Yes, it's the third, Member
7 Johnson. It's the third group, ET & D yards
8 per three.

9 BOARD MEMBER JOHNSON: 67.46.

10 MS. MANNING: That's the 90th percentile,
11 you're right. The minimum was 57. The maximum
12 was 69.509, average was 6140. These were based
13 on, as I indicated, each of the company's
14 submitting to me, somebody designing this form
15 based on the Agency's Subpart H, as we've
16 suggested it be amended in terms of adjusting
17 certain categories.

18 An example of that is the type of tanks.
19 I think the Agency only had two or three
20 different types of categories of tanks, and we
21 thought there needed to be more categories of
22 tanks. As can you tell when you get a tank
23 that's very large, the issues get more
24 complicated. And several of the companies

1 didn't want to put a price on that at all.

2 So there are some, you know, of these
3 various different things where what you can see
4 from this is where we were uncomfortable
5 putting prices on and where the companies were
6 comfortable putting prices on. And in some
7 areas that's not all that far apart from the
8 Agency in terms of these discrete construction
9 costs.

10 Many of these costs as well, the Board can
11 look at RS Means and find similar kinds of
12 costs. And that's my next --

13 BOARD MEMBER GIRARD: Before you leave
14 this exhibit, could I just ask a question now?

15 MS. MANNING: Sure.

16 BOARD MEMBER GIRARD: How again did you
17 solicit this information from the company? Did
18 you just call them up and say how much money
19 you would like to get for this service?

20 MS. MANNING: They're not services.
21 Basically we said look at Subpart H, and
22 emailed a blank Excel spread sheet, said price
23 this as you would if you're bidding for an IDOT
24 job, and send it to me. And that's exactly

1 what happened. And then I took those figures
2 and created this document.

3 We were not able to do any of the other
4 costs that need a more clearly defined scope of
5 work, professional services cost, the cost of
6 doing EACP, those kinds of things.

7 BOARD MEMBER GIRARD: Now, company four,
8 you didn't get any information from company
9 four; is that correct?

10 MS. MANNING: That's correct.

11 BOARD MEMBER GIRARD: So this is simply an
12 email survey. And were these companies
13 familiar with the Subpart H proposal?

14 MS. MANNING: Yes.

15 HEARING OFFICER TIPSORD: Were they all
16 members of PIPE, did you say?

17 MS. MANNING: Yes. Some of them not
18 active members of PIPE. Some of the members of
19 PIPE, I should point out as well, were not
20 willing to yet attach any costs to it. So you
21 can't assume that they're simply the members
22 that testified. They're -- go ahead.

23 MR. TRUESDALE: I might mention that some
24 of the PIPE members are -- our firm, for

1 instance, used RS Means data entirely to derive
2 costs that we presented as reasonable prices in
3 our statement for costs.

4 MS. MANNING: Which is an example I'm
5 going to label Exhibit Number 93.

6 HEARING OFFICER TIPSORD: I think we have
7 another question on this chart.

8 MR. GOBELMAN: Steve Gobelman, Illinois
9 Department of Transportation.

10 I haven't seen this form, but you say it's
11 like any other IDOT construction costs.

12 MS. MANNING: No, I didn't mean to suggest
13 that.

14 MR. GOBELMAN: Is that volume based on
15 what's going to the landfill per cubic yard
16 cost? Is that based on the volume that's going
17 to the landfill?

18 MS. MANNING: Yards per three.

19 MR. GOBELMAN: Is that based upon the
20 volume?

21 MS. MANNING: Yes, I think it is, isn't
22 it?

23 MR. GOBELMAN: Are you aware of how IDOT
24 does their work?

1 MS. MANNING: I'm not making a comparison
2 to IDOT.

3 MR. GOBELMAN: Yes, you did.

4 MS. MANNING: Maybe. Let me just
5 clarify --

6 HEARING OFFICER TIPSORD: Wait a minute.
7 One at a time, one at a time.

8 MS. MANNING: I can.

9 MR. GOBELMAN: Specifically everything
10 related to the cost of what you perceive to be
11 the average cost that IDOT pays for
12 transportation, disposal of contaminant soil?

13 MS. MANNING: From our perspective, and in
14 what we're suggesting here, it's irrelevant to
15 us at this point in time what the average cost
16 of ET & D is that IDOT does in its contracting
17 service.

18 MR. GOBELMAN: Are you aware of how IDOT's
19 transportation disposal of volume is calculated
20 on?

21 MS. MANNING: Not at this point in time,
22 no.

23 MR. GOBELMAN: So, therefore, you're
24 making a comparison on something you don't

1 understand or know about?

2 HEARING OFFICER TIPSORD: Wait a minute.

3 MR. COOK: All of these members of PIPE
4 that responded to that are all doing work and
5 are well aware of how the Agency does those
6 calculations, and they would use their current
7 levels of experience and understanding in how
8 the Agency works. So it is completely
9 irrelevant.

10 HEARING OFFICER TIPSORD: Mr. Cook, you
11 have not been sworn in. And you are clearly
12 offering testimony. So please be sworn in.

13 (Whereupon the witness was sworn.)

14 HEARING OFFICER TIPSORD: You can
15 continue.

16 MR. COOK: Well, my point is, that the
17 firms that prepare those numbers would have
18 prepared those numbers consistent with the
19 means that they would use to prepare a budget
20 that they would submit to the Agency today.

21 MS. MANNING: Correct.

22 MR. COOK: So they're well aware of the
23 Agency's methods of determination of soil
24 volumes and that sort of thing. So this

1 comparison to IDOT, which was used casually, I
2 believe, was completely irrelevant.

3 MS. MANNING: Thank you.

4 MR. TRUESDALE: I might just mention maybe
5 to clarify.

6 The way it was presented is, it was sent
7 out as this would be a request for proposal for
8 any environmental work, be it an SRP project,
9 whatever, an arbitrator request, a proposal for
10 a request for this particular work item, that's
11 how it was bid irrespective whether it was in
12 the LUST program, SRP. It was marketable rates
13 for doing this service.

14 MS. MANNING: And, again, it's presented
15 to show that on some of these costs, there's
16 not that great a distinction.

17 And based on your question about moving
18 this forward, I wanted the Agency to know, and
19 I wanted the Board to know that it's not like
20 we're out here hanging, not working. We're
21 working at very hard getting to where we think
22 this rule needs to go, and I presented that to
23 show you that.

24 HEARING OFFICER TIPSORD: We had no doubt

1 that you were working hard.

2 BOARD MEMBER GIRARD: I have one more
3 question.

4 How can you come up with a bid for -- I
5 mean, like I understand excavation. You know,
6 per yard square and disposing a per yard
7 square. But transportation costs depend on the
8 distance that's being transported. So how are
9 you able to come up with a figure without
10 knowing that, you know, it's X number of miles
11 to your disposal site, from your cleanup site?

12 HEARING OFFICER TIPSORD: I am sorry?

13 MR. RANGUSSO: Bob Ranguzzo with Marlin
14 Environmental.

15 I think you're getting to the point
16 exactly. How do you set one price when there's
17 such high variability in the cost of transport
18 and disposal variables throughout the state,
19 regional, local, traffic, seasonal conditions,
20 all of those things. What we were responding
21 to is the Agency has set one number that
22 categorically covers the maximum for any
23 scenario that might happen throughout the
24 state. So, therefore, we're trying to match

1 apples with apples on their behalf. I mean, I
2 would certainly agree that it is not something
3 that should be -- it should be on a
4 site-by-site basis.

5 MS. MANNING: That's why I would add to
6 that, that's why some PIPE members refused to
7 actually even fill the numbers out because they
8 were not able to do that.

9 Our point was the Board is going to want
10 to see something as an alternative to the
11 Agency. The Agency has been asking us for
12 alternative numbers for several months now.
13 You have hit the nail on the head. It is very
14 difficult to put numbers out there when you
15 don't exactly know what the numbers apply to.
16 We were trying as best as possible to be
17 responsive to the Agency Subpart H.

18 BOARD MEMBER GIRARD: But would this make
19 it appear that Subpart H now has become the
20 floor for these costs, because the lowest cost
21 of these five companies that came back with an
22 estimate is the maximum cost that the Subpart H
23 proposals is to pay for that? \$57?

24 MS. MANNING: Again, we looked at Subpart

1 H, where we could define a particular cost
2 based on what we believe to be the Agency's
3 expectation.

4 MR. TRUESDALE: I might explain.

5 Some of the responses may have been that
6 appears that Agency proposed Subpart H costs
7 are adequate or something to that effect. So
8 as a result, the numbers that went in would
9 have been reflective of what Subpart H
10 suggested.

11 HEARING OFFICER TIPSORD: Go ahead.

12 MR. WALTON: Harry Walton.

13 At the previous hearing, there was a lot
14 of dialogue focussed at the IEPA statistics for
15 their population from which they drew their
16 costs. In comparison, what is the population
17 from which PIPE drew its sampling, in context
18 to the total population out there, do you feel
19 that your numbers are statistically valid? Are
20 the same issues that you raised to the Illinois
21 EPA's numbers, are they still issued here also?

22 MS. MANNING: I'll answer to that, Harry.
23 I don't disagree with you. The fact of the
24 matter is, it took us a long time to try to

1 decide whether we were going to throw these out
2 or not. We're not suggesting these are the
3 numbers. In fact, that is exactly the issue in
4 this proceeding. The Agency comes out with
5 select numbers based upon not a statistical
6 database. Our numbers are based on -- I can
7 tell you our numbers are based on contractors
8 that do a lot of UST work today. Now, today,
9 probably out of -- there's an exhibit already
10 in the record out of most of those UST
11 remediation consultants that have in the double
12 digits, if you will, sites out there, and are
13 members who may have been asked to fill this
14 out.

15 MR. WALTON: But population size is very
16 small?

17 MS. MANNING: What do you mean population
18 size?

19 MR. WALTON: Responses that characterize
20 your entire statistics.

21 MS. MANNING: I would point out, Harry, as
22 well, when I reviewed the documentation of all
23 the underground remediation businesses, the
24 businesses in Illinois that do underground

1 storage tank remediation, the great bulk of
2 them, the great bulk of them had less than
3 1 percent market share, if you will, out of
4 the -- for lack of a better word, less than
5 1 percent of the Agency's decision making
6 applied to those.

7 HEARING OFFICER TIPSORD: Excuse me,
8 Ms. Manning, but you're making it very
9 difficult for us to hear. Go ahead,
10 Ms. Manning.

11 MS. MANNING: Less than 1 percent of the
12 Agency's decisions applied to that great bulk
13 of contractors.

14 MR. WALTON: I understand.

15 MS. MANNING: So, basically, this is a
16 good representative group of those underground
17 storage tank remediation businesses that do a
18 lot of underground storage tank remediation.

19 HEARING OFFICER TIPSORD: Mr. Truesdale?

20 MR. TRUESDALE: In addition to that, I'd
21 like to point out, once again, that many of the
22 costs were derived solely from RS Means, which
23 is a database that's essentially infinitely
24 prepared by a third party data resource

1 clearing house. UST abandonment costs, for
2 instance, at least I know at least one of the
3 inputs of the six companies were derived solely
4 based on RS Means data and is within the range
5 of applicability for the rest. So the
6 individual estimates that were submitted do
7 have a kind of inherent check and balance
8 system against RS Means.

9 I know that Holliston Wallgreen (sp),
10 two-inch well installation, which I believe
11 Claire is going to present as another exhibit,
12 was derived solely from RS Means' data, using
13 their production rate estimates and their
14 material, labor and equipment costs.

15 MS. MANNING: Basically, Member Girard,
16 I'm not -- this can't be done. It's just that
17 it needs to be done correctly. And at least
18 from my perspective, this is more market based
19 because it's actually done by people out from
20 the market than it is based on historical data
21 that was discovered and potentially dated. I
22 mean, I guess so that's the point I'd like to
23 make on this particular document.

24 MR. ROMINGER: I have just a quick

1 question on that.

2 When I was looking through this under the
3 soil, removal and disposal, the transportation
4 for clean soil column, and then all of the
5 columns under truck disposal, I was just
6 wondering if there was some information that's
7 missing, because when you look down the
8 information that's applied to the cost reach
9 company, when you get down to the
10 90th percentile, the very last row, those
11 numbers are all higher than the numbers
12 actually provided by the companies.

13 MS. MANNING: I don't know why that is.
14 That's the only one like that, isn't it?

15 MR. ROMINGER: Well, everything under drum
16 disposal, under transportation, clean soil,
17 those are the only ones I looked at. I didn't
18 look at the other ones. There was some blank
19 lines. So I didn't know if there was some
20 company's information that was missing out of
21 that.

22 MS. MANNING: Go ahead.

23 MR. WEINHOFF: I was just going to say,
24 it's just due to not having enough response.

1 The 90th percentile is simply a formula that
2 takes a number times the standard deviation
3 plus the average. And it's just due to lack of
4 enough response, and I'm still -- I mean, we
5 are trying to get more responses, and we're
6 getting as many as we can.

7 MR. TRUESDALE: It's representative of the
8 input that has significant variability.

9 MS. MANNING: It's not intended to be
10 imperial.

11 MR. WEINHOFF: It was a formula set in
12 those, and the numbers were put in, and the
13 formula wasn't changed and wasn't.

14 MR. ROMINGER: So you get a
15 90th percentile that exceeds all the data
16 inputs?

17 MR. WEINHOFF: If there's not enough
18 inputs, that's how it came out. I guess it
19 looks like there's probably two inputs on
20 those; is that correct? And so the standard,
21 that's just not enough to probably calculate
22 standard deviation.

23 MR. TRUESDALE: It's standard deviation
24 assumes the normal distribution. So it's

1 probably not normal distribution.

2 HEARING OFFICER TIPSORD: Yeah. Mr. Cook?

3 MR. COOK: I think it would serve to help
4 sort of to resolve this situation. From USI's
5 perspective, we looked at this exercise as the
6 Agency has proposed this figure \$57 per yard,
7 and does this figure look palatable based upon
8 our 15 years' of experience and the several
9 hundred sites that we're involved in. We put
10 our number down. We believe we're close. We
11 believe we're close enough and USI does -- we
12 believe we're close enough in this instance
13 that we don't see significant opposition to
14 what -- on USI's perspective for what the
15 Agency has proposed.

16 MS. MANNING: On these costs. We should
17 also point out that these costs do not consider
18 any costs of the competitive bidding process
19 that the Agency has just proposed. In other
20 words, the cost of bidding isn't built into any
21 of these costs.

22 HEARING OFFICER TIPSORD: If there's no
23 objection, I don't think we've formally
24 admitted this. We'll admit this as Exhibit 92.

1 (Whereby, Exhibit Number 92 was
2 admitted into evidence.)

3 MS. MANNING: Exhibit 93 is basically
4 taken from RS Means 2004. It deals just with
5 monitor well, material costs for two-inch,
6 four-inch, six-inch and eight-inch wells. I'm
7 going to put this into -- I think you already
8 have it.

9 HEARING OFFICER TIPSORD: Yes. It's
10 Exhibit 93.

11 MS. MANNING: Thank you. This is
12 basically information that the Board can obtain
13 or the Agency could have obtained from RS
14 Means, which is, as we said, early in this
15 proceeding, a service that writes a book that
16 has contractor costs, as well as they have a
17 special one in terms of environmental costs,
18 and that's where this information is derived
19 from.

20 HEARING OFFICER TIPSORD: Seeing no
21 objection, we'll admit that as Exhibit 93.

22 (Whereby, Exhibit Number 93 was
23 marked and admitted into
24 evidence.)

1 MR. TRUESDALE: I might adjust a bit about
2 that particular exhibit. The costs, once
3 again, were derived wholly from RS Means. And,
4 essentially, the same thing can be done for a
5 number of the other general costs components
6 proposed in Subpart H, using third party
7 environmental cost data that's representative
8 of a large sample set collected over a long
9 period of time and accepted widely throughout
10 not only the environmental construction agency,
11 but a vast majority of construction industries
12 nationwide.

13 MS. MANNING: Again, though, he's talking
14 unit costs, discrete costs, not costs that are
15 dependent on a delineated scope of work.

16 MR. TRUESDALE: Exactly. It's
17 predominantly associated with fixed services or
18 commodity services, not professional consulting
19 services.

20 But a similar exercise to be completed for
21 UST removal using RS Means' data, the example
22 provided in that exhibit is strictly for
23 monitor well construction and monitor well
24 abandonment.

1 MS. MANNING: And PIPE has always
2 indicated the Agency would be fine with that
3 approach in terms of using RS Means, in terms
4 of these various unit costs that are discrete.
5 So that in that regard, this is not new.

6 MR. TRUESDALE: And another point I might
7 bring out, we did the ratios also just to
8 compare to what Doug presented in his
9 testimony. And it's fairly similar to what
10 they proposed a ratio of 1 and 1/2, I think,
11 for 20-foot or 25-foot well, 2 inch compared to
12 4 inch, the ratio for 2. However, the unit
13 costs were different than what is currently
14 proposed by the Agency, but the scenarios
15 appeared to check out.

16 HEARING OFFICER TIPSORD: Given this
17 testimony that you're very close to what the
18 Agency has proposed in Subpart H, I'm going to
19 ask you the same question that I asked earlier
20 about the businesses, the members of PIPE. If
21 the Board adopts Subpart H as currently
22 proposed by the Agency, would you anticipate
23 that this would put any of your companies
24 either out of business or at least out of the

1 underground storage tank business?

2 MS. MANNING: As currently proposed with
3 the rates that are proposed without any
4 delineation of scope of work?

5 HEARING OFFICER TIPSORD: Yes.

6 MS. MANNING: Yes.

7 HEARING OFFICER TIPSORD: We'll start with
8 Mr. Cook, since he's already sworn in.

9 MR. COOK: In answer to your question, I
10 was -- I would segregate that question into two
11 parts.

12 With regard to the professional services,
13 that's where I have the major area of concern.
14 And I think absolutely you would see
15 consultants go out of business, or just simply
16 choose not to do LUST work any more. That's
17 based upon many years of experience in dealing
18 with all the unknowns that consultants have to
19 deal with, and the fact that these Subpart H
20 regulations, as proposed, don't provide, define
21 the scope of work to implement a maximum
22 payment amount in the absence of a defined
23 scope of work is -- it just doesn't make good
24 business sense. It doesn't make good financial

1 sense for anyone.

2 And it would be analogous to hiring an
3 architect to design a home and tell him that
4 you're going to have him design this home, but
5 we're going to have him design it, and you're
6 going to pay him \$2,000. What he doesn't
7 realize is that it's a 15,000 square foot home.
8 If he can design the home and it was a 2,000
9 square foot home for that fee, fine. He's
10 going to lose a significant amount of money on
11 a larger home.

12 So absolutely I think there are companies
13 that will go out of business.

14 I think as it pertains to drilling and
15 excavation, transportation and disposal and
16 remedial action performed in the field, I think
17 the Agency has a long history of collecting
18 well-defined data.

19 As I recall in Mr. Oakley's testimony -- I
20 believe it was in Bloomington -- he testified
21 that the Agency had long collected statistics
22 based upon excavation, transportation and
23 disposal of the cubic yard of soil. And I
24 would concur with his testimony on that. I

1 would say the same thing holds true for
2 drilling. So I think that the Agency's data
3 based in those areas is much more significant.
4 I don't see that same thing happening with the
5 professional services. I don't think they have
6 a database that can define well a scope from
7 site A to site B.

8 HEARING OFFICER TIPSORD: Ms. Davis, did
9 you have anything else?

10 MR. TRUESDALE: I would just like to add
11 to Mr. Cook's testimony also.

12 The same is true with the construction
13 costs that we presented. It's all for fixed
14 scope of work. The items there's dissension
15 among PIPE members are in the areas where
16 there's less fixed scope of work, are less
17 defined tasks lists associated with it.

18 And the same holds true for the Agency.
19 We've seen the same thing also. We've seen
20 similar costs, fixed scope of work. That
21 hasn't changed substantially over years and
22 years for drilling and excavation, disposal,
23 but professional services change as a result of
24 variations in the regulatory frame work, the

1 implementation of TACO, the multiple options
2 available to the owner/operators to address the
3 contamination at the site. New technologies
4 are developed every year that changes costs and
5 changes the amount of work associated with
6 cleanup of contaminated sites. Yet excavating
7 cubic yard of soil and drilling one foot of
8 boring stays relatively consistent from year to
9 year, and the scope of work doesn't change
10 appreciably.

11 HEARING OFFICER TIPSORD: Mr. Cook?

12 MR. COOK: One other thing that I would
13 like to add is a very serious concern that I
14 have, is that if specific maximum payment
15 amounts are passed as they relate to
16 professional services, then what drives
17 innovation? Because it's innovation within the
18 marketplace that ultimately drives costs down.
19 And in the absence of that innovation, the
20 ability for that professional to innovate and
21 to think, to go outside the box, we don't have
22 a permanent mechanism in Illinois to drive
23 costs down. It's that innovation that drives
24 the free market system. And I certainly hope

1 the Board will keep that in mind as it makes
2 its decision.

3 HEARING OFFICER TIPSORD: Are there any
4 other -- Mr. King?

5 MR. KING: I want to ask the question of
6 Mr. Cook; are you saying that if Subpart H is
7 adapted the way it is proposed here with the
8 rates and the bidding options involved, that
9 USI is going to stop doing LUST work in this
10 state?

11 MR. COOK: I didn't say that USI would. I
12 say that I believe that there are firms that
13 will be put out of business.

14 MR. KING: But USI will continue to do
15 work?

16 MR. COOK: I'm not going to comment on
17 that one way or another at this point.

18 MR. KING: Is there a reason why you can't
19 comment on that?

20 MR. COOK: Is there a reason why?

21 MR. KING: Yes.

22 MR. COOK: Because there are competitors
23 in this room, I'm not going to comment. I'm
24 going to refrain from commenting while

1 competitors are present.

2 MR. KING: When you say other competitors
3 are going out of business, what would that
4 analogy be based on?

5 MR. COOK: Comments within the industry.

6 MR. KING: Comments from other competitors
7 that have told you they're going to go out of
8 business?

9 MR. COOK: Yes.

10 HEARING OFFICER TIPSORD: Mr. Truesdale?

11 MR. TRUESDALE: I think the market, in
12 general, whether or not a particular firm
13 decides to continue to work, do work in the
14 LUST market is going to be depending on what
15 the numbers come out. If they're lucrative and
16 provide a reasonable profit for completion,
17 then people are going to perform the work. If
18 companies continue to lose money from
19 completing LUST projects as a result of changes
20 and limitations in payment, then they're going
21 to naturally drop out of the industry and
22 choose not to do that work or be forced to
23 close the doors and not be able to do that work
24 essentially.

1 HEARING OFFICER TIPSORD: Thank you.

2 MR. TRUESDALE: It's a business decision
3 and will be made once the final numbers are
4 determined.

5 BOARD MEMBER JOHNSON: I looked through
6 this Appendix E. I guess it is the personnel
7 titles and rates. And there doesn't appear to
8 be a significant difference, not a huge
9 difference between any of the categories and
10 the maximum hourly rate attributed to that
11 particular job description and category.

12 So what you're saying your concern is, is
13 because of the scope of work is not defined,
14 you don't know how many hours of whatever
15 dollar per hour increment it is? Okay.

16 MS. MANNING: That's correct.

17 HEARING OFFICER TIPSORD: Mr. King?

18 MR. KING: Mr. Truesdale, you used the
19 term you have to -- you look at whether the
20 payback was lucrative. Was that the word you
21 used?

22 MR. TRUESDALE: Possibly. There has to be
23 a profit associated with completion of work.
24 If we just cover costs and don't have

1 reasonable profit to keep our overhead and
2 salaries and so forth --

3 MR. KING: What kind of percentage of
4 profit would you consider to be necessary for
5 your firm to continue doing LUST work?

6 MR. TRUESDALE: I personally don't have
7 any idea. Industry standards for personnel
8 tend to range from multiplier of three to four.
9 So three to four times what our operating costs
10 would be.

11 MS. MANNING: If I might add to that,
12 RS Means includes the industry standards in
13 terms of profit overlay. The Board could look
14 at RS Means for that information.

15 MR. TRUESDALE: I mean, it's not strictly
16 profit. You have overhead cost, profit,
17 general conditional projects, so forth and so
18 on, that go on top of our operating capital.
19 So in order for a particular job to be
20 lucrative, we have to cover operating capital,
21 plus make enough money in addition to that to
22 cover overhead, general conditions, profit.
23 Insurance costs continue to go up, our profit
24 margin changes continuously.

1 MR. KING: So in other words, the
2 reimbursement would have to end up being
3 lucrative in order for you, the firm, to
4 continue?

5 MR. TRUESDALE: Correct.

6 HEARING OFFICER TIPSORD: Mr. Cook?

7 MR. COOK: I'd like to clarify, too, that
8 I think that what's proposed in Subpart H as it
9 relates to professional services will be more
10 difficult for the smaller firms to deal with
11 and address.

12 I've heard in meetings with the Agency
13 that it should be an obligation of the larger
14 firms to cut costs, contain costs, and that it
15 all comes out in the wash. Smaller firms don't
16 have an opportunity. They're members of PIPE
17 that have just a few jobs, and they don't have
18 an opportunity to allow -- to come out into the
19 wash. They have the 5, 10, 15 jobs that they
20 have, and that's their opportunity to make a
21 living. I don't believe it's appropriate or
22 fair for those types of firms to go out of
23 business.

24 I was once there. And I stand in the

1 position today where we're the largest firm in
2 this type of work in the State of Illinois, and
3 we could gladly gobble those firms up as they
4 go out of business, but I've been in that
5 individual sole proprietor's type role before,
6 and it's not fun. It's very difficult.

7 And so I think this particular set of
8 regulations, as it pertains to professional
9 services, would be extremely difficult for
10 those one- and two-man shops.

11 HEARING OFFICER TIPSORD: Did you have
12 anything else, Ms. Manning?

13 MS. MANNING: Just as a follow-up to that.

14 One of the things that I've been most
15 impressed with working with PIPE is they are a
16 group of very viable businesses that do compete
17 with one another and hardly knew each other
18 before they formed this association.

19 MR. KING: I had other questions.

20 HEARING OFFICER TIPSORD: That's fine. Go
21 ahead. I just wanted to be sure that we were
22 done with the presentation before we --

23 MR. KING: Oh, okay.

24

1 QUESTIONS BY MR. KING:

2 Q There's a couple references made to the
3 Wisconsin DNR. Excuse me. To the LUST program
4 within Wisconsin.

5 A (By Ms. Manning) Just a couple, yes.

6 Q Did you talk to somebody with --

7 A I did.

8 Q Who did you talk to?

9 A Mr. Dangler (sp).

10 Q Mr. Danger?

11 A I think that was his name. I can't
12 remember. I can get you that information.

13 Q Who does he work for?

14 A Is it called pecfa (phonetic). It's the
15 Wisconsin Underground Storage Tank Program with DNR,
16 with the Wisconsin DNR.

17 Q Are you aware that in Wisconsin the LUST
18 program is administered by two separate agencies?

19 A It wouldn't surprise me, as it is in
20 Illinois as well.

21 Q The LUST program, the LUST program --

22 MR. MULLEN: The Department of Commerce
23 handles the issues that defer from the --

24 HEARING OFFICER TIPSORD: Hold on. Wait a

1 minute. State your name, and we'll have you
2 sworn in.

3 MR. MULLEN: Scott Mullen (sp).

4 HEARING OFFICER TIPSORD: And who do you
5 represent?

6 MR. MULLEN: Regensis (sp).

7 HEARING OFFICER TIPSORD: Thank you.

8 MR. MULLEN: Yeah, we're within the group.
9 We all have specialists in certain areas, but,
10 yeah, I don't know if Claire is speaking of the
11 DNR or the department of commerce, but how the
12 divisions go, yeah.

13 MS. MANNING: And I'm not sure which one I
14 was speaking to either, actually. Just the one
15 that is doing the rule making that's going to
16 be effective September 1st. And the
17 gentleman's name was Mr. Dangler.

18 Q (By Mr. King) So you're aware that about
19 half of the program is administered by Wisconsin
20 DNR, and then about the other half of the program is
21 administered by the equivalent of the Illinois
22 Department of Commerce and Economic Opportunity?

23 And when were you suggesting that
24 that is -- maybe I missed the point. Are you saying

1 that that is a model we'd want to start to follow?

2 A No, I didn't suggest that at all,
3 Mr. King. I simply suggested that I think in terms
4 of the -- I think the only thing I raised about that
5 is the agency that I was talking to was totally
6 funded by the USEPA fund, and not by the state
7 dollars that came through the UST state fund. I
8 believe that's about all I said about the Wisconsin
9 issue.

10 I wasn't -- in fact, I think they
11 have a competitive bidding in Wisconsin. All of the
12 models and all of the states are very different.
13 And I'm not necessarily suggesting that Illinois
14 look to any different any one of the states.

15 I do think that you all put the
16 different states into evidence. And I did suggest
17 as well to the Board that they look not only at the
18 dollar figures in the other state statutes, but also
19 in the escape clauses, whatever you want to call
20 them, the scope of work clauses, whatever you want
21 to call them, because they have those kind of
22 clauses as well.

23 Q I noticed in your proposal, you didn't
24 refer to this in your testimony, but in your

1 proposal, there was a provision that said that the
2 Agency personnel reviewing a plan would have to be
3 an LPE or an LPG.

4 A Where is that? Just point me to the
5 language.

6 Q It's page 21. This is under 734. It says
7 something -- a technical review shall be conducted
8 by IEPA personnel who is a licensed professional
9 engineer or geologist.

10 HEARING OFFICER TIPSORD: Top page of 21.

11 MS. MANNING: I see it.

12 MR. KING: Yes.

13 MS. MANNING: What I think, what I was
14 testifying in terms of apples and oranges. If
15 there is a technical review performed by the
16 Agency, it needs to be performed by someone who
17 has technical licensure. And if it's a
18 financial review, the Agency ought to be freer
19 than making technical judgments.

20 Q (By Mr. King) So it's PIPE's position that
21 every IEPA reviewer needs to be -- reviewing a
22 technical plan needs to be either an LPE or LPG?

23 A I think that when the Agency makes a
24 determination and denies reimbursement on a

1 technical ground, they ought to have a technical
2 review and a technical person make that
3 determination.

4 Q You probably have no reason to know this,
5 but I'm sworn. So accept this for what it's worth.

6 But approximately 10 to 15 percent of
7 the Agency reviewers are LPEs or LPGs. As I
8 interpret this, that would mean that approximately
9 85 to 90 percent of the current staff project
10 reviewers would be ineligible to review technical
11 plans. And based on that, do you have a view as to
12 what that would do to the speed of the review
13 process relative to the Agency's program?

14 A It's certainly not PIPE's intention to
15 slow up the review process.

16 HEARING OFFICER TIPSORD: Go ahead,
17 Mr. Truesdale.

18 MR. TRUESDALE: I would add that we
19 contemplated that. If you look back to
20 professional engineer/professional geologists
21 Act, the requirements are a little looser than
22 that. The review should be conducted under the
23 direction and oversight of a licensed
24 professional engineer, licensed professional

1 geologist who ultimately has responsibility for
2 that decision. But the review itself does not
3 have to be conducted by that person, just under
4 the direction of. It's the same way your
5 regulations are written, because they're
6 modeled after the Professional Engineer and
7 Professional Geologist Act.

8 MR. KING: But that's not what this says
9 here.

10 MR. TRUESDALE: The intention of that.

11 MS. MANNING: Mr. King, I honestly think
12 this is your language.

13 MR. KING: Well, it's not.

14 MS. MANNING: 734-5150(a)and (b).

15 MR. KING: It's not.

16 MS. MANNING: Okay.

17 MR. TRUESDALE: It may need to
18 be -- that's what the intent was. It may need
19 some changing of wording or whatever, but the
20 intention was to be consistent with the
21 Professional Engineer and Professional
22 Geologist Act.

23 MR. KING: I want to go back. I'm kind of
24 going backwards through this provision on 20

1 where you discussed this mediator or arbitrator
2 provision.

3 MS. MANNING: Pardon?

4 BOARD MEMBER JOHNSON: You're putting all
5 of us out of work. The reviewers, the Board.

6 Q (By Mr. King) By the terms of this, it
7 states the parties may mutually agree. So if one of
8 the parties -- for instance, if the Agency did not
9 agree to having a mediator or arbitrator, then that
10 would not be applicable.

11 A (By Ms. Manning) That's correct. That's
12 what alternate means, alternative.

13 Q Now, I can tell you right now that the
14 Agency is not going to agree in any instance to this
15 kind of thing.

16 A You've told me that before, Mr. King.

17 Q So, I mean, in that sense, the Board could
18 put this in the rule or not put it in the rule.
19 It's not going to make any difference because it's a
20 dead letter as it would go in.

21 A So long as the Agency makes that position,
22 takes that position, that's the Agency's position.

23 Q One of the things we seem to have a
24 difference of opinion on is the ability of the Board

1 to shorten a statutory review period, which is 120
2 days at this point. As I understand what you're
3 saying is, that the Board has authority to mandate
4 that the Agency complete its reviews in something
5 shorter than 120 days.

6 A Under certain conditions, yes.

7 Q Okay. Now, if you're suggesting that the
8 Board has the authority to shorten a statutory time
9 frame, do you think the Board also has the authority
10 to shorten the statutory time frame when it comes
11 to a petitioner filing a petition for review? In
12 other words, could the Board say you have only got
13 15 days to file an appeal as opposed to 35?

14 A No, because that's jurisdictional.

15 Q Well, why isn't the 120-day time frame
16 jurisdictional then? I mean, in this case, the
17 legislature has made a decision that the Agency has
18 the right to take up to 120 days to perform a
19 review. On what authority would the Board have to
20 mandate that the Agency has to review things in less
21 than what the legislature has said it can review
22 things?

23 A Actually, the legislative prescription is
24 that the Agency shall do it within that period of

1 time. In other words, there used to be a
2 consequence for the Agency not acting on it. Now
3 there's not even a consequence, really, for the
4 Agency not acting within the 120-day period of time.
5 The fact of the matter is, there still probably
6 isn't a consequence with the Agency not acting
7 within the 120-day period of time, but that does not
8 preclude the Board or the Agency from having a
9 shorter time frame than that which is generously
10 allowed by the legislature.

11 Q You made some comments about -- there was
12 four different legislative versions of 57.7 F. I
13 think it was F. Or was it H?

14 A No, not of F, of that section.

15 Q Of that section.

16 A Of that section.

17 Q Now, the Agency attempted to meld all
18 those different bills when we drafted our rule
19 that's before the Board here.

20 Are you suggesting that what the
21 Agency drafted is somehow inconsistent with those
22 statutes or did not meld those statutes properly?

23 A I was reacting to Mr. Clay's testimony
24 regarding the LPE and LPG certification, where I

1 believe he just focussed on Section F, which is in
2 only one of those statutes. So basically I was
3 suggesting that, in fact, the LPE/LPG certification,
4 which that particular Act amended, various different
5 sections of the Act needed to be considered as well.
6 I was actually acting in reaction to your testimony
7 regarding LPE and LPG certification where you said
8 that it's simply an oversight, and that's all the
9 legislature intended. And in that same vein then, I
10 just talked basically about the complicated nature
11 of Title 16.

12 Q But you're not suggesting that what we
13 propose is an inconsistent melding of those?

14 A I'm suggesting the Board needs to look at
15 whether it is or whether it isn't. I think the
16 Board is going to have to before they send it to the
17 joint committee on administrative rules anyway. I
18 think it's a complicated legal question.

19 MR. KING: That's all the questions.

20 HEARING OFFICER TIPSORD: Are there any
21 other questions for PIPE?

22 MS. MANNING: Thank you.

23 HEARING OFFICER TIPSORD: Thank you.

24 Mr. Goodwin, do you want to go ahead?

1 MR. GOODWIN: Thank you for the
2 opportunity to testify further in this
3 proceeding.

4 This proceeding has proven to be one of
5 the most confounding sets of issues that I've
6 wrestled with in my professional experience.

7 I am here today representing the American
8 Council of Engineer Companies of Illinois. I
9 may offer some comments that don't represent
10 review. In which case, I will endeavor to make
11 it clear that I am speaking from a personal
12 view point or that of my employer, Secor
13 International Incorporated. I will also remind
14 everybody that ACECI is constrained from making
15 specific recommendations regarding pricing by
16 antitrust law considerations. And so if there
17 are questions that go into that area, I will
18 only be able to speak on behalf of my own
19 company and not for the organization.

20 The latest changes in the Agency's
21 proposal are generally moving in the right
22 directions, but I must say there are
23 significant problems that remain. Going back
24 on my previous testimony, the changes that the

1 Agency has made in their proposal regarding the
2 specifics of the stage one site investigation
3 and what must or must not be done, those
4 changes, I think, largely alleviate the
5 concerns regarding overall prescriptive. And
6 my sense is that we can live with the Agency's
7 current proposal in that regard.

8 But in regard to Sub letter H, we are
9 still plagued by the lack of clear delineation
10 of scope of work associated with several of the
11 lump sum payment provisions. As has been
12 testified upon at length here today, that scope
13 of work delineation is very critical to making
14 lump sum payments work. It is imperative that
15 this issue be resolved before any new lump sum
16 payment provisions are made final. It needs to
17 be recognized that the movement to lump sum
18 payments entails a shifting of an element of
19 risk from the UST fund to the owner/operator,
20 or in those cases where the consultant is
21 operating under an agreement with the
22 owner/operator to take the loss on any charges
23 not reimbursed, and that risk is shifted to
24 consultant. If that risk is significant, it

1 can be minimized by making very clear what is
2 or isn't covered in the scope of a given phase
3 of work for which a lump sum payment has been
4 established. Unfortunately, that clear
5 delineation is not yet there. And my
6 understanding from discussions that I've
7 participated in with the Agency is that the
8 Agency does not agree that it needs to be made
9 more specific. Whether we're at a true impasse
10 on that question or not, I don't know, but
11 there appears to be a major gap yet there
12 between the Agency and the number of the
13 interested parties.

14 Another area of concern is the area -- the
15 Agency's introduction of the concept of
16 competitive bidding as an alternative way of
17 dealing with a atypical situation. I happen to
18 think that this is a constructive and probably
19 ultimately a sound idea, but it is a new policy
20 proposal. I think it is one that needs much
21 more consideration and discussion among the
22 affected parties than we've had the opportunity
23 to have at this point, and I don't think it's
24 ready for adoption yet.

1 I would just make note of the fact that
2 the Agency has continued in its submission of a
3 principal job classification in its proposal
4 along with the corresponding hourly rates.
5 This was an issue that was raised in my earlier
6 testimony. The Agency has indicated to me that
7 they do not wish or intend to add that. And I
8 don't want to have it become the tail that wags
9 the dog, but it is still something that ICE
10 would like to see added.

11 Another area that is problematic is the
12 review and updating of the reimbursement
13 limits. The Agency's flat rejection of
14 creating a database for this purpose is
15 disappointing to me, and I think it's
16 shortsighted.

17 I'm not optimistic that the proposed
18 advisory committee will be a very successful
19 mechanism for accomplishing the updating when
20 it is needed.

21 I'll just point out the Agency's proposal
22 makes no provision for staff support for such a
23 group. It would only meet quarterly, four
24 times a year. They have no apparent financial

1 resources with which to pay anybody to do
2 analyses of data or compilations of data. And
3 therefore it would be limited to whatever can
4 be accomplished on a volunteer basis by the
5 members of the advisory committee and the
6 constituent groups that they represent.
7 Frankly, I don't think that's the way to do it.
8 And I would not expect that to work out very
9 well as the means for updating the rates.

10 Apart from that, having the advisory
11 committee as a general forum for discussion of
12 issues of all types, considering the
13 underground storage tank program, I think, is a
14 fine idea. I don't know that the Agency
15 necessarily needs a Board mandate to do that.
16 I think they can do it on their own, if they
17 chose to, but certainly I have no objection.
18 ACECI has no objection to the establishment of
19 such a group, and I would expect when we
20 participate as one of the organizations to be
21 represented.

22 Moving on to the PIPE proposal. I've
23 reviewed the alternative plan, and I think it
24 provides a good vehicle for resolving some of

1 the issues, particularly in Subpart H issues,
2 but obvious difficulty in defining scope of
3 work for the lump sum items and for attaching
4 the specific dollar amounts that are present in
5 the proposal that I place markers at this time.

6 Moving away from speaking for ACECI now
7 and speaking just for myself and from my
8 company, I would like to make the following
9 points:

10 First of all, there had been three
11 significant new policy proposals incorporated
12 in the Agency's latest errata sheet. The one
13 that I already had mentioned, the competitive
14 bidding is one. The proposed limit on
15 reimbursement to amounts to correspond to
16 Tier 2 cleanup objectives is another one.
17 Again, I think this is a concept that has
18 considerable merit. And I'm not sure that if
19 the tank owners and operators come to
20 understand it fully, that they will really find
21 themselves opposed, notwithstanding
22 Mr. Fleischli's comments this morning, but I
23 don't think we have had sufficient time to talk
24 about it, and think about it and the language.

1 And as I indicated earlier this morning
2 with my question to the Agency, I'm not at all
3 clear on whether there is adequate statutory
4 basis for such a change to the regulations.
5 The changes can be a two-edged sword for
6 owner/operator. It can save money from
7 individual cleanups, and it can save money for
8 the fund. But in some cases, it can remove the
9 option that the owner/operator has of cleaning
10 up to Tier 1 levels, which may be a very
11 desirable thing if they're trying to sell the
12 property, rather than to redevelop it as a
13 service station. I think that needs discussion
14 and development and consideration before it's
15 ready to adopt.

16 The third policy initiative here that I
17 think needs further discussion is the one to
18 require cost estimates for alternative
19 technologies, and then limited reimbursement to
20 just the least cost technology, whether it be
21 dig and haul or one of the alternatives that
22 are costed out. The current Agency proposal
23 does not consider differences in time of
24 completion of the given technology. Dig and

1 haul, you can get in there and get it done and
2 have it over with in a relatively short period
3 of time. Most of the alternative technologies
4 will take longer, and some of them may take
5 years to take to completion.

6 Not only does the Agency's proposal offer
7 no guidance upon how you factor in cost of
8 money in the analysis, it also does not
9 consider how you take into account the benefit
10 to the owner/operator, the property owner or to
11 the environment of getting the cleanup done
12 sooner, rather than later.

13 The Agency's proposal does not take into
14 consideration the greater risk of full or
15 likely partial failure of alternative
16 technologies or the risk that the cost
17 estimates used proves to be significant lower
18 than the actual costs, because not enough data
19 was collected prior to developing the cost
20 estimate to completely determine what would be
21 required in the alternative technology.

22 None of this is to say that I think this
23 is necessarily a bad idea. I'm simply saying
24 it has to be given enough time for

1 consideration, and development of all of the
2 details that need to be in the regulation to
3 make sure that it works properly.

4 So having said all those things, my
5 conclusions at this stage are that we have
6 three new policies that need further
7 discussion, and we need more time to do that.

8 The parties are represented here in this
9 room. They may be far apart in a number of
10 different issues in this proceeding. And in my
11 opinion, the Board would be making a serious
12 error to try to promulgate a complete final
13 rule based on the information that is in front
14 of the Board right now. And the degree of
15 consensus has been reached in the many
16 different issues involved in this proceeding.

17 And my suggestion is that the Board should
18 take one of two actions. You should either
19 suspend this proceeding more or less
20 indefinitely with the request of the parties,
21 the Agency, and all the people in this room to
22 get back to work, hammer out our differences,
23 narrow them. If we can't, at least if we can't
24 reach a complete agreement, and we could then

1 come back to the Board with a proposal or
2 proposals that don't contain so many widely
3 divergent views of how things should be done.

4 Or the other alternative would be to split
5 the docket, move forward with the final rule
6 making on those things, that where there is
7 reasonable -- a reasonable degree of consensus.
8 And I think there are many, many aspects of
9 this proceeding where that point has been
10 reached, and continue on in a separate docket
11 with additional hearings on the issues that
12 where consensus has still not been reached.

13 That concludes my statement.

14 HEARING OFFICER TIPSORD: Thank you. Any
15 questions for Mr. Goodwin?

16 MR. KING: I don't have any questions, but
17 just to kind of respond when we get there.

18 HEARING OFFICER TIPSORD: Questions?

19 Thank you very much. And, actually, I
20 can't remember if -- it's been so long
21 ago -- whether Mr. Fleischli specifically
22 talked about having another hearing or not. He
23 spoke to me about that on the phone when he
24 talked to me last Thursday.

1 Ms. Manning has indicated that PIPE would
2 like to have another hearing to go over scope
3 of work, etcetera. And now we have
4 Mr. Goodwin. So we have not heard from the
5 Agency on their position. And so I offer this
6 opportunity for you to do so.

7 MR. KING: At this point, I hesitate to
8 see what is going to transpire at an additional
9 hearing, given where we're at. I mean, we
10 think we have made changes that were
11 appropriate.

12 We've heard that there's some agreement on
13 some of the Subpart H things, there's some
14 disagreement on other parts. Generally, people
15 were in agreement with the bidding provisions,
16 but Mr. Goodwin has indicated disagreement with
17 that. So we've got people complaining about
18 the unit rates. We've got people complaining
19 about the bidding process. And yet we're in a
20 position where for many years, we had run this
21 program based on internal guidelines. And the
22 Board, as a clear exercise of its authority, in
23 the Ehrends (sp) case said that was not
24 appropriate for us to do any more, and so we

1 haven't. So we don't have internal guidelines
2 that we're running a reimbursement program on.
3 We don't have any rules in effect. And to me,
4 that's not good public administration.

5 I think if the Board sees that there's
6 some weaknesses in the record -- you know, for
7 instance, I was hearing complaints about the
8 excavation, transport and disposal numbers.
9 Well, if the Board looks at the record and
10 says, well, we don't think those numbers are
11 justified, maybe the solution is just you bid
12 all of that out, bid it all out, and that would
13 be a result.

14 At this point, I don't know what we're
15 going to do at another hearing. What I would
16 suggest is that the Board take the record
17 that's at hand and proceed to first notice.
18 And then at that point, certainly that
19 is -- it's happened many times where the Board
20 has had -- at hearings, developed the record,
21 had first notice, and then had hearings with
22 regard to its first notice proposal. I think
23 that would certainly be much more useful than
24 for us to come back in a week to two weeks,

1 because that wouldn't be sufficient time for
2 notice. But to come back in 30 days, in 60
3 days and not be any closer than we are now, I
4 don't see that that would be really useful.

5 And then the Agency continues to
6 administer a program without any rules, which I
7 don't think is the appropriate solution either.

8 So my recommendation would be that the
9 Board take the record that has been presented,
10 which is voluminous, and proceed to first
11 notice, and then schedule hearings based on
12 that, based on that first notice proposal.

13 HEARING OFFICER TIPSORD: Thank you.

14 BOARD MEMBER GIRARD: Well, I have a
15 question on those comments. It does seem like
16 there's been a lot of progress during the
17 course of these hearings, in the meetings you
18 had with PIPE and with the other firms and
19 individuals in terms of coming closer on
20 Subpart H. Even the bidding process sounds as
21 if it's palatable to most of the players.

22 It seems like the area that still has the
23 most outstanding issues and probably the
24 largest issues is, you know, the Subsection 845

1 with professional consulting services, those
2 lump sum payments for a specific task.

3 Are you saying that the Agency has reached
4 a point where they don't feel that there's any
5 need to have any more discussion between the
6 affected parties, that the figures that you've
7 got are the best at this point in time?

8 MR. KING: Well, we've had these numbers
9 in the public record since January. And today
10 was the first time I've seen numbers in
11 response put back into the record here, and I'm
12 not sure if he even covers all these items.

13 You know, so if we're going to see more
14 numbers in an expeditious way, that they're
15 going to have some support for them, we would
16 certainly be willing to look at those. I guess
17 I don't know what we're going to see. I mean,
18 we've been waiting a long time, and we haven't
19 seen much in the way of responses. So I don't
20 know what the intentions are from PIPE or how
21 quickly we're going to receive any kind of
22 response.

23 HEARING OFFICER TIPSORD: Mr. Mullen?

24 MR. MULLEN: Scott Mullen again. I just

1 wanted to ask the question to the Board; does
2 the Board understand why you haven't received
3 numbers from PIPE on these large engineering
4 lump sum items? It's truly only because there
5 is no defined scope of work. That's okay,
6 because that's what we would like to see done.

7 BOARD MEMBER JOHNSON: Well, that's in
8 fact the question I had. It seems as though
9 we've got lots of testimony and a huge record
10 on both sides of most issues, and in fact, I
11 think enough to make a decision on most issues.
12 There's been concern about the Board adopting
13 rules that are contrary to state and federal
14 law not in the habit of doing that. We're
15 supposed to ask -- we've got a legal staff who
16 can help us make sure that we don't wrongfully
17 adopt rules that are in contradiction to state
18 statute.

19 My big question was, it is the Agency's
20 position that there's no need to work in
21 further defining the scope of work in these
22 particular areas? Or is that something that
23 you think you can make some headway over the
24 next couple of weeks?

1 MR. CLAY: I think it's our position that
2 there's nothing more we need to do as part of
3 defining the scope of work. I mean, the LUST
4 rules that we have proposed, it's what it takes
5 to put together a plan of report. It is the
6 same in water, in air and in other portions of
7 land. I mean, that's the way the regulations
8 are written. What it takes to get an approved
9 plan, budget, in our case, and report. I mean,
10 that's, you know, the scope of work, if you
11 will.

12 BOARD MEMBER JOHNSON: Thank you.

13 BOARD MEMBER GIRARD: So but in other
14 words, what you're saying is, you don't feel
15 that you're going to delineate the scope of
16 work any further than you already have? I
17 mean, you've got a scope of work in there.
18 It's just that it's a very broad scope of work?

19 MR. CLAY: Correct.

20 MR. KING: And we have made a couple of
21 changes. In response to Mr. Goodwin's
22 testimony, we simplified stage one, and we
23 clarified some of the well survey procedures as
24 we talked about today as well. So we have made

1 those changes.

2 HEARING OFFICER TIPSORD: Was there anyone
3 else who wanted to comment on that?

4 You know what; let's take a very brief
5 break, five minutes, because we're returning up
6 on 4:30. So let's take five minutes.

7 (WHEREBY A SHORT BREAK WAS
8 TAKEN.)

9 HEARING OFFICER TIPSORD: I think we're
10 ready to go back on the record.

11 Is there any additional comment regarding
12 whether or not there's a need for another
13 hearing at this time? Go ahead.

14 MS. MANNING: Prior to going to first
15 notice?

16 HEARING OFFICER TIPSORD: Yes.

17 MS. MANNING: I think Dan Goodwin gave a
18 good reason to have another hearing prior to
19 going to first notice. And I think PIPE feels
20 as well that there's more work to be done in
21 this proposal.

22 HEARING OFFICER TIPSORD: Could PIPE have
23 something ready in, say, 30 days?

24 MS. MANNING: Yes.

1 HEARING OFFICER TIPSORD: Would it be -- I
2 guess the problem I'm having right now is that
3 what I see coming -- and even with what you had
4 to say, Mr. Goodwin, the three areas you talked
5 about specifically, Mr. Goodwin, the type of
6 scope of work and proposed Subpart H numbers.
7 I guess my question is, do we need a hearing
8 for you to continue that dialogue? Or can we
9 give you, let's say, 30 days after the
10 transcript comes in, in this hearing, before
11 final comments are due -- that doesn't mean
12 that you all can't have a dialogue during that
13 time.

14 I guess the thing is, is I don't want to
15 schedule another hearing for PIPE to hand me 10
16 more exhibits, and the Agency say we don't have
17 any questions; we're okay with everything. You
18 know, I'm not sure that's the best use of our
19 resources at this time.

20 We've had some excellent hearings. We've
21 had some excellent information come in. I
22 guess where I'm sort of leaning is, wondering
23 if we shouldn't go ahead and have the
24 transcript come in, and in 30 days have a round

1 of comments and see where we are when those
2 comments come in as to whether or not the
3 dialogue is sufficient, that we don't need
4 another hearing. Or if we do need another
5 hearing before first notice, perhaps looking at
6 it at that point. I sort of opened that up for
7 comments.

8 MS. MANNING: That makes sense to me.

9 MR. GOODWIN: I think that makes sense.
10 My only feeling isn't so much that we need more
11 hours in the hearing room, but I think we need
12 time to continue the dialogue about the Agency
13 language on several issues. And if that
14 doesn't really lead us to a consensus on the
15 language, maybe it will at least narrow things.

16 I do have a little bit of concern about
17 whether proposed alternative language that we
18 might submit later on will be given the same
19 weight as things that have been available for
20 question and answer at a hearing format. But,
21 you know, I'll defer to the Board on that.

22 HEARING OFFICER TIPSORD: Well, certainly
23 on that point, if there's proposed alternative
24 language, if you still feel a need for a

1 hearing, that could be included in your final
2 comments. And then I or the Board can make the
3 decision based on those comments and where we
4 feel we're at, at that point.

5 MR. GOODWIN: That's fine.

6 HEARING OFFICER TIPSORD: All right.

7 Well, then, let's do it this way then. Let's
8 plan on comments due 45 days from today.
9 That's assuming 14 days from the transcript and
10 30 days beyond that. I'll give you 45 days
11 from today. I'll put a hearing officer order
12 out that gives a specific date, but it will be
13 45 days. So it will be approximately
14 September, about the end of September, in that
15 area. No. This is August already. Yeah, the
16 beginning of September. I'll put out a hearing
17 officer order with the specific date and make
18 sure it gets to everyone, and we'll proceed at
19 that point.

20 I really do appreciate all the comments,
21 all the cooperation we're seeing. I think
22 we're really getting to a good working proposal
23 here, and I'm looking forward to continuing to
24 work with all of you.

1 Mr. Girard, do you have anything?

2 BOARD MEMBER GIRARD: No. Thank you. I'd
3 just like to echo the comments of the hearing
4 officer. I think this has been a very good
5 rule making, in that we've continued to get
6 closer and closer, and we certainly narrowed
7 the gap considerably.

8 Eventually at some point, the Board is
9 going to have to make a decision and put out a
10 first notice. And that doesn't mean that there
11 won't be continued discussion after that point,
12 but I think we're getting a lot closer than we
13 were back at the first hearing. So thank you
14 very much.

15 HEARING OFFICER TIPSORD: All right. Then
16 we'll have comments in 45 days. And thank you
17 very much. We're adjourned.

18 (End of proceedings.)

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1 C E R T I F I C A T E

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4 I, Ann Marie Hollo, CSR, RMR, do hereby
5 certify that the foregoing proceedings came
6 before me on August 9, 2004, held in the
7 Department of Natural Resources building,
8 Illinois State Fair Grounds, Springfield,
9 Illinois, and was taken in shorthand by me and
10 later transcribed into computer-aided
11 transcription under my supervision, and that
12 the said proceedings is a true record of the
13 proceedings.

14 IN WITNESS WHEREOF, I have hereunto
15 subscribed my name and affixed my seal this
16 16th day of August, 2004.

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18 Ann Marie Hollo, CSR, RMR

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